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UNITED STATES REPORTS

VOLUME 188

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1902

CHARLES HENRY BUTLER

REPORTER

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1903

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

MELVILLE WESTON FULLER, Chief Justice.
JOHN MARSHALL HARLAN, 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.
OLIVER WENDELL HOLMES, Associate Justice.

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

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* Resigned February 23, 1903. See p. vii, *post*.

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Justices by whom the opinions in this volume were rendered.

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1902.

TUESDAY, FEBRUARY 24, 1903.

The following correspondence is spread upon the record by direction of the Chief Justice:

"SUPREME COURT OF THE UNITED STATES.
"In Chambers,
"February 23, 1903.

"DEAR BROTHER SHIRAS:

"We cannot refrain from the expression of our sincere regret at your retirement from the bench.

"Some of us have been associated with you during the entire period of your service here, but all alike appreciate the single-mindedness with which you have sought to do equal and exact justice, and the great value of your assistance to the court, and of your contributions to jurisprudence; and all alike feel for you the deepest affection and regard.

"We earnestly hope that the personal intercourse with you, we have so much enjoyed, may be continued for many years to come.

"MELVILLE W. FULLER,
"JOHN M. HARLAN,
"DAVID J. BREWER,
"HENRY B. BROWN,
"E. D. WHITE,
"R. W. PECKHAM,
"JOSEPH MCKENNA,
"OLIVER WENDELL HOLMES."

"SUPREME COURT OF THE UNITED STATES,
"WASHINGTON, D. C.

"MY DEAR CHIEF AND ASSOCIATE JUSTICES:

"I gratefully acknowledge your kind letter of farewell.

"I am glad to be thus assured, though indeed I never doubted it,

that, whether I fully performed my judicial duties or not, you all felt that I earnestly endeavored to do so.

"The ten years and upwards that I have spent on the bench have been very pleasant to me, and I quit the court and its labors with much regret. I have much enjoyed my personal intercourse with each and all of you, and hope that, in the few years that are left to me, I shall frequently meet you, and hear from you when we are separated.

"Sincerely your friend,

"GEORGE SHIRAS, JR.

"February 24, 1903."

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1902.

KELLEY *v.* RHOADS.

ERROR TO THE SUPREME COURT OF THE STATE OF WYOMING.

No. 93. Submitted November 12, 1902.—Decided January 19, 1903.

A herd of sheep driven at a reasonable rate of speed from a point in Utah, across the State of Wyoming, a distance of about five hundred miles, to a point in Nebraska, for the purpose of shipment by rail from the latter point, is property engaged in interstate commerce to such an extent as to be exempt from taxation by the State of Wyoming under a statute taxing all live stock brought into the State "for the purpose of being grazed;" and this notwithstanding that the sheep were maintained by grazing along the route and that the owner could have shipped them to their ultimate destination from a point on the same railroad, which could have been reached from the starting point without entering the State of Wyoming. *Brown* v. *Houston*, 114 U. S. 622; *Pittsburg &c. Coal Co.* v. *Bates*, 156 U. S. 577; *Coe* v. *Errol*, 116 U. S. 317, distinguished.

THIS was a petition originally filed in the District Court of Laramie County, Wyoming, by Kelley against Rhoads, county assessor of the county of Laramie, to recover back certain taxes to the amount of $250 upon a flock of sheep owned by the plaintiff and in charge of a shepherd who was driving them through the State of Wyoming, from the then Territory of Utah to the State of Nebraska.

The case was finally presented to the District Court upon the following agreed statement of facts, upon which the court en-

tered judgment in favor of the defendant, which was affirmed by the Supreme Court of the State, 9 Wyoming, 352:

"*Agreed Statement of Facts.*

"1. John Kelley is now and was at all times mentioned in the petition filed herein a citizen and resident of the State of Kansas.

"2. Oliver F. Rhoads was the duly elected, qualified and acting county assessor of the county of Laramie, State of Wyoming, from the 7th day of January, A. D. 1895, until the 4th day of January, A. D. 1897.

"3. Plaintiff at all times mentioned in the petition herein was the owner of the sheep mentioned in said petition, and that said sheep on or about the 29th day of October, A. D. 1895, were in the county of Laramie, in charge of James M. Yeates, the agent of the plaintiff, who was driving and transporting said sheep through the State of Wyoming from the then Territory of Utah, to the State of Nebraska.

"4. In driving said sheep in such manner it was the practice of the person in charge to permit them to spread out at times in the neighborhood of a quarter of a mile, and while so being driven the sheep were permitted to graze over land of that width. They were driven in some instances through large pastures, in other instances through the public domain and in other instances through pastures enclosed by fences. While being driven from the western boundary of the State to Pine Bluffs station, they were maintained by grazing along the route of travel.

"5. Said sheep were duly returned by plaintiff for taxation and assessed by the assessor and collector of taxes for the year 1895 in the county of Juab, Territory of Utah.

"6. On the 29th day of October, A. D. 1895, while the said herd of sheep were in charge of the agent of the plaintiff in the county of Laramie, State of Wyoming, the defendant, in company with S. J. Robb, deputy sheriff, of Laramie County, Wyoming, collected from said plaintiff's agent the sum of two hundred and fifty dollars, ($250,) alleged to be taxes due for the current year 1895, and that before the collection of said tax,

upon demand for the payment of the same by the said defendant, the plaintiff's agent refused to pay the same, whereupon the said defendant said to the agent of plaintiff that the said defendant could or would take enough sheep and sell them, and from the proceeds retain the said amount of two hundred and fifty dollars, ($250,) with costs; whereupon the plaintiff's agent, to prevent the seizure and sale of plaintiff's property and the damage that would thereby accrue to plaintiff, paid the said defendant the sum of two hundred and fifty dollars ($250).

"7. It was a fact and defendant had knowledge of the fact and was notified by plaintiff's agent that said herd of sheep was being driven across the State of Wyoming to Pine Bluffs station for the purpose of shipment, and that the same were not brought into the State for the purpose of being maintained permanently therein.

"8. At the time of the regular assessment of property for the purpose of taxation in the county of Laramie in the year 1895, plaintiff had no property of any kind whatever in the county of Laramie, or in the State of Wyoming.

"9. At the time the assessment of property in the county of Laramie for the year 1895 was equalized by the board of equalization of the county of Laramie, plaintiff had no notice of the time or place of meeting of said board of equalization, or that any assessment had been made against him for any purpose whatever within the State of Wyoming or the county of Laramie.

"10. At the time the taxes for the current year 1895 were regularly and legally levied in the said county of Laramie, plaintiff had no property whatever in the county of Laramie or State of Wyoming.

"11. Plaintiff has demanded of defendant a return to him of the amount of tax so collected from plaintiff's agent, but defendant refused and still refuses to return to plaintiff the amount so collected.

"12. The time consumed in driving said sheep from the western boundary of the State of Wyoming to Pine Bluffs station, in Laramie County, was from six to eight weeks, and by the route followed the distance travelled was about five hundred miles.

"13. The said taxes were assessed, levied and collected by the defendant without the action, authority or assistance of the board of county commissioners, or of any other officer or officers of Laramie County.

"14. The said property so owned by the plaintiff had not been regularly assessed in any other county of the State for that year and no taxes had been paid thereon in any other county in the State.

"15. That for the purpose of shipping said sheep it was not necessary that they should be driven into the State of Wyoming, and that the railroad over which they were shipped could be reached from the point where the sheep were first driven by travelling a less distance than was necessary to travel from the place where they were first driven to any point in the State of Wyoming.

"16. That at the time the two hundred and fifty dollars was paid to the defendant, it was paid without any protest other than appears in the other paragraphs of this agreed statement of facts."

Mr. J. A. Van Orsdel for plaintiff in error.

Mr. Willis Van Devanter for defendant in error. *Mr. W. R. Stoll* was with him on the brief.

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

This case resolves itself into the single question whether the property of the plaintiff was engaged in interstate commerce to such an extent as to be exempt from taxation by the State of Wyoming, through which it was being transported.

The statute of the State upon this subject, Laws, 1895, c. 61, is as follows:

"Sec. 1. All live stock brought into this State *for the purpose of being grazed* shall be taxed for the fiscal year during which it shall have been brought into the State.

"Sec. 2. Assessors are, for the purpose of enforcing this act,

hereby vested with the powers, and charged with the duties vested in and conferred upon other officers for the collection of taxes.

"SEC. 3. It shall be the duty of the assessors in the several counties to levy and immediately collect the taxes provided for in this act, as soon as live stock is brought into their counties to graze; and to pay, without delay, such sums to the treasurers of their respective counties.

"SEC. 4. Whenever the owner of any live stock upon which a tax has been levied as provided in this act, shall refuse to immediately pay the amount of such tax to the assessor who levied it, such assessor shall proceed forthwith to collect such tax as provided by law for the collection of delinquent taxes on other kinds of personal property."

The question to be determined, then, is, whether the stock of the plaintiff was brought into the State *for the purpose of being grazed* at the time it was assessed for taxation. This question must be answered by the agreed statement of facts. While this statement is binding upon this court, as well as the state courts, different inferences may be drawn from these facts as to the applicability of the state statute. Had the state court found directly the ultimate fact that these sheep were brought into the State for the purpose of being grazed, such finding might have bound us, but, under the facts actually found or agreed upon, we are at liberty to inquire whether they support the judgment. *Harrison* v. *Perea*, 168 U. S. 311.

The law upon this subject, so far as it concerns interference with interstate commerce, is settled by several cases in this court, which hold that property actually in transit is exempt from local taxation, although if it be stored for an indefinite time during such transit, at least for other than natural causes, or lack of facilities for immediate transportation, it may be lawfully assessed by the local authorities. *State* v. *Engle*, 34 N. J. Law, 425; *Standard Oil Co.* v. *Bachelor*, 89 Indiana, 1; *Burlington Lumber Co.* v. *Willetts*, 118 Illinois, 559.

The first case in which the question arose is that of *Brown* v. *Houston*, 114 U. S. 622, in which it was held that coal mined in Pennsylvania and sent by water to New Orleans to

be sold in the open market there on account of the owners in Pennsylvania, and lying at New Orleans in flatboats for sale, became intermingled, on its arrival there, with the general property of the State, and was subject to taxation under the general laws of Louisiana, although it might have been, after arrival, sold from the vessel on which the transportation was made, without being landed, and for the purpose of being taken out of the country by a vessel bound to a foreign port. The case was affirmed in *Pittsburg &c. Coal Co.* v. *Bates*, 156 U. S. 577, which differed from the former only in the fact that the coal did not reach New Orleans, the port of destination, but was still on the Mississippi River, nine miles above Baton Rouge, where it was held for sale. It appeared that the boats were held subject to the orders of plaintiff to be navigated to such place or places as he might deem convenient or advantageous to the trade in which he was engaged.

In *Coe* v. *Errol*, 116 U. S. 517, it was held that logs cut in New Hampshire, which were hauled down to the town of Errol on the Androscoggin River in that State, to be thence floated down the river to Lewiston, Maine, and were awaiting a convenient opportunity for such transportation, were still a part of the general mass of property of the State liable to taxation, if taxed in the usual way in which such property was taxed in that State. It was a stipulated fact that the timber thus cut had lain over one season, being about a year, in the Androscoggin River in that State either in Errol, Dummer or Milan; and that other timber referred to in the petition as having been cut in Maine had lain over in Errol since the spring or summer before the taxation. The question is thus stated by Mr. Justice Bradley: "Are the products of a State, though intended for exportation to another State, and partially prepared for that purpose by being deposited at a place or port of shipment within the State, liable to be taxed like other property within the State?" Said he: "There must be a point of time when they cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which

they commence their final movement for transportation from the State of their origin to that of their destination. . . . Until then it is reasonable to regard them as not only within the State of their origin, but as a part of the general mass of property of that State, subject to its jurisdiction, and liable to taxation there."

The substance of these cases is that, while the property is at rest for an indefinite time awaiting transportation, or awaiting a sale at its place of destination, or at an intermediate point, it is subject to taxation. But if it be actually in transit to another State, it becomes the subject of interstate commerce and is exempt from local assessment.

We place no reliance upon the fact in this case that plaintiff's sheep had been duly returned for taxation, and assessed for the taxes of 1895 in the Territory of Utah, since, although this may have some bearing upon the equities of the case, it was declared in *Coe* v. *Errol* to have no significance as a matter of law.

The question turns upon the purpose for which the sheep were driven into the State. If for the purpose of being grazed, they are expressly within the first section of the act. But if for the purpose of being driven through the State to a market, they would be exempt as a subject of interstate commerce, though they might incidentally have supported themselves in grazing while actually in transit. We think the question is sufficiently answered by the statement of facts, from which it appears (3) that the sheep were in charge of plaintiff's agent, "who was driving and transporting said sheep through said State of Wyoming from the then Territory of Utah to the State of Nebraska;" (4) "While being driven from the western boundary of the State to Pine Bluffs station, on the eastern boundary, they were maintained by grazing along the route of travel." (7) "It was a fact, and defendant had knowledge of the fact, and was notified by plaintiff's agent, that said herd of sheep were being driven across the State of Wyoming to Pine Bluffs station *for the purpose of shipment*, and that the same were not brought into the State for the purpose of being maintained permanently there." (12) "The time consumed in driv-

ing said sheep from the western boundary of the State of Wyoming to Pine Bluffs station, in Laramie County, was from six to eight weeks and by the route followed the distance travelled was about 500 miles."

It thus appears that the only purpose found for which this herd of sheep was being driven across the State was for *shipment*, and the agreed statement wholly fails to show that they were detained at any place within the State for the purpose of grazing or otherwise. As they consumed from six to eight weeks in travelling about 500 miles, or, as the Supreme Court found, at the rate of about nine miles per day, it does not even appear that they loitered unnecessarily on the way. As they required sustenance on the journey, and could obtain it only by grazing, it would appear, though there is no testimony upon that point, that they could hardly have been driven more rapidly without a loss of flesh during the transit. The only evidence as to the manner in which such grazing was conducted is contained in the fourth stipulation: "In driving said sheep in such manner it was the practice of the person in charge to permit them to spread out at times in the neighborhood of a quarter of a mile, and while being so driven the sheep were permitted to graze over land of that width. They were driven, in some instances, through large pastures; in other instances through the public domain, and in other instances through pastures enclosed by fences." Considering that the herd numbered about 10,000 sheep, and were moved eastward at the rate of nine miles a day, it does not seem as though the fact that they were permitted to graze over a width of a quarter of a mile was evidence of any unnecessary delay; and while the owner would undoubtedly be liable for any damage done to pasturage *en route*, there is no evidence at all that the transit of the sheep was delayed for the purpose of grazing while going through the State. Bearing in mind that the weight of all the previous cases in this court has been laid upon the fact of an indefinite delay, awaiting transportation at the commencement of the journey, or awaiting sale or delivery at its termination, the facts of this case fail completely to bring it within those authorities. The fact that the sheep may not

have lost flesh, or may even have gained flesh, during their transit through the State, is impertinent, unless the primary purpose of their being driven there was for grazing.

It is true that the sheep might have been transported by rail from Utah to Pine Bluffs, but the statement fails to show whether that course would have been more or less expensive than the one adopted. It is clear that the owner had the right to avail himself of such means of transportation as he preferred, and in estimating the probable cost he was at liberty to consider the fact that he was licensed to make use of the public lands of the United States without charge for the sustenance of his sheep. *Buford* v. *Houtz*, 133 U. S. 320. Why he shipped them by rail from Pine Bluffs is not explained, but it seems quite probable that it was due to the fact that the public lands in Nebraska had been so far taken up that the sheep would not be able to obtain sufficient nourishment if they were driven through that State. We do not deny that it may have been plaintiff's intention not only to graze but to fatten his sheep while *en route* through Wyoming. Indeed, we may suspect it, but there is nothing in the agreed statement of facts to justify that inference. While the fifteenth finding states that for the purpose of shipping said sheep it was not necessary that they should be driven into the State of Wyoming and that they might have been shipped on the railroad much farther west than Pine Bluffs station, that finding really resolves itself back to the proposition already stated, that the owner or his shepherd was at liberty to choose his own method of transportation, and as he took a direct route through the State, deviating neither to the right nor to the left, and travelled as rapidly as a due regard for the condition of his flock permitted, we think there could be no fair inference from these facts that the sheep were introduced into the State for the purpose of grazing.

There is another consideration worthy of attention, and that is that the right which the State of Wyoming had to tax this property might have been exercised in every State through which the sheep were driven. In this particular case it would appear that they were shipped at Pine Bluffs, but they might with equal propriety have been driven through Nebraska and

Statement of the Case.

Iowa before reaching their final destination. Indeed, section 3 of the act, which provides "it shall be the duty of the assessors in the several counties to levy and immediately collect taxes as provided for in this act, as soon as live stock is brought into their counties to graze," leaves it an open question whether these taxes may not have been assessed in every county through which these sheep were driven.

The judgment of the Supreme Court of Wyoming is therefore

Reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion.

WEBER *v.* ROGAN.

ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

No. 107. Submitted December 1, 1902.—Decided January 19, 1903.

The Supreme Court of the State of Texas having decided that the statute of that State, Acts of 1897, c. 129, providing that certain lands *may be sold* at a specified price under certain conditions by the Commissioner of the General Land Office was not mandatory, but that it was discretionary with the Commissioner whether to sell such lands or not, no Federal question arises which this court can consider in a proceeding brought to compel the Commissioner to convey certain lands under such act to a person offering to purchase the same at the price specified in the act.

The constitutional inhibition against the impairment of contracts applies only to legislative enactments of the States and not to the judicial decisions or acts of the state tribunals or officers, under statutes in force at the time of the making of the contract, the obligation of which is alleged to have been impaired.

THIS was an original petition filed in the Supreme Court of Texas by the plaintiff in error, Weber, against Charles Rogan, Commissioner of the General Land Office of the State, praying for a writ of mandamus directing such Commissioner to award to the petitioner two isolated and detached sections of the public school lands, situated respectively in Polk and Jefferson Counties in the State of Texas.

Statement of the Case.

The petitioner alleged in substance that on August 11, 1899, being desirous of purchasing such lands, he applied to the Commissioner for the same at the price fixed by law, $1 per acre, and otherwise fully complied with the terms of sale offered by law authorizing him to become the purchaser; that the Commissioner refused and rejected his applications, for the reason that the two sections applied for had theretofore been classified—the first as timber land, and the second as grazing land, to neither of which the law was applicable, and could not be purchased under the law in force at the date of the application for one dollar per acre, though such grazing and timber lands were isolated and detached from other public lands, and were situated in counties organized prior to January 1, 1875, and that there was no law under which the petitioner could have lawfully awarded to him the two said sections at one dollar per acre. Petitioner admitted that said two sections were classified by the Commissioner, one as timber land and the other as grazing land, but averred that such classification was of no force or effect because the provisions of the law requiring lands belonging to the public school fund to be classified did not relate or apply to isolated and detached sections, or fractions of sections of such lands, situated in counties organized prior to January 1, 1875, but that the price of said lands was at that time fixed by law at one dollar per acre, irrespective of any classification made of said lands either before or after the time they became isolated and detached. That by application to the Commissioner and depositing with the treasurer of the State the amount due therefor, he became the purchaser of said two sections, and the Commissioner was without authority to withhold from him said lands.

Upon this petition the case was submitted upon briefs and oral arguments to the Supreme Court, which awarded a mandamus, 94 Texas, 62, subsequently granted a rehearing, 94 Texas, 67, and upon such rehearing filed an opinion refusing the writ, 94 Texas, 67.

Whereupon petitioner applied for and was granted a writ of error from this court, and assigned as error that the State had offered to sell all isolated and detached sections, and fractions

of sections of public school lands situated in counties organized prior to January 1, 1875, at one dollar per acre; that this offer by the State was accepted by the petitioner, and that such acceptance constituted a contract between the State and the purchaser, and that by holding that the Commissioner of the Land Office might decline to award the petitioner the lands applied for, the court gave a construction to the statute which impaired the obligation of such contract.

Mr. F. Charles Hume for plaintiff in error. *Mr. M. E. Kleberg* was with him on the brief.

Mr. C. K. Bell, attorney general of the State of Texas, for defendant in error.

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

At the time the petitioner made his applications to the Commissioner of the Land Office for the purchase of these lands the following law was in force, 2 Batt's Rev. Stat. art. 4218*y*:

"The Commissioner of the General Land Office may withhold from lease any agricultural lands necessary for the purpose of settlement, and no agricultural lands shall be leased, if, in the judgment of the Commissioner, they may be in immediate demand for settlement, but such lands shall be held for settlement and sold to the actual settlers only, under the provisions of this chapter; and all sections and fractions of sections, in all counties organized prior to the first day of January, 1875, except El Paso, Presidio and Pecos counties, which sections are isolated and detached from other public lands, *may be sold* to any purchaser, except to a corporation, without actual settlement, at one dollar per acre, upon the same terms as other public lands are sold under the provisions of this chapter." Acts of 1897, c. 129.

The Supreme Court held that the determination of the case depended upon the question whether it was made by this law the imperative duty of the Commissioner of the Land Office to sell all isolated and detached sections and parts of sections

of the public free school lands to the first applicant without regard to their classification; and that that construction depended upon the question whether the words "may be sold to any purchaser" implied a discretion in the Commissioner to refuse, or was to be understood as equivalent to "shall," which would imply a duty upon the part of the Commissioner to sell to any purchaser at the price fixed of one dollar per acre. At first, the court was of opinion that the word "may" was used in the sense of "shall"; that no discretion was vested in the Commissioner; that the general provisions regulating the sale of public school lands did not apply to isolated and detached sections and fractions of sections; that they required no classification or appraisement; that the law of 1897 fixed their purchase price absolutely at one dollar per acre; and that all that was necessary to acquire an inchoate title was to make application to the Commissioner and tender the proportion of the purchase money, required by law to be paid in cash, together with the statutory obligations for the balance. Upon rehearing, the opinion of the court was changed, and the majority came to the conclusion that the word "may," as used in the statute, ought to be construed in its literal sense, and as merely conferring the power upon the Commissioner to sell land at one dollar per acre, but not making it obligatory upon him to do so. The mandamus was denied. Another rehearing was also denied.

There is hardly a semblance of a Federal question in this case. None such was noticed in the original petition or in either opinion of the court; and it was not until after an application was made for a rehearing that petitioner discovered that the act of the legislature of 1895, as amended by the act of 1897, Rev. Stat. art. 4218*y*, above cited, constituted a contract on the part of the State to sell all isolated and detached sections and fractions of sections of public school lands to any purchaser who would offer one dollar per acre therefor, which had been impaired by the Supreme Court of the State in holding that the Commissioner of the Land Office might refuse to execute such contract by declining to award the lands applied for, and therefore violated its obligation.

Syllabus.

We agree with the Supreme Court of the State that no contract was created by this statute. Hence, there was none to be impaired. We had occasion to hold in *Central Land Company* v. *Laidley*, 159 U. S. 103, that we have no jurisdiction of a writ of error to a state court upon the ground that the obligation of a contract has been impaired, when the validity of the statute under which the contract is made is admitted, and the only question is as to the construction of the statute by that court; and in the same case as well as in *Hanford* v. *Davies*, 163 U. S. 273, we held that the constitutional inhibition applies only to the legislative enactments of the State, and not to judicial decisions or the acts of state tribunals, or officers under statutes in force at the time of the making of the contract, the obligation of which is alleged to have been impaired.

In addition to this, however, the question was not made until after the final decision of the state court, and upon application for a rehearing. This was clearly too late. *Miller* v. *Texas*, 153 U. S. 535.

The writ of error is

Dismissed.

ANDREWS *v.* ANDREWS.

ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.

No. 23. Argued February 28, 1902.—Decided January 19, 1903.

When rights, based on a judgment obtained in one State, are asserted in the courts of another State under the due faith and credit clause of the Federal Constitution, the power exists in the state court in which they are asserted to look back of the judgment and ascertain whether the claim which had entered into it was one susceptible of being enforced in another State (*Wisconsin* v. *Pelican Insurance Company*, 127 U. S. 215; *Thompson* v. *Whitman*, 18 Wall. 457). And where such rights are in due time asserted, the power to decide whether the Federal question so raised was rightly disposed of in the court below exists in, and involves the exercise of jurisdiction by, this court.

Statement of the Case.

1. Although marriage, viewed solely as a civil relation, possesses elements of contract, it is so interwoven with the very fabric of society that it cannot be entered into except as authorized by law, and it may not, when once entered into, be dissolved by the mere consent of the parties.

The Constitution of the United States confers no power whatever upon the government of the United States to regulate marriage or its dissolution in the States.

A State may forbid the enforcement within its borders of a decree of divorce procured by its own citizens who, whilst retaining their domicil in the prohibiting State, have gone into another State to procure a divorce in fraud of the law of the domicil.

The statute of Massachusetts which provides that a divorce decreed in another State or country by a court having jurisdiction of the cause and both the parties shall be valid and effectual in the Commonwealth; but if an inhabitant of Massachusetts goes into another State or country to obtain a divorce for a cause which occurred in Massachusetts, while the parties resided there, or for a cause which would not authorize a divorce by the laws of Massachusetts, a divorce so obtained shall have no force or effect in that Commonwealth, is an expression of the public policy of that State in regard to a matter wholly under its control and does not conflict with the Constitution of the United States or violate the full faith and credit clause thereof. And the courts of Massachusetts are not obliged to enforce a decree of divorce obtained in another State as to persons domiciled in Massachusetts and who go into such other State with the purpose of practicing a fraud upon the laws of the State of their domicil; that is, to procure a divorce without obtaining a *bona fide* domicil in such other State.

2. Although a particular provision of the Constitution may seemingly be applicable, its controlling effect is limited by the essential nature of the powers of government reserved to the States when the Constitution was adopted.

As the State of Massachusetts has exclusive jurisdiction over its citizens concerning the marriage tie and its dissolution, and consequently the authority to prohibit them from perpetrating a fraud upon the law of their domicil by temporarily sojourning in another State and there procuring a decree of divorce without acquiring a *bona fide* domicil, a decree of divorce obtained in South Dakota upon grounds which do not permit a divorce in Massachusetts under the conditions stated in the opinion is not rendered by a court of competent jurisdiction and hence the due faith and credit clause of the Constitution does not require the enforcement of such decree in the State of Massachusetts against the public policy of that State as expressed in its statutes.

THE plaintiff and the defendant in error, each claiming to be the lawful widow of Charles S. Andrews, petitioned to be appointed administratrix of his estate. The facts were found as follows:

Statement of the Case.

Charles S. and Kate H. Andrews married in Boston in April, 1887, and they lived together at their matrimonial domicil in the State of Massachusetts. In April, 1890, the wife began a suit for separate maintenance, which was dismissed in December, 1890, because of a settlement between the parties, adjusting their property relations.

In the summer of 1891, Charles S. Andrews, to quote from the findings, "being then a citizen of Massachusetts and domiciled in Boston, went to South Dakota to obtain a divorce for a cause which occurred here while the parties resided here, and which would not authorize a divorce by the laws of this Commonwealth; he remained personally in that State a period of time longer than is necessary by the laws of said State to gain a domicil there, and on November 19, 1891, filed a petition for divorce in the proper court of that State."

Concerning the conduct of Charles S. Andrews and his purpose to obtain a divorce in South Dakota, whilst retaining his domicil in Massachusetts, the facts were found as follows:

"The husband went to South Dakota and took up his residence there to get this divorce, and that he intended to return to this State when the business was finished. He boarded at a hotel in Sioux Falls all the time, and had no other business there than the prosecution of this divorce suit. I find, however, that he voted there at a state election in the fall of 1891, claiming the right to do so as a *bona fide* resident under the laws of that State. His intention was to become a resident of that State for the purpose of getting his divorce, and to that end to do all that was needful to make him such a resident, and I find he became a resident if, as a matter of law, such finding is warranted in the facts above stated."

And further, that—

"The parties had never lived together as husband and wife in South Dakota, nor was it claimed that either one of them was ever in that State except as above stated."

With reference to the divorce proceedings in South Dakota it was found as follows:

"The wife received notice, and appeared by counsel and filed an answer, denying that the libellant was then or ever had been

a *bona fide* resident of South Dakota, or that she had deserted him, and setting up cruelty on his part toward her. This case was settled, so far as the parties were concerned, in accordance with the terms of the agreement of April 22, 1892, signed by the wife and consented to by the husband, and, for the purpose of carrying out her agreement 'to consent to the granting of divorce for desertion in South Dakota,' she requested her counsel there to withdraw her appearance in that suit, which they did, and thereafterwards, namely, on May 6, 1892, a decree granting the divorce was passed, and within a day or two afterwards the said Charles, having attained the object of his sojourn in that State, returned to this Commonwealth, where he resided and was domiciled until his death, which occurred in October, 1897."

By the agreement of April 22, 1892, to which reference is made in the finding just quoted, it was stipulated that a payment of a sum of money should be made by Charles S. Andrews to his wife, and she authorized her attorney on the receipt of the money to execute certain papers, and it was then provided as follows:

"Fourth. Upon the execution of such papers M. F. Dickinson, Jr., is authorized in my name to consent to the granting of divorce for desertion in the South Dakota court."

Respecting the claim of Annie Andrews to be the wife of Charles S. Andrews, it was found as follows:

"Upon his return to this State he soon met the petitioner, and on January 11, 1893, they were married in Boston, and ever after that lived as husband and wife in Boston, and were recognized as such by all until his death. The issue of this marriage are two children, still living."

It was additionally found that Annie Andrews married Charles S. Andrews in good faith and in ignorance of any illegality in the South Dakota divorce, and that Kate H. Andrews, as far as she had the power to do so had connived at and acquiesced in the South Dakota divorce, had preferred no claim thereafter to be the wife of Charles S. Andrews until his death when in this case she asserted her right to administer his estate as his lawful widow.

From the evidence above stated the ultimate facts were found to be that Andrews had always retained his domicil in Massachusetts, had gone to Dakota for the purpose of obtaining a divorce, in fraud of the laws of Massachusetts, and with the intention of returning to that State when the divorce was procured, and hence that he had never acquired a *bona fide* domicil in South Dakota. Applying a statute of the State of Massachusetts forbidding the enforcement in that State of a divorce obtained under the circumstances stated, it was decided that the decree rendered in South Dakota was void in the State of Massachusetts, and hence that Kate H. Andrews was the widow of Charles S. Andrews and entitled to administer his estate. 176 Massachusetts, 92.

Mr. Elbridge R. Anderson for plaintiff in error.

I. In support of the jurisdictional question cited *Home Insurance Co.* v. *City Council of Augusta*, 93 U. S. 116; *Powell* v. *New Brunswick County*, 150 U. S. 433.

It is not necessary that the Federal question appear affirmatively upon the record or in the opinion if the adjudication of such a question is involved in the disposition of the case by the state court. *Kaukauna County* v. *Green Bay &c.*, 142 U. S. 254; *Willson* v. *Blackbird Creek Marsh Co.*, 2 Peters, 245; *Armstrong* v. *Athens Co.*, 16 Peters, 281; *Chicago Life Ins. Co.* v. *Needles*, 113 U. S. 574; *Eureka Lock Co.* v. *Yuba Co.*, 116 U. S. 410; *Chapman* v. *Goodnow's Adm.*, 123 U. S. 540.

II. Both parties submitted to the jurisdiction of the South Dakota court. No fraud was practised upon the court. Under the Constitution of the United States the judgment of divorce is conclusive. It appears that the state court felt constrained to sustain the appeal because of Pub. Stats. of Massachusetts, chap. 146, sec. 41, which provides that "when an inhabitant of this Commonwealth goes into another State or country to obtain a divorce for a cause which occurred here while the parties resided here, . . . a divorce so obtained shall be of no force or effect in this Commonwealth.' It is

important, therefore, to consider the validity and scope of this statute. Const. art. 4, sec. 1; Rev. Stat. sec. 905.

Such judgments as are protected by this constitutional provision cannot be nullified by any state law, and on the question what judgments are so protected, the decisions of this court are controlling. *Christmas* v. *Russell*, 5 Wall. 290; *Laing* v. *Rigney*, 160 U. S. 531.

On the one hand there is a plain intimation that an *ex parte* judgment of divorce is not conclusive beyond the State in which it is rendered, and that every other State is at liberty to give it such effect as may seem proper as a matter of comity or public policy. *Pennoyer* v. *Neff*, 95 U. S. 714, 731, 734. "On the other hand it is settled that where the appellant has resided in the State for the period required by the local laws and the defendant is before the court, a judgment of divorce is conclusive everywhere." *Cheever* v. *Wilson*, 9 Wall. 108.

Under this decision, if Andrews was in fact a resident of South Dakota when he applied for his divorce, then the judgment is conclusive. If he was not a resident, then the question as to whether the judgment is open to attack upon that ground is left undecided.

Andrews was a resident of South Dakota at the time he applied for his divorce, *Thayer* v. *Boston*, 124 Massachusetts, 132, 148, notwithstanding that he intended to return to this State when the business was finished. Methodist clergymen are required by the rules of their denomination to change from place to place every two or three years, but these rules do not prevent the clergyman from obtaining a residence and a right to vote in every place in which he resides. *Holmes* v. *Green*, 7 Gray, 299; *Carnoe* v. *Inhabitants of Freetown*, 9 Gray, 357; *Sleeper* v. *Page*, 15 Gray, 349, 350.

The finding of the South Dakota court that Andrews was a resident of that State is conclusive in the absence of fraud. The defendant was before the court; it was open to her to try that question there; she cannot try it in Massachusetts or here. *Noble* v. *Union River Logging Railroad*, 147 U. S. 165.

Within the distinction here indicated the fact of the residence

of the libellant in a divorce suit in which a defendant appears is *quasi* jurisdictional. By the great preponderance of authority, the findings of the court upon this question are held to conclude the parties to the proceeding in the absence of fraud. *Ellis's Estate*, 55 Minnesota, 401; *Kinnier* v. *Kinnier*, 45 N. Y. 535; *Jones* v. *Jones*, 108 N. Y. 415; *Kirrigan* v. *Kirrigan*, 15 N. J. Eq. 147; *Fairchild* v. *Fairchild*, 53 N. J. Eq. 678 (1895); *Waldo* v. *Waldo*, 52 Michigan, 94 (1883); Van Fleet Collateral Attack, sec. 648 (1892).

The conclusive effect given by the New York courts to judgments of divorce rendered in the presence of both parties is the more noteworthy from the fact that it is still held in New York that *ex parte* judgments of divorce obtained in other States are of no validity in New York whether the libellant was or was not a resident of the State where the divorce was obtained. *People* v. *Baker*, 76 N Y. 78; *O'Dea* v. *O'Dea*, 101 N. Y. 23.

Waldo v. *Waldo*, 52 Michigan, 94, sustains contention of plaintiff in error fully and controls everything to the contrary in *People* v. *Dawell*, 25 Michigan, 247.

There are only two cases in which a judgment of divorce obtained in another State, the defendant appearing, has been held void in Massachusetts. *Chase* v. *Chase*, 6 Gray, 157; *Hardy* v. *Smith*, 136 Massachusetts, 328, in which the wife obtained a decree of divorce from a Utah court pursuant to an agreement with her husband under which he fabricated the evidence by which she sustained her libel. After her death he was permitted to maintain his right as husband in her property notwithstanding the divorce.

This decision is not inconsistent with any position we have taken or need to take in the present case, since it cannot be contended, in the face of Mr. Justice Hammond's findings, that Andrews perpetrated any fraud upon the South Dakota court. "His intention was to become a resident of that State for the purpose of getting his divorce, and to that end to do all that was needful to make him such a resident, and I find he became a resident if, as a matter of law, such finding is warranted on the facts above stated." Page 32, Record.

Argument for Plaintiff in Error.

It is to be noticed that while fraud is suggested in the New Jersey cases as a ground for collateral attack, the fraud referred to means fraud upon one of the parties to the suit. Collusion, unless it involves an agreement to commit perjury or some other illegal act, is not treated either there or in any other jurisdiction as a ground for attack, but rather a ground for estoppel.

III. It is a universal proposition that the judgment of a court which has the power to enter judgment upon the facts alleged is binding upon the parties before it, and that this proposition is true of divorce judgments as of other judgments. "If both parties colluded in a cheat upon the court it was never known that either of them could vacate the judgment." *Prudam* v. *Phillips*, Hargraves' Law Tracts, 456; *Adams* v. *Adams*, 154 Massachusetts, 290, 297; *Edson* v. *Edson*, 108 Massachusetts, 590, 598. In some States it was held on an indictment for adultery that a divorce obtained in the State in which neither party resided, although the parties had submitted to the jurisdiction, was no defence. *People* v. *Dawell*, 25 Michigan, 247; *State* v. *Armington*, 25 Minnesota, 29. But in later cases these courts have held that a divorce obtained under the same circumstances was not open to attack by either party. *Waldo* v. *Waldo*, 52 Michigan, 94; *Ellis's Estate*, 55 Minnesota, 401.

A party who assents to a divorce judgment is bound by it. In some cases the judgment has been attacked on want of jurisdiction, collusion and fraud upon the court. In some cases the party making the attack was the original libellant, and in others the libellee, who either agreed to the divorce judgment at the time, or subsequently acquiesced in it by marrying or by permitting the libellant to marry without objection.

Cases in which a woman has renounced her status as wife, and has later tried to assert her status as widow, are not infrequent, but the unanimity with which the court has discouraged this form of enterprise is impressive. *Nichols* v. *Nichols*, 25 N. J. Eq. 60; *Zoellner* v. *Zoellner*, 46 Michigan, 511; *Richardson's Estate*, 132 Pa. St. 292; *Arthur* v. *Israel*, 15 Colorado, 147; *Mohler* v. *Shank*, 93 Iowa, 273; *Marvin* v. *Foster*, 61 Minnesota, 154; *Stephens* v. *Stephens*, 51 Indiana, 542; *Nichol-*

son v. *Nicholson*, 113 Indiana, 131; *Davis* v. *Davis*, 61 Maine, 395; *Miltimore* v. *Miltimore*, 40 Pa. St. 151; *In the Matter of Morrison*, 52 Hun, 102; affirmed 117 N. Y. 638; *Ellis* v. *White*, 61 Iowa, 644; *Elliott* v. *Wohlfrom*, 55 California, 384. In the foregoing cases the original divorce judgment was attacked in some instances on jurisdictional grounds and in others on non-jurisdictional grounds of fraud and collusion, and where the parties have submitted to the jurisdiction of the court there is no valid ground of distinction between the two cases.

If there is any ground for holding that the parties to a divorce judgment are not bound by it, that must be because the State is interested to uphold the marriage relation even against the will of both parties. But if that is the true ground, then it is clear that it can make no difference whether the fraud practised upon the court is a jurisdictional fraud or some other kind of fraud.

No state court would allow a divorce decree of its own tribunals, rendered in the presence of both parties, to be attacked upon the jurisdictional question or upon any other. If this be true we submit that the Constitution of the United States protects under the same circumstances the decrees of other States.

IV. The recent cases decided by this court in no way change the law as it heretofore existed, but are declaratory of the principles contended for in this brief. *Bell* v. *Bell*, 181 U. S. 175; *Streitwolf* v. *Streitwolf*, 181 U. S. 179.

In both these cases the decree of divorce sought to be set up was obtained in cases where there was no appearance by the respondent, and the proceedings were *ex parte*.

The case of *Atherton* v. *Atherton*, 181 U. S. 155, in no way applies to a case like the case at bar and in no way affects the principles contended for in this brief.

Mr. Wayne Mac Veagh and *Mr. Frank Dewey Allen* for defendant in error. *Mr. Frederic D. McKenney* was with them on the brief.

I. No Federal question is presented by this record for the consideration of the court. Possibly a Federal question might

have been raised in the courts of Massachusetts which would have supported the writ of error from this court, but it does not appear that the courts of that Commonwealth were called upon to consider any Federal question, nor do they appear to have disposed of one. Under such circumstances, the writ of error should be dismissed. *Loeber* v. *Schroeder*, 149 U. S. 580; *Sayward* v. *Denny*, 158 U. S. 180; *Pim* v. *St. Louis*, 165 U. S. 273; *Oxley Stave Co.* v. *Butler Co.*, 166 U. S. 695; *Chapin* v. *Fye*, 179 U. S. 129.

The mere fact that the state courts "decreed that the divorce obtained by Charles S. Andrews in South Dakota is of no force and effect in this Commonwealth" does not of itself raise a Federal question necessitating the exercise of appellate powers by this court, for if it appears upon the face of the foreign decree or otherwise that the court of its origin was without jurisdiction to pronounce it, the so-called decree is in fact no decree, and consequently no constitutional question can arise thereabout. *Bell* v. *Bell*, 181 U. S. 175, and cases cited; *Streitwolf* v. *Streitwolf*, 181 U. S. 179; Schouler on Husband and Wife, sec. 574; *Sewall* v. *Sewall*, 122 Massachusetts, 156; *People* v. *Dawell*, 25 Michigan, 247.

It does not follow, because a court has the statutory power to grant divorces, that faith and credit must necessarily be accorded to its decrees, for to enable such court to render a valid decree of divorce it must also happen that at least one of the parties to the proceedings was a domiciled citizen of the State from which the court derives its powers. *Hood* v. *State*, 56 Indiana, 263; 26 Am. Rep. 21. The Massachusetts courts have uniformly refused to recognize the validity of divorces granted by other States where a party has gone into another State without acquiring a domicil there for the purpose of obtaining, and does obtain, a divorce for a cause which occurred in but which was not a cause of divorce by the law of Massachusetts, on the ground that the court of that State had no jurisdiction, and its decree granting the divorce is entitled to no faith and credit in Massachusetts as a judicial proceeding, even if the decree recites facts sufficient to give it jurisdiction. *Sewall* v. *Sewall*, 122 Massachusetts, 156; *Hanore* v. *Turner*, 14 Mass-

achusetts, 227; *Chase* v. *Chase*, 6 Gray, 157; *Lyon* v. *Lyon*, 2 Gray, 368.

It is now well settled that each State has the right to regulate the status of its own citizens, but it has no jurisdiction to change or determine the status of citizens of a foreign State. *Ditson* v. *Ditson*, 4 R. I. 87; *Atherton* v. *Atherton*, 181 U. S. 155. Each State is the sole judge of the marital status of its citizens, and it alone has exclusive right to say upon what grounds or for what causes such status may be dissolved or modified. *Cook* v. *Cook*, 56 Wisconsin, 195; *Hunt* v. *Hunt*, 72 N. Y. 217.

The State of Massachusetts contravened no Federal right in enacting section 41 of chapter 146 of its Public Statutes.

II. On the merits and upon the facts as disclosed by the record that judgment must be affirmed.

By section 2558 of the Compiled Laws of South Dakota, Civil Code, it is provided that marriage may be dissolved only—

"1. By the death of one of the parties.

"2. By the judgment of a court of competent jurisdiction decreeing a divorce of the parties."

"SECTION 2578. A divorce must not be granted unless the plaintiff has, in good faith, been a resident of the Territory (State) ninety days next preceding the commencement of the action."

It is plain that a court may have jurisdiction to try a divorce case without having power to grant a valid decree of divorce to the applicant, even though he may allege and prove a cause for divorce under the laws of the State where relief is sought; for example, if the applicant be not in fact domiciled within the territorial jurisdiction of the court. Bishop, Marriage, Divorce and Separation, sec. 51.

The tribunals of a country have no jurisdiction over any cause of divorce, wherever or whenever it arose, if neither of the parties has within its territory an actual *bona fide* domicil. Nor does it make any difference that both parties are temporarily there, submitting to the jurisdiction. Bishop, Marriage and Divorce, 6th ed. sec. 144.

Argument for Defendant in Error.

Though the words "domicil" and "residence" are not synonymous, a statute requiring a specified number of years' residence in a State to give the courts jurisdiction of an application for divorce is to be interpreted as requiring domicil. Bishop, Marriage and Divorce, 6th ed. sec. 124.

The principles of international law and the general principles of our own requiring the residence for divorce to be *animo menendi*, such residence must at least partake of the character of permanency. *Whitcomb* v. *Whitcomb*, 46 Iowa, 437; *Hanson* v. *Hanson*, 111 Massachusetts, 158.

"If a party goes to a jurisdiction other than that of his domicil for the purpose of procuring a divorce, and has residence there for that purpose only, such residence is not *bona fide*, and does not confer upon the courts of that State or country jurisdiction over the marriage relations, and any decree they may assume to make would be void as to the other party." Cooley, Constitutional Limitations, p. 401. Citing: *Hanover* v. *Turner*, 14 Massachusetts, 227; *Greenlaw* v. *Greenlaw*, 12 N. H. 200; *Kimball* v. *Kimball*, 13 N. H. 225; *Bachelder* v. *Bachelder*, 14 N. H. 380; *Payson* v. *Payson*, 34 N. H. 518; *Hopkins* v. *Hopkins*, 35 N. H. 474.

In an action by the husband for his interest in the deceased wife's lands it appeared that the wife had gone to Nebraska temporarily to obtain a divorce. The law of Nebraska required as a condition precedent six months' residence. The wife remained within the State the requisite length of time. *Held*, that the Nebraska court had not acquired jurisdiction, and its decree of divorce in the case might be collaterally assailed. *Neff* v. *Beauchamp*, 74 Iowa, 95.

Residence in good faith includes the attributes of domicil. *Carpenter* v. *Carpenter*, 30 Kansas, 712.

It presupposes the intention of remaining in the place permanently. *Smith* v. *Smith*, 7 North Dakota, 412.

This view was applied to the case at bar as follows:

"Charles S. Andrews went to South Dakota for the purpose of getting the divorce, and intended to return to Massachusetts as soon as he had done so. Subject to this intention, it is found that he intended to become a resident of South Dakota for the

purpose of getting a divorce, and to do all that was needful to make him such a resident.

"The statute of South Dakota forbids a divorce, 'unless the plaintiff has, in good faith, been a resident of the Territory ninety days next preceding the commencement of the action.' . . . The language of the South Dakota statute must be taken to require not merely bodily presence, but domicil. In the light of the decisions upon similar acts, and the generally accepted rule making domicil the foundation, the words 'resident of the Territory' mean domiciled in the Territory, whether they also mean personally present or not," citing *Graham* v. *Graham*, 81 N. W. Rep. 44; *Dickinson* v. *Dickinson*, 167 Mass. 474, 475; *Reed* v. *Reed*, 52 Michigan, 117, 122; *Leith* v. *Leith*, 39 New Hampshire, 20, 41; *Van Fossen* v. *State*, 37 Ohio St. 317, 319.

"The finding of the single justice clearly means that the deceased did not get a domicil in South Dakota. He meant to stay there ninety days, and such further time, perhaps, as was necessary to get his divorce, and then he meant to come back to Massachusetts."

The facts in evidence warranted, and indeed required, the finding that Charles S. Andrews did not have a *bona fide* residence or domicil in the State of South Dakota when he obtained the decree of divorce there, and also the further finding that his wife, Kate H., had never been in that State.

Upon the authority of *Bell* v. *Bell* and *Streitwolf* v. *Streitwolf*, *ubi supra*, it is plain that the decree of the supreme judicial court must be affirmed unless the further facts found by that court, viz., that said Kate H., having notice of the pendency of the proceedings in the South Dakota court, appeared therein by counsel, filed an answer denying that the libellant was then or ever had been a *bona fide* resident of South Dakota, and subsequently "for the purpose of carrying out her agreement, 'to consent to the granting of a divorce for desertion in South Dakota,' requested her counsel there to withdraw her appearance in that suit, which they did," and afterwards, without further objection on her part, the decree now attacked was passed, are material and necessitate a different result.

Argument for Defendant in Error.

These additional facts cannot affect the result unless connivance or consent can serve to render a decree otherwise void for want of jurisdiction in the tribunal pronouncing it valid.

However this might be in ordinary suits *in personam*, in divorce proceedings consent cannot vitalize an otherwise void decree, for the courts of a State where neither party is domiciled are without jurisdiction in law to render a valid decree of divorce, and as such suits are not merely suits between the husband and wife, but affect a public institution, their consent cannot confer jurisdiction, so that where a divorce is granted in a State where neither party is domiciled, but in a proceeding in which both have appeared, their married status is not affected. *Harrison* v. *Harrison*, 20 Alabama, 629; *McGuire* v. *McGuire*, 7 Dana (Ky.), 181; *People* v. *Dawell*, 25 Michigan, 247; *Van Fossen* v. *State*, 37 Ohio St. 317; *Whitcomb* v. *Whitcomb*, 46 Iowa, 437; *Litowitch* v. *Litowitch*, 19 Kansas, 451; *Chase* v. *Chase*, 6 Gray, 157; *Sewall* v. *Sewall*, 122 Massachusetts, 156; *Leith* v. *Leith*, 39 New Hampshire, 20; *Platt* v. *Platt*, 80 Penn. St. 501; *Hare* v. *Hare*, 10 Texas, 355; *Jackson* v. *Jackson*, 1 Johns. 424.

"Divorce is allowed only for causes approved by law. Therefore the parties cannot dissolve their own marriage, or validly agree to a suspension of the cohabitation under it. Nor, for the same reason, can the courts do either simply from their consent. So that when an attempt is made through the tribunals to accomplish this object, the public becomes in effect a party to the proceeding, not to oppose the divorce at all events, but to prevent the sentence passing except as justified by facts which the law has declared to be sufficient; 'for society has an interest in the maintenance of marriage ties, which the collusion or negligence of the parties cannot impair;' hence a divorce suit, while on its face a mere controversy between private parties of record, is, as truly viewed, a triangular proceeding *sui generis*, wherein the public, or government, occupies in effect the position of a third party." Bishop, Marriage and Divorce, 6th ed. secs. 229*b*, 230.

This view has already been sealed with the approval of this court, and the doctrine contended for was expounded at length

in *Maynard* v. *Hill*, 125 U. S. 190, 210, citing *Adams* v. *Palmer*, 51 Maine, 481, 483; *Maguire* v. *Maguire*, 7 Dana, 181, 183; *Ditson* v. *Ditson*, 4 R. I. 87, 101; *Chase* v. *Chase*, 6 Gray, 157, 161. In the first of these the supreme court of Kentucky said that marriage was more than a contract; that it was the most elementary and useful of all the social relations, was regulated and controlled by the sovereign power of the State, and could not, like mere contracts, be dissolved by the mutual consent of the contracting parties, but might be abrogated by the sovereign will whenever the public good, or justice to both parties, or either of the parties, would thereby be subserved; that being more than a contract, and depending especially upon the sovereign will, it was not embraced by the constitutional inhibition of legislative acts impairing the obligation of contracts. In the second case the supreme court of Rhode Island said that *marriage*, in the sense in which it is dealt with by a decree of divorce, is not a contract, but one of the domestic *relations*. In strictness, though formed by a contract, it signifies the *relation* of husband and wife, deriving both its rights and duties from a source higher than any contract of which the parties are capable, and as to these uncontrollable by any contract which they can make. "When formed, this relation is no more a contract than 'fatherhood' or 'sonship' is a contract."

Upon the whole case, then, it is submitted:

1st. That the writ of error should be dismissed for want of jurisdiction; or

2d. The judgment should be affirmed because it is clearly right.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the court.

It was suggested at bar that this court was without jurisdiction. But it is unquestionable that rights under the Constitution of the United States were expressly and in due time asserted, and that the effect of the judgment was to deny these rights. Indeed, when the argument is analyzed we think it is apparent that it but asserts that, as the court below committed

no error in deciding the Federal controversy, therefore there is no Federal question for review. But the power to decide whether the Federal issue was rightly disposed of involves the exercise of jurisdiction. *Penn Mutual Life Insurance Company* v. *Austin*, (1897) 168 U. S. 685. As the Federal question was not unsubstantial and frivolous, we pass to a consideration of the merits of the case.

The statute of the State of Massachusetts, in virtue of which the court refused to give effect to the judgment of divorce, is as follows:

"SEC. 35. A divorce decreed in another State or country according to the laws thereof by a court having jurisdiction of the cause and of both the parties, shall be valid and effectual in this Commonwealth; but if an inhabitant of this Commonwealth goes into another State or country to obtain a divorce for a cause which occurred here, while the parties resided here, or for a cause which would not authorize a divorce by the laws of this Commonwealth, a divorce so obtained shall be of no force or effect in this Commonwealth." 2 Rev. Laws Mass. 1902, ch. 152, p. 1357; Pub. Stat. 1882, c. 146, § 41.

It is clear that this statute, as a general rule, directs the courts of Massachusetts to give effect to decrees of divorce rendered in another State or country by a court having jurisdiction. It is equally clear that the statute prohibits an inhabitant of Massachusetts from going into another State to obtain a divorce, for a cause which occurred in Massachusetts whilst the parties were domiciled there, or for a cause which would not have authorized a divorce by the law of Massachusetts, and that the statute forbids the courts of Massachusetts from giving effect to a judgment of divorce obtained in violation of these prohibitions. That the statute establishes a rule of public policy is undeniable. Did the court fail to give effect to Federal rights when it applied the provisions of the statute to this case, and, therefore, refused to enforce the South Dakota decree? In other words, the question for decision is, does the statute conflict with the Constitution of the United States? In coming to the solution of this question it is essential, we repeat, to bear always in mind that the prohibitions of the

statute are directed solely to citizens of Massachusetts domiciled therein, and that it only forbids the enforcement in Massachusetts of a divorce obtained in another State by a citizen of Massachusetts who, in fraud of the laws of the State of Massachusetts, whilst retaining his domicil, goes into another State for the purpose of there procuring a decree of divorce.

We shall test the constitutionality of the statute, first by a consideration of the nature of the contract of marriage and the authority which government possesses over the subject; and, secondly, by the application of the principles thus to be developed to the case in hand.

1. That marriage, viewed solely as a civil relation, possesses elements of contract is obvious. But it is also elementary that marriage, even considering it as only a civil contract, is so interwoven with the very fabric of society that it cannot be entered into except as authorized by law, and that it may not, when once entered into, be dissolved by the mere consent of the parties. It would be superfluous to cite the many authorities establishing these truisms, and we therefore are content to excerpt a statement of the doctrine on the subject contained in the opinion of this court delivered by Mr. Justice Field, in *Maynard* v. *Hill*, (1888) 125 U. S. 190:

"Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of the people than any other institution, has always been subject to the control of the legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution." (p. 205.)

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"It is also to be observed that, whilst marriage is often termed by text writers and in decisions of courts a civil contract—generally to indicate that it must be founded upon the agreement of the parties, and does not require any religious ceremony for its solemnization—it is something more than a mere contract. The consent of the parties is of course essential

to its existence, but when the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change. Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress." (p. 210.)

It follows that the statute in question was but the exercise of an essential attribute of government, to dispute the possession of which would be to deny the authority of the State of Massachusetts to legislate over a subject inherently domestic in its nature and upon which the existence of civilized society depends. True, it is asserted that the result just above indicated will not necessarily flow from the conclusion that the statute is repugnant to the Constitution of the United States. The decision that the Constitution compels the State of Massachusetts to give effect to the decree of divorce rendered in South Dakota cannot, it is insisted, in the nature of things be an abridgment of the authority of the State of Massachusetts over a subject within its legislative power, since such ruling would only direct the enforcement of a decree rendered in another State and therefore without the territory of Massachusetts. In reason it cannot, it is argued, be held to the contrary without disregarding the distinction between acts which are done within and those which are performed without the territory of a particular State. But this disregards the fact that the prohibitions of the statute, so far as necessary to be considered for the purposes of this case, are directed, not against the enforcement of divorces obtained in other States as to persons domiciled in such States, but against the execution in Massachusetts of decrees of divorce obtained in other States by persons who are domiciled in Massachusetts and who go into such other States with the purpose of practicing a fraud upon the laws of the State of their domicil; that is, to procure a divorce without obtaining a *bona fide* domicil in such other State. This being the scope of the statute, it is

evident, as we shall hereafter have occasion to show, that the argument, whilst apparently conceding the power of the State to regulate the dissolution of marriage among its own citizens, yet, in substance, necessarily denies the possession of such power by the State. But, it is further argued, as the Constitution of the United States is the paramount law, and as, by that instrument, the State of Massachusetts is compelled to give effect to the decree, it follows that the Constitution of the United States must prevail, whatever may be the result of enforcing it.

Before coming to consider the clause of the Constitution of the United States upon which the proposition is rested, let us more precisely weigh the consequences which must come from upholding the contention, not only as it may abridge the authority of the State of Massachusetts, but as it may concern the powers of government existing under the Constitution, whether state or Federal.

It cannot be doubted that if a State may not forbid the enforcement within its borders of a decree of divorce procured by its own citizens who, whilst retaining their domicil in the prohibiting State, have gone into another State to procure a divorce in fraud of the laws of the domicil, that the existence of all efficacious power on the subject of divorce will be at an end. This must follow if it be conceded that one who is domiciled in a State may whenever he chooses go into another State and, without acquiring a *bona fide* domicil therein, obtain a divorce, and then compel the State of the domicil to give full effect to the divorce thus fraudulently procured. Of course, the destruction of all substantial legislative power over the subject of the dissolution of the marriage tie which would result would be equally applicable to every State in the Union. Now, as it is certain that the Constitution of the United States confers no power whatever upon the government of the United States to regulate marriage in the States or its dissolution, the result would be that the Constitution of the United States has not only deprived the States of power on the subject, but whilst doing so has delegated no authority in the premises to the government of the United States. It would thus come to pass that the governments, state and Federal, are bereft by the

operation of the Constitution of the United States of a power which must belong to and somewhere reside in every civilized government. This would be but to declare that, in a necessary aspect, government had been destroyed by the adoption of the Constitution. And such result would be reached by holding that a power of local government vested in the States when the Constitution was adopted had been lost to the States, though not delegated to the Federal government, because each State was endowed as a consequence of the adoption of the Constitution with the means of destroying the authority with respect to the dissolution of the marriage tie as to every other State, whilst having no right to save its own power in the premises from annihilation.

But let us consider the particular clause of the Constitution of the United States which is relied upon, in order to ascertain whether such an abnormal and disastrous result can possibly arise from its correct application.

The provision of the Constitution of the United States in question is section 1 of article IV, providing that "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State." The argument is that, even although the Massachusetts statute but announces a rule of public policy, in a matter purely local, nevertheless it violates this clause of the Constitution. The decree of the court of another State, it is insisted, and not the relation of the parties to the State of Massachusetts and their subjection to its lawful authority, is what the Constitution of the United States considers in requiring the State of Massachusetts to give due faith and credit to the judicial proceedings of the courts of other States. This proposition, however, must rest on the assumption that the Constitution has destroyed those rights of local self-government which it was its purpose to preserve. It, moreover, presupposes that the determination of what powers are reserved and what delegated by the Constitution is to be ascertained by a blind adherence to mere form in disregard of the substance of things. But the settled rule is directly to the contrary. Reasoning from analogy, the unsoundness of the proposition is demonstrated. Thus, in en-

forcing the clause of the Constitution forbidding a State from impairing the obligations of a contract, it is settled by the decisions of this court, although a State, for adequate consideration, may have executed a contract sanctioning the carrying on of a lottery for a stated term, no contract protected from impairment under the Constitution results, because, disregarding the mere form and looking at substance, a State may not, by the application of the contract clause of the Constitution, be shorn of an ever inherent authority to preserve the public morals by suppressing lotteries. *Stone* v. *Mississippi*, 101 U. S. 814; *Douglas* v. *Kentucky*, 168 U. S. 488. In other words, the doctrine is, that although a particular provision of the Constitution may seemingly be applicable, its controlling effect is limited by the essential nature of the powers of government reserved to the States when the Constitution was adopted. In view of the rule thus applied to the contract clause of the Constitution, we could not maintain the claim now made as to the effect of the due faith and credit clause, without saying that the States must, in the nature of things, always possess the power to legislate for the preservation of the morals of society, but that they need not have the continued authority to save society from destruction.

Resort to reasoning by analogy, however, is not required, since the principle which has been applied to the contract clause has been likewise enforced as to the due faith and credit clause.

In *Thompson* v. *Whitman*, (1874) 18 Wall. 457, the action in the court below was trespass for the conversion of a sloop, her tackle, furniture, etc., upon a seizure for an alleged violation of a statute of the State of New Jersey. By special plea in bar the defendant set up that the seizure was made within the limits of a named county, in the State of New Jersey, and by answer to this plea the plaintiff took issue as to the place of seizure, thus challenging the jurisdiction of the justices who had tried the information and decreed the forfeiture and sale of the property. The precise point involved in the case, as presented in this court, was whether or not error had been committed by the trial court in receiving evidence to contradict the record of the New Jersey judgment as to jurisdictional facts asserted

therein, and especially as to facts stated to have been passed upon by the court which had rendered the judgment. It was contended that to permit the jurisdictional facts, which were foreclosed by the judgment, to be reëxamined would be a violation of the due faith and credit clause of the Constitution. This court, however, decided to the contrary, saying:

"We think it clear that the jurisdiction of the court by which a judgment is rendered in any State may be questioned in a collateral proceeding in another State, notwithstanding the provision of the fourth article of the Constitution and the law of 1790, and notwithstanding the averments contained in the record of the judgment itself."

The ground upon which this conclusion was predicated is thus embodied in an excerpt made from the opinion delivered by Mr. Chief Justice Marshall, speaking for the court, in *Rose* v. *Himely*, 4 Cranch, 241, 269, where it was said:

"Upon principle, it would seem, that the operation of every judgment must depend on the power of the court to render that judgment; or, in other words, on its jurisdiction over the subject matter which it has determined. In some cases, that jurisdiction, unquestionably, depends as well on the state of the thing, as on the constitution of the court. If, by any means whatever, a prize court should be induced, to condemn, as prize of war, a vessel which was never captured, it could not be contended, that this condemnation operated a change of property. Upon principle, then, it would seem, that, to a certain extent, the capacity of the court to act upon the thing condemned, arising from its being within, or without their jurisdiction, as well as the constitution of the court, may be considered by that tribunal which is to decide on the effect of the sentence."

And the same principle, in a different aspect, was applied in *Wisconsin* v. *Pelican Insurance Co.*, (1888) 127 U. S. 265. In that case the State of Wisconsin had obtained a money judgment in its own courts against the Pelican Insurance Company, a Louisiana corporation. Availing itself of the original jurisdiction of this court, the State of Wisconsin brought in this court an action of debt upon the judgment in question. The answer of the defendant was to the effect that the judgment

was not entitled to extra-territorial enforcement, because the claim upon which it was based was a penalty imposed upon the corporation for an alleged violation of the insurance laws of the State of Wisconsin. The answer having been demurred to, it was, of course, conceded that the claim which was merged in the judgment was such a penalty. This court, having concluded that ordinarily a penalty imposed by the laws of one State could have no extra-territorial operation, came then to consider whether, under the due faith and credit clause of the Constitution of the United States, a judgment rendered upon a penal statute was entitled to recognition outside of the State in which it had been rendered, because the character of the cause of action had been merged in the judgment as such. In declining to enforce the Wisconsin judgment and in deciding that, notwithstanding the judgment and the due faith and credit clause of the Constitution, the power existed to look back of the judgment and ascertain whether the claim which had entered into it was one susceptible of being enforced in another State, the court, speaking through Mr. Justice Gray, said (p. 291):

"The application of the rule to the courts of the several States and of the United States is not affected by the provisions of the Constitution and of the act of Congress, by which the judgments of the courts of any State are to have such faith and credit given to them in every court within the United States as they have by law or usage in the State in which they were rendered. Constitution, art. 4, sec. 1; act of May 26, 1790, chap. 11, 1 Stat. 122; Rev. Stat. § 905.

"Those provisions establish a rule of evidence, rather than of jurisdiction. While they make the record of a judgment, rendered after due notice in one State, conclusive evidence in the courts of another State, or of the United States, of the matter adjudged, they do not affect the jurisdiction, either of the court in which the judgment is rendered, or of the court in which it is offered in evidence. Judgments recovered in one State of the Union, when proved in the courts of another government, whether state or national, within the United States, differ from judgments recovered in a foreign country in no

other respect than in not being reëxaminable on their merits, nor impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the cause and of the parties. *Hanley* v. *Donoghue*, 116 U. S. 1, 4.

"In the words of Mr. Justice Story, cited and approved by Mr. Justice Bradley speaking for this court, 'The Constitution did not mean to confer any new power upon the States, but simply to regulate the effect of their acknowledged jurisdiction over persons and things within their territory. It did not make the judgments of other States domestic judgments to all intents and purposes, but only gave a general validity, faith and credit to them as evidence. No execution can issue upon such judgments without a new suit in the tribunals of other States. And they enjoy not the right of priority or lien which they have in the State where they are pronounced, but that only which the *lex fori* gives to them by its own laws in their character of foreign judgments.' Story's Conflict of Laws, § 609; *Thompson* v. *Whitman*, 18 Wall. 457, 462, 463.

"A judgment recovered in one State, as was said by Mr. Justice Wayne, delivering an earlier judgment of this court, 'does not carry with it, into another State, the efficacy of a judgment upon property or persons, to be enforced by execution. To give it the force of a judgment in another State, it must be made a judgment there; and can only be executed in the latter as its laws may permit.' *McElmoyle* v. *Cohen*, 13 Pet. 312, 325.

"The essential nature and real foundation of a cause of action are not changed by recovering judgment upon it; and the technical rules, which regard the original claim as merged in the judgment, and the judgment as implying a promise by the defendant to pay it, do not preclude a court, to which a judgment is presented for affirmative action (while it cannot go behind the judgment for the purpose of examining into the validity of the claim), from ascertaining whether the claim is really one of such a nature that the court is authorized to enforce it."

2. When the principles which we have above demonstrated by reason and authority are applied to the question in hand, its solution is free from difficulty. As the State of Massachu-

setts had exclusive jurisdiction over its citizens concerning the marriage tie and its dissolution, and consequently the authority to prohibit them from perpetrating a fraud upon the law of their domicil by temporarily sojourning in another State, and there, without acquiring a *bona fide* domicil, procuring a decree of divorce, it follows that the South Dakota decree relied upon was rendered by a court without jurisdiction, and hence the due faith and credit clause of the Constitution of the United States did not require the enforcement of such decree in the State of Massachusetts against the public policy of that State as expressed in its statutes. Indeed, this application of the general principle is not open to dispute, since it has been directly sustained by decisions of this court. *Bell* v. *Bell*, 181 U. S. 175; *Streitwolf* v. *Streitwolf*, 181 U. S. 179. In each of these cases it was sought in one State to enforce a decree of divorce rendered in another State, and the authority of the due faith and credit clause of the Constitution was invoked for that purpose. It having been established in each case that at the time the divorce proceedings were commenced, the plaintiff in the proceedings had no *bona fide* domicil within the State where the decree of divorce was rendered, it was held, applying the principle announced in *Thompson* v. *Whitman*, 18 Wall. 457, *supra*, that the question of jurisdiction was open for consideration, and that as in any event domicil was essential to confer jurisdiction, the due faith and credit clause did not require recognition of such decree outside of the State in which it had been rendered. A like rule, by inverse reasoning, was also applied in the case of *Atherton* v. *Atherton*, 181 U. S. 155. There a decree of divorce was rendered in Kentucky in favor of a husband who had commenced proceedings in Kentucky against his wife, then a resident of the State of New York. The courts of the latter State having in substance refused to give effect to the Kentucky divorce, the question whether such refusal constituted a violation of the due faith and credit clause of the Constitution was brought to this court for decision. It having been established that Kentucky was the domicil of the husband and had ever been the matrimonial domicil, and, therefore, that the courts of Kentucky had jurisdiction over the subject matter, it

was held that the due faith and credit clause of the Constitution of the United States imposed upon the courts of New York the duty of giving effect to the decree of divorce which had been rendered in Kentucky.

But it is said that the decrees of divorce which were under consideration in *Bell* v. *Bell* and *Streitwolf* v. *Streitwolf* were rendered in *ex parte* proceedings, the defendants having been summoned by substituted service, and making no appearance; hence, the case now under consideration is taken out of the rule announced in those cases, since here the defendant appeared and consequently became subject to the jurisdiction of the court by which the decree of divorce was rendered. But this disregards the fact that the rulings in the cases referred to were predicated upon the proposition that jurisdiction over the subject matter depended upon domicil, and without such domicil there was no authority to decree a divorce. This becomes apparent when it is considered that the cases referred to were directly rested upon the authority of *Thompson* v. *Whitman*, *supra*, where the jurisdiction was assailed, not because there was no power in the court to operate, by *ex parte* proceedings, on the *res*, if jurisdiction existed, but solely because the *res* was not at the time of its seizure within the territorial sway of the court, and hence was not a subject matter over which the court could exercise jurisdiction by *ex parte* or other proceedings. And this view is emphasized by a consideration of the ruling in *Wisconsin* v. *Pelican Insurance Company*, *supra*, where the judgment was one *inter partes*, and yet it was held that, in so far as the extra-territorial effect of the judgment was concerned, the jurisdiction over the subject matter of the State and its courts was open to inquiry, and if jurisdiction did not exist the enforcement of the judgment was not compelled by reason of the due faith and credit clause of the Constitution.

Indeed, the argument by which it is sought to take this case out of the rule laid down in the cases just referred to and which was applied to decrees of divorce in the *Bell* and *Streitwolf* cases practically invokes the overruling of those cases, and in effect, also, the overthrow of the decision in the *Atherton* case, since, in reason, it but insists that the rule announced in

those cases should not be applied merely because of a distinction without a difference.

This is demonstrated as to *Thompson* v. *Whitman* and *Wisconsin* v. *Pelican Insurance Co.*, by the considerations already adverted to. It becomes clear, also, that such is the result of the argument as to *Bell* v. *Bell* and *Streitwolf* v. *Streitwolf*, when it is considered that in both those cases it was conceded, *arguendo*, that the power to decree the divorce in *ex parte* proceedings by substituted service would have obtained if there had been *bona fide* domicil. The rulings made in the case referred to hence rested not at all upon the fact that the proceedings were *ex parte*, but on the premise that there being no domicil there could be no jurisdiction. True it is, that in *Bell* v. *Bell* and *Streitwolf* v. *Streitwolf* the question was reserved whether jurisdiction to render a divorce having extra-territorial effect could be acquired by a mere domicil in the State of the party plaintiff, where there had been no matrimonial domicil in such State—a question also reserved here. But the fact that this question was reserved does not affect the issue now involved, since those cases proceeded, as does this, upon the hypothesis conceded, *arguendo*, that if there had been domicil there would have been jurisdiction, whether the proceedings were *ex parte* or not, and therefore the ruling on both cases was that at least domicil was in any event the inherent element upon which the jurisdiction must rest, whether the proceedings were *ex parte* or *inter partes*. And these conclusions are rendered certain when the decision in *Atherton* v. *Atherton* is taken into view, for there, although the proceeding was *ex parte*, as it was found that *bona fide* domicil, both personal and matrimonial, existed in Kentucky, jurisdiction over the subject matter was held to obtain, and the duty to enforce the decree of divorce was consequently declared. Nor is there force in the suggestion that because in the case before us the wife appeared, hence the South Dakota court had jurisdiction to decree the divorce. The contention stated must rest on the premise that the authority of the court depended on the appearance of the parties and not on its jurisdiction over the subject matter—that is, *bona fide* domicil, irrespective of the

appearance of the parties. Here again the argument, if sustained, would involve the overruling of *Bell* v. *Bell* and *Streitwolf* v. *Streitwolf*. As in each of the cases jurisdiction was conferred, as far as it could be given, by the appearance of the plaintiff who brought the suit, it follows that the decision that there was no jurisdiction because of the want of *bona fide* domicil was a ruling that in its absence there could be no jurisdiction over the subject matter irrespective of the appearance of the party by whom the suit was brought. But it is obvious that the inadequacy of the appearance or consent of one person to confer jurisdiction over a subject matter not resting on consent includes necessarily the want of power of both parties to endow the court with jurisdiction over a subject matter, which appearance or consent could not give. Indeed, the argument but ignores the nature of the marriage contract and the legislative control over its dissolution which was pointed out at the outset. The principle dominating the subject is that the marriage relation is so interwoven with public policy that the consent of the parties is impotent to dissolve it contrary to the law of the domicil. The proposition relied upon, if maintained, would involve this contradiction in terms: that marriage may not be dissolved by the consent of the parties, but that they can, by their consent, accomplish the dissolution of the marriage tie by appearing in a court foreign to their domicil and wholly wanting in jurisdiction, and may subsequently compel the courts of the domicil to give effect to such judgment despite the prohibitions of the law of the domicil and the rule of public policy by which it is enforced.

Although it is not essential to the question before us, which calls upon us only to determine whether the decree of divorce rendered in South Dakota was entitled to extra-territorial effect, we observe, in passing, that the statute of South Dakota made domicil, and not mere residence, the basis of divorce proceedings in that State. As without reference to the statute of South Dakota and in any event domicil in that State was essential to give jurisdiction to the courts of such State to render a decree of divorce which would have extra-territorial effect, and as the appearance of one or both of the parties to a divorce proceed-

ing could not suffice to confer jurisdiction over the subject matter where it was wanting because of the absence of domicil within the State, we conclude that no violation of the due faith and credit clause of the Constitution of the United States arose from the action of the Supreme Judicial Court of Massachusetts in obeying the command of the state statute and refusing to give effect to the decree of divorce in question.

Affirmed.

MR. JUSTICE BREWER, MR. JUSTICE SHIRAS and MR. JUSTICE PECKHAM dissent.

MR. JUSTICE HOLMES, not being a member of the court when the case was argued, takes no part.

EARLE *v.* CARSON.

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

No. 83. Argued November 11, 1902.—Decided January 19, 1903.

1. The presumption of liability of a stockholder of a national bank begotten by the presence of the name on the stock register may be rebutted if the jury finds the fact to be that a *bona fide* sale of the stock had been made and every duty had been performed which the law imposed in order to secure a transfer on the registry of the bank. The mere reduction of the reserve of a national bank below the legal limit does not affect with a legal presumption of bad faith, all transactions made with or concerning the bank during the period whilst the reserve is impaired.
2. The power of a stockholder to transfer stock in a national bank, like other personal property, is not limited by the mere fact that at the time of the transfer the bank, which was a going concern, was insolvent in the sense that its assets, if liquidated, would not discharge its liabilities, unless it be shown that the seller was aware of the facts and had sold the stock in order to avoid the impending double liability.
3. Nor is such a *bona fide* sale void if the person to whom the stock is sold is, owing to his insolvency, unable to respond to the double liability, if the fact of such insolvency was, at the time of the sale, unknown to the seller.

WHEN the Chestnut Street National Bank of Philadelphia

suspended payment and its doors were closed there stood on the stock register ten shares in the name of the defendant in error. A call having been made by the Comptroller for the sum of the double liability, this suit was commenced to recover the amount. The defence was: First, that prior to the suspension of the bank the defendant had in good faith sold the stock standing in her name for a full market price, which had been paid her; second, that, in consummation of such sale, she had, by her agent delivered to the proper officer of the bank in its banking house, at the place where transfers were made, the stock certificate, with an adequate power of attorney to make the transfer, and requested that the stock be transferred; third, that the officer of the bank said that the transfer would be made as requested, and the defendant was ignorant of the fact that the officer had failed to discharge his duty; fourth, that as the defendant had done everything which the law required her to do to secure the transfer, she had ceased to be a stockholder, and was not responsible.

In submitting the case to the jury the court instructed, First, that the presence of the name of the defendant on the stock register created a presumption of liability. This, however, the jury was informed, was not conclusive, but might be rebutted. Such rebuttal, the court charged, would result if it was proven that the defendant had made a *bona fide* sale of her stock, and had, at the proper time and place, handed to the proper officer of the bank a power to transfer the same, although the officer of the bank had neglected to fulfill his duty in the premises. Second, after charging fully and accurately as to the proof essential to show a *bona fide* sale of stock in a national bank, the court, having during the trial applied a like rule in passing on the admissibility of evidence, instructed the jury if the evidence established that a sale of such character had been made whilst the bank was a going concern, the defendant would not be liable, because, unknown to her, the bank was, at the time of the sale, in fact insolvent. And the same principle was applied to the unknown insolvency of the person to whom the stock was sold. There was verdict and judgment for the defendant, which was affirmed by the Circuit Court of

Appeals, 107 Fed. Rep. 639; thereupon this writ of error was prosecuted.

Mr. Asa W. Waters and *Mr. Charles Biddle* for plaintiff in error.

Mr. Richard C. Dale for defendant in error.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the court.

In the argument at bar all but three of the grounds of error specified in the Circuit Court of Appeals and assigned on the allowance of this writ were expressly waived. In stating the case we have therefore called attention only to the facts and proceedings essential to an elucidation of the three questions now pressed, and hence, disregarding the grounds of error which are obsolete, we come to consider the real issues.

1. Treating the facts as foreclosed by the verdict, the Circuit Court of Appeals held that the trial court rightly instructed that the presumption of liability begotten by the presence of the name on the stock register would be rebutted if the jury found the fact to be that a *bona fide* sale of the stock had been made and that the defendant had performed every duty which the law imposed on her in order to secure a transfer on the registry of the bank. The correctness of this ruling is not open to controversy. *Matteson* v. *Dent*, 176 U. S. 521; *Whitney* v. *Butler*, 118 U. S. 655. But, it is urged, the court erroneously assumed the *bona fides* of the sale to have been concluded by the verdict, since the trial court mistakenly refused to instruct the jury that the sale of the stock, though in every other respect lawful, could not be so treated by the jury if, as a matter of fact, it was found that at the time of the sale, to the knowledge of the defendant, the reserve of the bank was below the limit fixed by law. Rev. Stat. sec. 5191. To sustain this contention it is argued that by operation of law when the reserve of a national bank falls below the maximum provided in the statute, every transfer of stock made by a per-

son having knowledge of the fact creates a legal presumption of bad faith, and therefore, in the event of the future suspension of the bank, avoids the transaction. But the statute creates no presumption of inability to continue business as a consequence of the reduction of the reserve below the legal requirement. On the contrary, the statute expressly contemplates the continuance of business by a bank, although its reserve may have fallen below the standard, since it merely forbids the making by a bank of certain enumerated transactions during the period when the reserve is impaired. Whether the provisions just referred to are mandatory or directory, we are not called upon to determine, but certainly, in either event, they clearly refute the construction of the statute which would be necessary in order to sustain the proposition. True, the law confers authority on the Comptroller in his discretion to require a bank, whose reserve has fallen below the legal limit, to restore the reserve within thirty days, and moreover gives power to the Comptroller, with the approval of the Secretary of the Treasury, to appoint a receiver when a bank fails to comply after the thirty days with the demand made. These provisions, however, but add cogency to the view that it cannot be implied that the mere reduction of the reserve below the legal limit, as a matter of law, suspends the business of the bank, or, what would be tantamount thereto, affects, with a legal presumption of bad faith, all transactions made with or concerning the bank during the period whilst the reserve is impaired.

2. The proposition which arises under this head is, that it was erroneously ruled that the insolvency of the bank when the sale of stock was made was irrelevant unless the fact of insolvency was known to the seller and the sale was made to avoid impending liability, that is, in contemplation of insolvency. It is undisputed that at the date when the stock was sold the doors of the bank were open and it had not failed in business. Hence the proposition is this: Although a national bank has not suspended payment, all sales of its stock, whatever may be the good faith with which they are made, are void if it develops that at the date of the sale the assets of the bank, if they had

been then realized on, would have been insufficient to pay its debts. The proposition is supported by what is assumed to be the essential nature of the double liability of a stockholder in a national bank and the time when such liability by operation of law becomes irrevocably fixed. Passing for a moment an analysis of the premises upon which the argument proceeds, let us determine the result to which it necessarily leads. Proceeding to do so, it becomes clear that the effect of maintaining the argument would be to virtually prevent the exercise of the power to transfer stock "like other personal property," which the statute gives in express terms. Rev. Stat. sec. 5139. That such would be the result if the validity of every sale of stock depended, not upon the good faith of the seller, but upon the condition of the bank as subsequently developed, is, we think, obvious. Certainly it cannot in reason be said that the power would exist to sell stock like any other personal property if before the power could be exercised the seller must examine the affairs of the bank, marshal its assets and liabilities in order to form an accurate judgment as to the precise condition of the bank. But it has long since been pointed out, *Bank* v. *Lanier*, 11 Wall. 369, 377, that—

"The power to transfer their stock is one of the most valuable franchises conferred by Congress on banking associations. Without this power, it can readily be seen the value of the stock would be greatly lessened, and, obviously, whatever contributes to make the shares of the stock a safe mode of investment, and easily convertible, tends to enhance their value. It is no less the interest of the shareholder, than the public, that the certificate representing his stock should be in a form to secure public confidence, for without this he could not negotiate it to any advantage.

"It is in obedience to this requirement, that stock certificates of all kinds have been constructed in a way to invite the confidence of business men, so that they have become the basis of commercial transactions in all the large cities of the country, and are sold in open market the same as other securities. Although neither in form nor character negotiable paper, they approximate to it as nearly as practicable."

And in the same case (p. 376) attention was called to the fact that the purpose of Congress in making the certificates transferable had been clearly manifested by the repeal, in adopting the national banking act of 1864, of section 36 of the act of 1863, which subjected any transfer of stock in a national bank to debts due to the bank by the seller of the stock. To maintain the proposition, then, would compel us to give an interpretation to the statute which would destroy one of its essential features under the guise of giving effect to another provision of the same statute; in other words, to destroy the law under the pretext of enforcing it. But the controlling principle is, that, when reasonably possible, a statute should be so interpreted as to harmonize all its requirements by giving effect to the whole.

Moreover, when other parts of the statute are brought into view the *reductio ad absurdum* to which the proposition leads is additionally shown. Thus, it is provided, Rev. Stat. sec. 5242, that—

"All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another except in payment of its circulating notes, shall be utterly null and void; . . ."

This by a negative affirmative establishes the validity of all contracts otherwise lawful made by the bank concerning its assets before its failure albeit at the time such contracts were made the bank was insolvent, unless the contracts come within the restrictions which the section imposes—that is, those entered into after the commission of an act of insolvency or in contemplation thereof or made with a view to prevent the application of the assets of the bank in the manner prescribed by law or with the purpose of giving a preference to one creditor over another. If the

proposition were sustained it would thus come to pass that the power of stockholders to freely transfer their stock like any other personal property would be burdened with a restriction arising from the unknown insolvency of the bank, whilst such limitation would not apply to any other contract concerning the property or affairs of the bank. This would be to hold that the statute had conferred the lesser freedom of contract where it was its avowed purpose to give the greater. It would besides require us to say that a limitation resulting from unknown insolvency was made effective upon a stockholder in transferring his stock when such restriction was not made operative on the bank and its officers when they entered into contracts. But this would cause the unknown insolvency to restrict the power of the person less likely to be aware of its existence and to cause it not to be controlling where knowledge was most apt to obtain. Taking into view the whole act, the provision conferring the power to transfer stock; the one already referred to which avoids contracts made in contemplation of insolvency; the authority conferred upon the Comptroller to constantly test the condition of a national bank; the right given him to suspend the business of such bank when the exigencies of its situation require it, and the double liability imposed on the registered stockholders, we think it results that the power to transfer stock, like other personal property, is not limited by the mere fact that at the time of the transfer the bank, which was a going concern, was insolvent in the sense that its assets, if liquidated, would not discharge its liabilities, unless it be shown that the seller was aware of the fact and had sold his stock to avoid the double liability which was impending.

Let us come, however, to consider the matter in the light of authority. It is clear that the assertion that the power to transfer the stock was limited by the unknown insolvency of the bank does not rest upon any express provision of the statute, but is deduced from mere implications which it is deemed must be drawn from the statute as a whole. But the settled rule hitherto enunciated by this court, in accord with the rule obtaining in the English courts, is, that where an express power is given to transfer stock, such power may not be rendered

nugatory by implication. This general principle, however, is, by the decisions of this court, subjected to a limitation which does not prevail in England; that is, that the exercise of the power to transfer stock in a national bank is controlled by the rules of good faith applicable to other contracts. The qualification just stated gives no support to the proposition that where a sale of stock in a national bank is made in good faith, nevertheless the consequences of the sale are avoided if subsequently it developed that the bank was insolvent at the time of the transfer, in the sense that its assets were then unequal to the discharge of its liabilities, when such fact was unknown to the seller of the stock at the time of the sale. Without undertaking to refer to the numerous cases in which the subject has been variously considered since the adoption of the national banking act in 1863, we advert to some of the leading authorities.

In *National Bank* v. *Case*, 99 U. S. 629, the proof concerning the insolvency of the bank was thus stated in the opinion of the court:

"The Crescent City National Bank of New Orleans was organized under the national banking law in 1871. On the 13th of February, 1873, its London correspondents failed and the bank lost heavily by the failure—nearly the entire amount of its capital. This loss was almost immediately known in the community where the institution was located, and necessarily affected its credit. On the 14th of March, 1873, payment of checks drawn upon it by its depositors was suspended, and on the 17th of the same month its circulating notes went to protest."

As a result of the failure of the bank its doors were closed and suit was brought by the receiver to recover from the Germania the sum of its double liability on one hundred and three shares of stock which had previously stood in the name of the Germania on the stock register of the Crescent Bank. The stock in question had been acquired and registered in the name of the Germania on the tenth day of March, 1873, and the Germania had on the same day caused it to be transferred on the register from its own name to that of Waldo, one of its clerks. The court, in enforcing the liability, said:

"While it is true that shareholders of the stock of a corporation generally have a right to transfer their shares, and thus disconnect themselves from the corporation and from any responsibility on account of it, it is equally true that there are some limits to this right. A transfer for the mere purpose of avoiding his liability to the company or its creditors is fraudulent and void, and he remains still liable. The English cases, it is admitted, give effect to such transfers, if they are made (as it is called) 'out and out;' that is, completely, so as to divest the transferrer of all interest in the stock. But even in them it is held that if the transfer is merely colorable, or, as sometimes coarsely denominated, a sham—if, in fact, the transferee is a mere tool or nominee of the transferrer, so that, as between themselves, there has been no real transfer, 'but in the event of the company becoming prosperous the transferrer would become interested in the profits, the transfer will be held for naught, and the transferrer will be put upon the list of contributories.' *Williams' Case*, Law Rep. 9 Eq. 225, note, where the transfer was, as in the present case, made to a clerk of the transferrer without consideration; *Payne's Case*, L. R. 9 Eq. 223; *Kintrea's Case*, Law Rep. 5 Ch. 95. See also Lindley on Partnership, 2d ed. page 1352; *Chinnock's Case*, 1 Johns. (Eng.) chap. 714; *Hyam's Case*, 1 De G. F. & J. 75; *Budd's Case*, 3 De G. F. & J. 296. The American doctrine is even more stringent. Mr. Thompson states it thus, and he is supported by the adjudicated cases: 'A transfer of shares in a failing corporation, made by the transferrer with the purpose of escaping his liability as a shareholder, to a person who, from any cause, is incapable of responding in respect to such liability, is void as to the creditors of the company and to other shareholders, although as between the transferrer and the transferee it was out and out.'"

It was decided, however, that it was not necessary to apply the more stringent American rule, since it was found that the transfer under consideration was not real, but was fraudulent and collusive. As from the undisputed facts stated by the court in its opinion, the bank became insolvent in the sense that its assets were unequal to pay its debts in February, 1873,

nearly a month before the alleged sale was made, it follows that everything said in the opinion of the court as to the fraudulent and collusive nature of the transfer, was wholly unnecessary if mere insolvency avoided the sale and affixed the liability. But it clearly appears from the reasoning of the court that the investigation of the question of fraud and collusion was essential because it was deemed that insolvency alone did not avoid the transfer. The ruling, therefore, was directly adverse to the construction of the law now relied upon.

Bowden v. *Johnson*, 107 U. S. 251, also involved whether a stockholder in a national bank was liable despite a transfer made by him of his stock. It was asserted that he was, first, because he had made the sale with knowledge of the approaching failure of the bank and to avoid the double liability which was impending; and, second, because the sale had been collusively made to a person who was known by the seller to be insolvent and unable to respond to the double liability. The undoubted fact was, although the bank had not suspended, that at the time of the transfer it was insolvent in the sense that its assets were not equal to the discharge of its liabilities. In considering whether the stockholder was liable, the court said:

"As such shareholder, he became subject to the individual liability prescribed by the statute. This liability attached to him until, without fraud as against the creditors of the bank, for whose protection the liability was imposed, he should relieve himself from it. He could do so by a *bona fide* transfer of the stock."

Having thus held that there could be no liability if the sale of stock had been made in good faith, and hence excluding the power to avoid the transfer merely because of the insolvency of the bank at the time when the sale was made, the court proceeded to examine the question of good faith and to reënunciate the principle which had been previously stated in *National Bank* v. *Case*, *supra*. The court said (p. 261):

"But where the transferrer, possessed of information showing that there is good ground to apprehend the failure of the bank, colludes and combines, as in this case, with an irresponsible

transferee, with the design of substituting the latter in his place, and of thus leaving no one with any ability to respond for the individual liability imposed by the statute, in respect of the shares of stock transferred, the transaction will be decreed to be a fraud on the creditors, and he will be held to the same liability to the creditors as before the transfer."

Answering the contention that even admitting the sale to have been made with knowledge of impending failure to avoid the liability to arise therefrom, it could not be avoided because the sale was intended between the parties to be real, or, to use the expression referred to in *National Bank* v. *Case*, was an out and out sale, the court, in declining to follow the English cases and in adhering to the broader doctrine adverted to in *National Bank* v. *Case*, said: "But it was held by this court in *National Bank* v. *Case*, 99 U. S. 628, that a transfer on the books of the bank is not in all cases enough to extinguish liability. The court, in that case, defined as one limit of the right to transfer, that the transfer must be out and out, or one really transferring the ownership as between the parties to it. But there is nothing in the statute excluding, as another limit, that the transfer must not be to a person known to be irresponsible, and collusively made, with the intent of escaping liability, and defeating the rights given by statute to creditors."

In *Whitney* v. *Butler*, 118 U. S. 655, the facts were these: A stockholder in the Pacific National Bank of Boston sold his stock on the 8th of November, 1881. Ten days thereafter, on November the 18th, the bank suspended payment and closed its doors. Beyond doubt the bank was insolvent on the 8th of November when the stock was sold, since the Comptroller certified, on the 16th of December, 1881, that the result of his investigation disclosed that "the entire capital stock," amounting to $961,300, had been lost. See statement of facts, *Delano* v. *Butler*, 118 U. S. 634, 638, which statement was also a part of the record in *Whitney* v. *Butler*. The defence of the stockholder, against whom the double liability was sought to be enforced, was that, having sold his stock and performed every duty required of him to secure a transfer, he was no longer liable, although his name remained upon the register. The court,

after expressly stating (p. 658) the good faith of the defendant, because he had no reason whatever "to believe that the bank was insolvent, or was about to become so," and treating the sale as valid for that reason, proceeded to hold that the stockholder was not liable, because he had done everything in his power to secure the transfer, and hence his name remained on the register by the neglect of the officers of the bank. It requires no comment to demonstrate that that case was wrongly decided if the contention now made is sustainable.

In *Stuart* v. *Hayden*, 169 U. S. 2, the facts were these: Stuart was an owner of shares in the Capital National Bank of Lincoln, Nebraska. He was a director of the bank and a member of its finance committee. On the 22d day of December, 1892, in consequence of contracts made by Stuart with Gruetter & Joers, Stuart delivered to them his certificates of stock, with the power to transfer, and a few days afterwards the stock was transferred. On the 6th of February, 1893, the bank failed. That the bank was insolvent at the date of the sale appears on the face of the opinion, for the court said:

"The bank closed its doors within less than three weeks after the stock was transferred on its books to Gruetter & Joers, its total assets being about $900,000, and total liabilities $1,463,013.17. Its bills receivable on hand were $519,600, of which $58,596.82 were good, $141,393.27 were doubtful, and $319,611.90 were worthless. Its bills receivable not on hand amounted to $141,000, of which only $10,000 were worth anything."

The question presented for decision was, whether Stuart continued liable despite the transfer made to Gruetter & Joers. The court elaborately stated the facts, directed attention to the finding by the court below that at the time of the sale the bank was absolutely insolvent, and proceeded to enforce the liability against Stuart solely because, being a director of the bank and a member of its finance committee, he had knowledge of the insolvency, and therefore the sale was in bad faith. Manifestly, this case also reiterates the doctrine announced in the previous cases and excludes the conception that the mere fact of unknown insolvency avoids the transfer, since every word of the careful statement in the opinion on the facts showing knowl-

edge would have been wholly unnecessary if the doctrine now asserted were well founded.

From what has previously been said and the cases just referred to, it is demonstrated that the contention now made is not supported by the statute, and is foreclosed by the decisions of this court. But it is suggested the rule announced in the previous cases is shown to have been a mistaken one by an observation in the opinion in *Stuart* v. *Hayden*, *supra*. The passage referred to (p. 9) is as follows:

"Whether—the bank being in fact insolvent—the transferrer is liable to be treated as a shareholder, in respect of its existing contracts, debts and engagements, if he believed in good faith, at the time of transfer, that the bank was solvent, is a question which, in the view we take of the present case, need not be discussed; although he may be so treated, even when acting in good faith, if the transfer is to one who is financially irresponsible."

But this remark does not purport to pass upon the question which it suggests, but simply reserves it. The argument, however, is that the opinion would not have reserved a question which had been conclusively foreclosed. The suggestion is based on a misconception of the sentences relied on. Obviously the observations in *Stuart* v. *Hayden* cannot in reason be construed as throwing doubt upon the doctrine announced in the opinion in which the expressions relied on are contained. This would be, however, the case if the significance now attributed to the language were sound. The error of the argument arises from the fact that it affixes to the word insolvency, as found in the sentences quoted, the erroneous import hitherto pointed out; that is, an inadequacy of the assets of a bank to pay its liabilities instead of giving to it its true meaning, that of failure and consequent suspension of business.

3. The proposition under this head is that as the person to whom the stock was sold in the case before us was in fact insolvent, and hence unable to respond to the double liability, the sale was void, although the fact of such insolvency of the buyer was unknown to the seller. But this in its last analysis merely again reiterates the proposition which we have previously dis-

posed of, since it but insists that the validity of the sale of the stock is to be tested, not by the good faith of the seller, but upon the unknown financial condition of the buyer. The rule on this subject was clearly stated in the passage which has already been excerpted from *Bowden* v. *Johnson*, 107 U. S. 251, where in declining to follow the English rule upholding a real or out and out sale, even if the purpose was to avoid impending liability, the court said that "the transfer must not be to a person known to be irresponsible, and collusively made, with the intent of escaping liability and defeating the rights given by statute to creditors," a principle which has been since expressly reiterated in *Matteson* v. *Dent*, 176 U. S. 521, 531. Here again support for the proposition is sought to be derived from the concluding sentence in the passage from the opinion in *Stuart* v. *Hayden*. But in any event the observation relied upon was not essential for the decision of the case of *Stuart* v. *Hayden*, and moreover its meaning is clearly shown by the context of the opinion in which the difference between the American and English rule is pointed out. When this is borne in mind it will be seen that the expression in *Stuart* v. *Hayden* referred to but stated that difference, and, being taken in connection with other clauses of the opinion in that case, must be understood as implying that a real or out and out transfer would not be adequate to relieve the seller from his liability as a stockholder if the sale was made by him to escape his impending liability and to a person whom he knew, or had reason to know, was financially irresponsible. As the views hitherto expressed are conclusive of the meaning of the act of Congress, we deem it unnecessary to refer to the many cases from state courts of last resort construing state statutes referred to in the argument.

Affirmed.

HALE *v.* ALLINSON.

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

No. 77. Argued November 6, 7, 1902.—Decided January 19, 1903.

1. As construed by the highest court of Minnesota the statutes of that State do not provide that a receiver of an insolvent corporation can recover the amount of the added liability of non-resident shareholders of the corporation; nor do they provide that such liability shall be an asset of the corporation, to be recovered by the receiver and payable to its creditors when such liability is enforced and the money recovered.

A receiver, appointed by a Minnesota Court of Equity, in the exercise of its general jurisdiction, of the assets of an insolvent Minnesota corporation, who has no title to the fund but simply acts as the arm of the court, cannot by virtue of his appointment, or of directions contained in the decree appointing him, maintain an action in equity in a foreign State against non-resident stockholders of a corporation to enforce their double liability, nor can he maintain such an action in a Circuit Court of the United States in a District outside of Minnesota.

The question of comity cannot avail in a case where the courts of the State in which the receiver was appointed hold that an action similar to the one brought in the foreign jurisdiction cannot be maintained by him in the courts of the State of his appointment.

2. A single action in equity cannot be maintained in the Circuit Court of the United States in Pennsylvania by such receiver against all of the Pennsylvania stockholders of an insolvent Minnesota corporation for the statutory liability of each defendant as a stockholder, on the ground that a single action would prevent a multiplicity of suits; nor can such an action be maintained on the ground that it is an ancillary or auxiliary proceeding brought in aid of, and to enforce, an equitable decree in an action brought in Minnesota, in which the Pennsylvania stockholders had been named as defendants with all the other stockholders, the receiver contending that such decree was conclusive as to the amount of indebtedness and the assets of the corporation, and the defendants were concluded as to the necessity of a resort to the stockholders' liability, and the only question left open was the special liability of each stockholder (the Pennsylvania stockholders, however, not having been served, and not having appeared).

THIS case comes here by virtue of a writ of certiorari directed to the Circuit Court of Appeals for the Third Circuit. It is a suit in equity brought by a foreign receiver, in the United States

Statement of the Case.

Circuit Court for the Eastern District of Pennsylvania, to enforce the liability of stockholders, residing in Pennsylvania, of the Northwestern Guaranty Loan Company, a corporation of Minnesota.

Demurrers were filed, setting up, among other grounds, that the receiver appointed under proceedings in Minnesota had no right to sue in any court of a foreign jurisdiction; also, that, even if the receiver had the right to sue, there was an adequate remedy at law for whatever rights might exist in the receiver or any other person, and that no ground of equitable jurisdiction was stated. The Circuit Court sustained the demurrer on the ground that the remedy, if any the complainant had, was at law. 102 Fed. Rep. 790. The judgment was affirmed by the Circuit Court of Appeals for the Third Circuit. 106 Fed. Rep. 258.

The facts are these: In May, 1893, the loan company was adjudged insolvent, in proceedings instituted under the Minnesota statute, in the District Court of Hennepin County, which court had jurisdiction, and the Minneapolis Trust Company was appointed a receiver of the corporate assets and took possession thereof, and proceeded to the discharge of its duties. In November, 1893, one Arthur R. Rogers, who was the assignee of a judgment creditor of the corporation, whose execution against it had been returned wholly unsatisfied, filed a bill in equity in the Minnesota state court in behalf of himself and all other creditors of the loan company against that company and all its stockholders, for the purpose of enforcing the stockholders' liability to the creditors, provided for by the statutes of Minnesota. Out of about five hundred stockholders some twenty-three only resided in the State of Minnesota and were served with process.

The creditors of the loan company, as required by the court, came in and proved their debts against the company, but, none of the non-resident stockholders had been served with process in the action and not one of them appeared therein. It was adjudged that the defendants who were named as resident stockholders of the loan company, and over whom the court had acquired jurisdiction by the service of process upon them,

were liable to the extent of the par value of their stock for the debts of the company. The decree also found a list of the creditors who had intervened and the amounts due to each of them from the loan company.

In addition to giving judgments against the resident stockholders of the loan company in favor of its ascertained creditors the court also decreed as follows:

"Tenth. That for the purpose of enforcing and collecting said judgments and all thereof and any and all liability thereon or in anywise incident thereto, and any and all liability upon the part of non-resident stockholders of said Northwestern Guaranty Loan Company, against whom no personal judgment for the ascertained liability is herein rendered, and disbursing the amounts so collected as hereinafter provided, W. E. Hale, Esq., has been by the order of this court appointed receiver, and has given bond in the sum of twenty-five thousand dollars and qualified as such receiver. That by the terms of said order of appointment said receiver was and hereby is authorized, empowered and directed to take any and all appropriate or necessary steps or proceedings for the purpose of collecting the judgments herein rendered, and was and hereby is authorized, empowered and directed to take any and all necessary or appropriate steps or proceedings against the non-resident stockholders of said defendant Northwestern Guaranty Loan Company against whom no personal judgment herein has been ordered, for the enforcement and realization upon their aforesaid stockholders' liability, and to that end said receiver be and hereby is authorized, empowered and directed to institute and prosecute all such actions or proceedings in foreign jurisdictions as may be necessary or appropriate to this end."

The decree also provided that jurisdiction of the cause should be retained until the adjustment of the several rights and liabilities of the respective parties.

Thereupon the receiver thus appointed commenced this suit in equity to recover from the resident stockholders in Pennsylvania the full amount of the par value of the shares of stock held by them. Rogers, the assignee of the judgment creditor in the Minnesota action, was joined as complainant in this

suit with the receiver, and a demurrer having been interposed on the ground, among others, of this joinder, the Circuit Court, upon the trial and upon the application of complainant, granted leave to dismiss the assignee as a party, and the case proceeded thereafter in the name of the receiver alone.

Mr. M. H. Boutelle for petitioner. *Mr. William E. Hale*, *Mr. Charles C. Lister* and *Mr. A. L. Pincoffs* were with him on the brief.

Mr. John G. Johnson for respondent.

Mr. Heman W. Chaplin, by leave of the court, submitted a brief as *amicus curiæ* in support of propositions adverse to those of the petitioner.

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

Of the several grounds of demurrer to the bill herein, only two need be specially noticed. They are (1) that this complainant (receiver) has no right to sue in the courts of a State foreign to that in which he was appointed; and (2) that, even if he had the right to sue, there was no ground of equitable jurisdiction set forth in the bill, and the complainant's remedy, if any he had, was at law.

The Circuit Court sustained the demurrer on the ground that no case for equitable relief was stated, and dismissed the bill without prejudice. The Circuit Court of Appeals sustained that view of the case and affirmed the judgment, but also intimated that it was strongly inclined to the opinion that the complainant's appointment as receiver by the Minnesota court did not entitle him to sue as such in a foreign jurisdiction.

In our judgment both grounds of demurrer were well taken.

First. As to the right of the receiver appointed in the Minnesota action to sue in a foreign State. The portions of the constitution and laws of Minnesota which are applicable are set forth in the margin.[1]

[1] Constitution of Minnesota, article X, sec. 3, provides:

The constitution of Minnesota it will be seen simply imposes a double liability upon the stockholders. The statutes of the

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Each stockholder in any corporation (excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business) shall be liable to the amount of stock held or owned by him.

The General Statutes of Minnesota of 1894, chapter 76, p. 1595, provide among other matters, for the method of enforcing the liability of stockholders, as follows:

Section 5897. Whenever a judgment is obtained against any corporation incorporated under the laws of this State, and an execution issued thereon is returned unsatisfied in whole or in part, upon the complaint of the person obtaining such judgment, or his representatives, the District Court within the proper county may sequestrate the stock, property, things in action and effects of such corporation, and appoint a receiver of the same.

Section 5905. Whenever any creditor of a corporation seeks to charge the directors, trustees, or other superintending officers of such corporation, or the stockholders thereof, on account of any liability created by law, he may file his complaint for that purpose, in any District Court which possesses jurisdiction to enforce such liability.

Section 5906. The court shall proceed thereon as in other cases, and, when necessary, shall cause an account to be taken of the property and debts due to and from such corporation, and shall appoint one or more receivers.

Section 5907. If, on the coming in of the answer, or upon the taking of any such account, it appears that such corporation is insolvent, and that it has no property or effects to satisfy such creditors, the court may proceed, without appointing any receiver, to ascertain the respective liabilities of such directors and stockholders, and enforce the same by its judgment as in other cases.

Section 5908. Upon a final judgment in any such action to restrain a corporation, or against directors or stockholders, the court shall cause a just and fair distribution of the property of such corporation, and of the proceeds thereof, to be made among its creditors.

Section 5909. In all cases in which the directors or other officers of a corporation, or the stockholders thereof, are made parties to an action in which a judgment is rendered, if the property of such corporation is insufficient to discharge its debts the court shall proceed to compel each stockholder to pay in the amount due and remaining unpaid on the shares of stock held by him, or so much thereof as is necessary to satisfy the debts of the company.

Section 5910. If the debts of the company remain unsatisfied, the court shall proceed to ascertain the respective liabilities of the directors or other officers, and of the stockholders, and to adjudge the amount payable by each, and enforce the judgment as in other cases.

Section 5911. Whenever any action is brought against any corporation,

State provide the only means of there enforcing that liability.

The Supreme Court of Minnesota has decided that the liability of the stockholder is to the creditor, and that the receiver of the company cannot enforce it. It was held as far back as 1879, in *Allen* v. *Walsh*, 25 Minnesota, 543, that the only remedy to enforce the liability of stockholders was laid down in the General Statutes of Minnesota, chapter 76, (the one in question,) and that the statute contemplated a single action, in which all persons having or claiming any interest in the subject of the action should be joined or particularly represented, and their respective rights, equities and liabilities finally settled and determined. The receiver of an insolvent corporation was not a proper party to bring such action.

In *Palmer* v. *Bank of Zumbrota*, 65 Minnesota, 90, (decided in 1896,) the court referred to *Allen* v. *Walsh*, as holding that a receiver could not maintain an action to enforce the liability of the stockholders, and held that the direction in the decree then under review ordering the receiver to sue the stockholders on such liability was a harmless error which had been corrected before it was assailed.

Again, in *Minneapolis Baseball Company* v. *City Bank*, 66 Minnesota, 441, (decided in 1896,) it was once more distinctly held that a receiver could not, under chapter 76, maintain in the courts of that State an action to enforce such liability of stockholders. The Supreme Court of Minnesota has, however, in a very late case, *Hanson* v. *Davison*, 73 Minnesota, 454, (decided in July, 1898,) somewhat limited or explained *Allen* v. *Walsh*, *supra*, and, in the course of his opinion, the Chief Justice expressed views as to the right of a receiver to sue in an-

its directors or other superintending officers, or stockholders, according to the provisions of this chapter, the court, whenever it appears necessary or proper, may order notice to be published, in such a manner as it shall direct, requiring all the creditors of such corporation to exhibit their claims and become parties to the action, within a reasonable time, not less than six months from the first publication of such order, and, in default thereof, to be precluded from all benefit of the judgment which shall be rendered in such action, and from any distribution which shall be made under such judgment.

other State under the facts which he rehearsed. The case does not, however, overrule the prior cases above referred to. The point as to the right of a receiver to sue in a foreign jurisdiction was not in issue or involved in the case. The material facts were, as stated in the opinion, that a creditor of the Citizens' Bank, which was an insolvent concern, brought an action (*Harper* v. *Carroll*, reported in 66 Minnesota, 487) in behalf of himself and all other creditors against all of the resident stockholders thereof, pursuant to the provisions of chapter 76, *supra*. The creditors of the bank intervened and proved their claims against it, and judgment was duly rendered in the action against the bank and all of its stockholders within the jurisdiction of the court in favor of each of the creditors, of whom the complainant herein was one, for the amount of their claims respectively, as adjudged in that action. Executions were issued on each of these judgments, which were returned, and there still remained unpaid upon them the sum of forty odd thousand dollars, exclusive of interest. The defendant in the *Hanson* v. *Davison* action was named as a defendant in the other, or *Harper* v. *Carroll*, action, but being a non-resident, the court in the latter case did not acquire jurisdiction to render a judgment against her. In the opinion in *Hanson* v. *Davison*, the court, after referring to the fact of non-residence, continues:

"She was, however, a stockholder of the bank at the time it became insolvent and made its assignment, and ever since has been, and now is, the owner of the capital stock thereof of the par value of $1500, and now has property within this State to satisfy her liability to the creditors of the bank as a stockholder therein. The existence of such property within the jurisdiction of the court was discovered after the entry of the judgment in the *Harper-Carroll* case. Upon the discovery of such property the plaintiff herein obtained leave of court to bring this action against the defendant, to the end that her statutory liability might be collected, and paid to the receiver in the original action, and by him distributed to the judgment creditors of the bank. The defendant's property was attached. Thereupon she appeared in this action."

The trial court dismissed the complaint and the Supreme

Opinion of the Court.

Court affirmed the dismissal on the ground that the property of the stockholder having been found within the jurisdiction of the court either before or after judgment in the original action, (*Harper* v. *Carroll*,) a separate suit against her to reach the property was neither necessary nor proper, for it could be attached or sequestered in the original action.

It was contended by the defendant in the *Hanson* v. *Davison* case that as there had been a former action, (*Harper* v. *Carroll*,) brought for the purpose of enforcing the liability of the stockholders, which action was, as prescribed by the statute, the exclusive remedy, no further suit could be maintained. The court in commenting upon the contention said that if it were correct, then as the court could only acquire jurisdiction of the resident stockholders in a corporation, all non-resident stockholders would have absolute immunity from such liability, while their associates who happened to be within the jurisdiction of the court would have to respond to the last cent of their liability. Continuing, the court said:

"Inequitable as such a conclusion would be, still it must be admitted that there are expressions in the opinion in the case of *Allen* v. *Walsh*, 25 Minnesota, 543, relied upon by the defendant, which, if taken literally, and without reference to the actual point decided by the court, justify the contention. A decision upon this claim of the defendant involves a consideration of the nature of the liability of stockholders for the debts of the corporation, the method of enforcing it, and just what was decided by the case of *Allen* v. *Walsh*. In that case, which was an action at law by a creditor, for his sole and exclusive benefit, against a single stockholder, to enforce his individual liability, it was correctly held that the action could not be maintained, and that the plaintiff's remedy was an equitable action, in behalf of himself and all other creditors, against the corporation and its stockholders, wherein the debts of the corporation must be determined, and, after exhausting the corporate assets, the liability of stockholders for the deficiency might be adjudicated and enforced pursuant to the provisions of Gen. Stat. 1878, c. 76, (Gen. Stat. 1894, c. 76). It was not, however, decided in that case that, if a stockholder was omitted from such

original action because the court could not acquire jurisdiction of him, or for any other cause, the liability could not be subsequently enforced against him by bringing him or his property into the original action, if found within the jurisdiction of the court, or by proceeding against him alone in an action ancillary to the original action in any other jurisdiction where he might be found, if the comity of the sister State would permit it."

The particular attention of the court was directed to the objection that but one action could ever be maintained against the stockholders over whom the court had jurisdiction, who must all be joined therein, and that the rest could not thereafter be made liable. The action it will be noticed was not brought by a receiver, the plaintiff in the action being a creditor of the corporation, and no question arose in regard to the right of a receiver appointed under chapter 76 to maintain an action either inside or outside the State to enforce the liability of stockholders to the creditors of an insolvent corporation. Whatever was said in the opinion regarding the possible right of a receiver to maintain such an action as the one now before us was not necessary to the decision of the case, and cannot be regarded as overruling the prior cases.

The opinions in the *Minneapolis Baseball Company* v. *Bank*, 66 Minnesota, 441, and in *Hanson* v. *Davison*, 73 Minnesota, 454, were written by the same judge, and in the latter case he does not refer to the earlier one decided but two years before, and which held that a receiver, under the state statute, could not maintain such an action as this. There was a strong dissent by Mr. Justice Canty from the remarks of the Chief Justice, as to the right of the receiver to maintain an action in a foreign State. Referring to the earlier cases, he said:

"This court has several times held that a receiver appointed under chapter 76 has no authority to enforce the stockholders' superadded liability. See *Minneapolis Baseball Company* v. *City Bank*, 66 Minnesota, 441; *Palmer* v. *Bank*, 65 Minnesota, 90. I am unable to see how this court can lay down a rule or edict to govern proceedings in courts of other States, contrary to the rule it lays down to govern proceedings in the courts of this State."

Opinion of the Court.

We can ourselves see the difficulty in holding that such an action may be maintained by the receiver in a foreign jurisdiction, while at the same time holding that such receiver could not maintain a like action in the Minnesota courts. If a receiver cannot maintain this kind of an action in the courts of his own State, because its statute provides another in the name of a creditor, or permits it only after the performance of conditions precedent which he has not performed, he cannot, although appointed in the State, maintain such action in a foreign jurisdiction. This we have decided at this term in *Evans* v. *Nellis*, 187 U. S. 271. In that case it was said the receiver was appointed under the statute of that State of 1868 or 1899. It was shown that the act of 1868 made the stockholder liable to the creditor, and that the receiver could not maintain the action thereunder. It also appeared that under the statute of 1899, which made the stockholder's liability an asset of the corporation, to be collected by the receiver, no such action could be maintained except by complying with the statute, and as the receiver had not done so, it was held he could not maintain the action outside the State.

This would seemingly be enough to compel the affirmance of the judgment herein, when we see that the Minnesota Supreme Court has held that a receiver cannot maintain such an action as this in the courts of that State.

An examination of the opinion of the Chief Justice, however, in the *Hanson* v. *Davison* case, shows that it is not based upon the proposition that such an action is provided for by the Minnesota statute, but that the statute failed to say anything forbidding it, and this failure the judge thought left the matter open to the general rules governing in such cases, for he says, at page 461:

"The remedy for enforcing the liability must, in the first instance, from the nature of the liability, be an equitable action. Gen. Stat. 1878, c. 76, (Gen. Stat. 1894, c. 76,) indicates and regulates to some extent the remedy, leaving to the court the duty of making the remedy effectual by an application of the principles of equitable procedure. This statute prescribes the exclusive remedy only to the extent that an equitable action of the

character therein indicated must be first instituted for the enforcement of the liability of stockholders. Such an action, though provided by statute, is essentially an equitable proceeding; and the rules of equity are to be followed, unless inconsistent with the statute. If chapter 76 were repealed, equity would find an adequate remedy for the enforcement of the liability. . . . There is nothing in the statute which justifies the conclusion that, if a stockholder's liability is not enforced in the original action because he is a non-resident, an ancillary action may not be brought against him alone after the amount for which stockholders are individually liable has been determined in the original action."

This language would seem to indicate that there is nothing in the statute which prevents a receiver from maintaining an action in a foreign State. There is no holding that the statute itself provides in terms for such an action or empowers a receiver to maintain it, or that it transfers any title in the fund to him. We should not, therefore, be justified in following the remarks made in this case, in opposition to those cases which had already been decided by the same court years before and up to and including the *Minneapolis Baseball Company* v. *Bank*, *supra*, especially when it appears, as in this case, that all the facts had occurred prior to the declaration of the Chief Justice of the court. The suit now before us was commenced in November, 1898. The corporation failed in May, 1893, and in November of that year proceedings were commenced in Minnesota, which ended in the final decree in 1897, months prior to the last decision, July 26, 1898.

It seems also entirely clear that the receiver provided for in section 5906 of above quoted statute, while not the receiver mentioned in section 5897, is yet simply one to be appointed in aid of the court to work out the provisions of the section, if the court choose to appoint him, and by section 5907, the court, if it appear that the corporation is insolvent, may proceed, without appointing any receiver, to ascertain and enforce the liabilities of stockholders in the creditors' action. The receiver, if he be appointed, is not given power to represent the creditors or to maintain, as representative owner or trustee, an action,

inside or outside the State, to enforce the liability spoken of. That is the right of the creditors themselves, and the statute provides for their action against the stockholders.

Assuming the contractual character of the subscription to the stock of the corporation, the right of the receiver to maintain this suit is not thereby made plainer. The contract may have been to pay, in the event of its insolvency, to the creditors of the corporation the amount for which the shareholder might be liable up to the par value of his stock. That was a contract in behalf of the creditor, with which the corporation had nothing to do, and the statute did not make this liability assets of the corporation or confer upon any receiver appointed in the case the right to proceed to enforce it. The cases of *Whitman* v. *Oxford National Bank*, 176 U. S. 559, and *Hancock National Bank* v. *Farnum*, 176 U. S. 640, do not bear upon the question, as the plaintiff in each case was a creditor of the corporation.

We are of opinion, following the decisions of the highest court of Minnesota, that the statutes of that State do not provide for the appointment of a receiver to recover as such the amount of the added liability of the non-resident shareholders to creditors of an insolvent corporation. They do not provide that such liability shall be assets of the corporation, to be recovered by the receiver and payable to its creditors when such liability is enforced and the money recovered. There is no transfer of any right or title to a receiver to enforce the liability (certainly not as to non-resident stockholders,) nor is it a case where any assignment of such right by the creditors has been made, so that the receiver is, in fact, an assignee of the persons interested in the recovery from the stockholders.

We are thus brought to the fact that this is a plain and simple case of the appointment, authorized by statute, of a receiver by a court of equity in the exercise of its general jurisdiction as such court, with no title to the fund in him, and where such receiver acts simply as the arm of the court without any other right or title, and the question is whether, in these circumstances, a receiver can maintain this suit in equity in a foreign State by virtue of his appointment, and the direc-

tion to sue contained in the decree in the case in which he was appointed a receiver? We pursue the subject after the decision of *Evans* v. *Nellis*, *supra*, only because of the argument made by counsel for appellant, that such a receiver as in this case, is not prevented by the statute or decisions of Minnesota from maintaining such an action as this, and that if the statute do not prevent it, he may maintain an action of this nature notwithstanding the former decision of this court in *Booth* v. *Clark*, 17 How. 322, which it is claimed has been, if not overruled, at least shaken in principle by the decisions as to the comity which is said to prevail among the different States, to permit such an action by a receiver, outside the jurisdiction of the State of his appointment. We do not think anything has been said or decided in this court which destroys or limits the controlling authority of that case.

It was there held that an ordinary receiver could not sue in a foreign jurisdiction, and an elaborate examination was made by Mr. Justice Wayne of the principles upon which the decision was founded. In speaking of the right of a receiver, appointed under a creditors' bill in New York, to bring an action in a foreign State, it was said, in the course of the opinion, as to such a receiver, "whether appointed as this receiver was, under the statute of New York, or under the rules and practice of chancery as they may be, his official relations to the court are the same. A statute appointment neither enlarges nor diminishes the limitation upon his action. His responsibilities are unaltered. Under either kind of appointment, he has at most only a passive capacity in the most important part of what it may be necessary for him to do, until it has been called by the direction of the court into ability to act. He has no extra-territorial power of official action; none which the court appointing him can confer, with authority to enable him to go into a foreign jurisdiction to take possession of the debtor's property; none which can give him, upon the principle of comity, a privilege to sue in a foreign court or another jurisdiction, as the judgment creditor himself might have done, where his debtor may be amenable to the tribunal which the creditor may seek." This statement has not been overruled or

explained away by any subsequent decision of this court to which our attention has been called.

In *Relfe* v. *Rundle*, 103 U. S. 222, it was held that a final decree dissolving an insolvent life insurance company of Missouri and vesting, as provided by the statutes in force, for the use and benefit of creditors and policy holders, the entire property of the company in the superintendent of the insurance department of the State, made him the statutory successor of the corporation for the purpose of winding up its affairs; as such he represented the corporation at all times and places in all matters connected with its trust; he was the successor of the State, and represented the State in its sovereignty, and as his authority did not come from the decree of the court, but from the statutes, he was in fact the corporation itself for the purpose mentioned. The superintendent of insurance, being the successor of the corporation, had the right to represent it, and he became a party to the suit commenced against it in Louisiana, and, being a citizen of Missouri, and appearing in time, had the right to remove the case into the United States court. The suit had been commenced against the company in Louisiana, and it having been dissolved by the decree of a court of competent jurisdiction, it was dead, and if the representative appointed pursuant to the laws of the State and holding the title to the property could not be substituted in place of the original defendant it would follow that no defence could be made by any one. The case is no authority for the maintenance of this action.

In *Hawkins* v. *Glenn*, 131 U. S. 319, Glenn was the trustee of the corporation, which by its deed assigned and transferred to three trustees, for whom he was afterwards substituted, all the property and effects of the corporation, in trust, for the payment of its debts. Glenn subsequently brought a suit in another jurisdiction against a stockholder, Hawkins. The right of Glenn was through an assignment, and he derived title to the property and to the rights of the corporation through a deed. No question was decided in that case which is material to be here considered.

There has been some contrariety of opinion in the lower

Federal courts in regard to the right of a receiver, situated as the complainant is in this suit, to maintain an action outside of the State of his appointment. In *Hazard* v. *Durant*, 19 Fed. Rep. 471, in the Circuit Court, District of Massachusetts, before Judges Lowell and Nelson, it was held that a receiver appointed in one jurisdiction to take charge of a fund cannot sue in another in his own name, though expressly authorized by the decree to maintain actions in his own name.

In *Hale* v. *Hardon*, 89 Fed. Rep. 283, Putnam, Circuit Judge, held that the plaintiff as receiver, appointed in Minnesota, who had commenced an action at law in the Federal Circuit Court in Massachusetts to enforce the liability of a stockholder in this same corporation of Minnesota, could not maintain such action in another jurisdiction from that in which he was appointed. That judgment was reversed by the Circuit Court of Appeals in 95 Fed. Rep. 747, in which District Judge Aldrich delivered the opinion, which was concurred in by District Judge Webb, while Circuit Judge Colt delivered a dissenting opinion. The judges were thus divided, two District Judges in favor of the right of the plaintiff to maintain the action, and the two Circuit Judges denying it.

In *Hilliker* v. *Hale*, 117 Fed. Rep. 224, the right of such receiver to maintain his action in a foreign jurisdiction was denied by the Circuit Court of Appeals of the Second Circuit.

In *Wigton* v. *Bosler*, 102 Fed. Rep. 70, 73, Dallas, one of the Circuit Judges of the Third Circuit, took the same view as Colt and Putnam, Circuit Judges, in 89 and 95 Fed. Rep., and made a decree in accordance with such views.

In *Hale* v. *Tyler*, 104 Fed. Rep. 757, Judge Putnam, regarding himself bound by the decision of the Circuit Court of Appeals in his own circuit in *Hale* v. *Hardon*, *supra*, follows the authority of that case, but he added some further views to show that the receiver in *Hale* v. *Hardon* was constituted such under the general equity powers of the court, and merely as its hand to assist it in realizing rights of action which vested, not in the receiver, but in the creditors. He referred also to the case of *Hayward* v. *Leeson*, decided by the Supreme Judicial Court of Massachusetts, June 15, 1900, and reported in 176 Massachu-

setts, 310, in which that court held that as none of the proceedings in Tennessee operated as an assignment to the receiver of the choses in action in litigation in Massachusetts, and as the utmost effect of the appointment of a receiver is to put property into his custody as an officer of the court, but not to change the title, nor even the right of possession, the receiver could not sue in his own name in Massachusetts.

The question of comity cannot avail in a case where the courts of the State in which the receiver was appointed hold that an action similar to the one brought in the foreign jurisdiction cannot be maintained by him in the courts of the State of his appointment.

Second. The other ground of demurrer is that whatever remedy may exist in favor of the complainant is at law, and that no case is made which gives a court of equity jurisdiction.

It appears from the bill and the record annexed to and forming a part thereof that there were in all somewhere about five hundred stockholders of the loan company, twenty-three of whom, living in Minnesota, had been made parties to the Rogers creditors' suit, and judgments had been obtained against them in that suit. Forty-seven of the remainder resided in Pennsylvania and were made parties to this suit, and the balance lived in different States. The indebtedness of the corporation was so great that the liability of the stockholders was up to the full amount imposed by the statutes of Minnesota. The theory of the bill was that the Minnesota decree was conclusive (even upon non-resident stockholders not served with process and not appearing in that suit,) as to the amount of the indebtedness of the corporation and the amount of its assets, thereby concluding the parties as to the necessity of a resort to the stockholders' liability in favor of creditors, leaving open the question of the special liability of each particular shareholder, and whether, if once liable, his liability had ceased wholly or partly by reason of facts pertaining to such stockholder. No accounting was asked for, but simply a judgment against each stockholder for the amount of the par value of his stock.

The jurisdiction of a court of equity over the subject matter is placed by the complainant upon the two grounds, among

others, that to sustain such jurisdiction prevents a multiplicity of suits, and also that this suit is an ancillary or auxiliary proceeding brought in aid of and to enforce an equitable decree of another court.

1. Upon the first ground, the cases are various in which the court has either taken or refused jurisdiction, but one cannot adduce from them a plain and uniform rule by which to determine the question. The application of the principles upon which jurisdiction has been suggested or denied has been various, both in England and in this country, and it is difficult, if not impossible, to reconcile the cases. The subject is discussed at length in 1 Pomeroy's Equity Jurisprudence, 2d ed. p. 318, sec. 243 *et seq.* It is therein shown that the foundation of the jurisdiction, or perhaps the earliest exercise of it upon this ground, was in so-called "bills of peace," where in one class of such bills the suit was brought to establish a general right between a single party and numerous other persons claiming distinct and individual interests; the second class being where the complainant sought to quiet his title and possession of land and to prevent the bringing of repeated actions of ejectment against him. The ground was, that the title could never be finally established by indefinite repetitions of such legal actions. And again the question has arisen whether the defendants in a suit by one complainant to establish his right against them all must be connected by some kind of privity among themselves, or can they hold their rights wholly separate and distinct from each other? The question has been answered differently by different courts, and while assuming that there was not always a necessity to show a common interest or privity between the members of the same class of defendants, the courts have also differed in regard to the jurisdiction of a court of equity in particular cases, even upon such assumption. Numerous cases are cited by Mr. Pomeroy, showing both sides of this question. In any case where the facts bring it within the possible jurisdiction of the court, according to the view taken by it in regard to such facts, the decision must depend largely upon the question of the reasonable convenience of the remedy, its effectiveness and the inadequacy of the remedy at law. To sustain the right to bring

the suit where the separate defendants have no privity among themselves, two early and leading cases in the English courts are cited, viz.: *City of London* v. *Perkins*, 3 Brown's Parl. Cas. Toml. ed. 602 (decided in 1734), and *Mayor of York* v. *Pilkington*, 1 Atk. 282 (decided in 1737).

In the first case the city claimed to be entitled to and that it had received, time out of mind, from all masters of ships bringing cheese eastward of London Bridge to the port of London to be sold, a certain duty per ton on such cheese. The defendants, being great importers of cheese, refused to pay the duty, and it was shown by the complainant that the right of the city had been proven at law in other cases, and a verdict given for the city in favor of its right, and the city therefore claimed there was no reason why the question should be sent to law to be tried over again. The real point decided in the case was that depositions of witnesses taken in former causes relating to the same matter for which a new suit is instituted against another party ought to be permitted to be read as evidence upon the hearing of such new cause, although the witnesses themselves are not proved to be dead. The depositions being regarded as proper evidence, and the right at law having been maintained, the judgment was for the recovery of the toll.

The second case was a bill filed by the mayor of York, who claimed in behalf of the city to have been in possession of a fishery in the river Ouse, the city claiming the sole right of fishery, and the court held that the mayor might bring a bill to be quieted in the possession, although he had not established his right at law, and that it was no objection upon a demurrer to such bill that the defendants had distinct rights, for upon an issue to try the general right they may at law take advantage of their several objections and distinct rights. The bill is described as a "bill of peace," and it is assumed that there would be an issue sent to a court of law for trial as to the sole right of the complainant and where the defendants might show their distinct rights. The Lord Chancellor said:

"Here are two causes of demurrer, one assigned originally, and one now at the bar, that this is not a proper bill, as it claims a sole right of fishery against five lords of manors, be-

cause they ought to be considered as distinct trespassers, and that there is no general right that can be established against them, nor any privity between the plaintiffs and them. . . . But there are cases where bills of peace have been brought, though there has been a general right claimed by the plaintiff, and yet no privity between the plaintiffs and defendants, nor any general right on the part of the defendants, and where many more might be concerned than those brought before the court. . . . I think therefore this bill is proper, and the more so, because it appears there are no other persons but the defendants who set up any claim against the plaintiffs, and it is no objection that they have separate defences; but the question is, whether the plaintiffs have a general right to the sole fishery, which extends to all the defendants; for notwithstanding the general right is tried and established, the defendants may take advantage of their several exemptions, or distinct rights."

The demurrer was therefore overruled.

On the other hand, in *Bouverie* v. *Prentice*, 1 Brown's Ch. Rep. 200 (decided in 1783), it was held that a bill would not lie against several tenants of a manor for quit-rents, the plaintiff's remedy being at law, and the suit also multifarious as to the different tenants. The Lord Chancellor said:

"Upon what principle two different tenants, of distinct estates, should be brought hither to hear each other's rights discussed, I cannot conceive. The court has gone great lengths in bills of this sort; and, taking the authority for granted, I cannot conceive on what ground such a suit can stand."

The Chancellor also remarked that where a number of persons claimed one right in one subject, such a bill may be entertained to put an end to litigation. Here no one issue could have tried the cause between any two of the parties. See also *Ward* v. *The Duke of Northumberland*, 2 Ans. 469 (decided in the Exchequer in 1794). The court in that case held that the suit could not be maintained in equity on the ground of preventing a multiplicity of suits where the demands against each of the defendants, although of the same nature, were entirely distinct from and unconnected with any other defendant. In

such case each defendant had a right to object to the joining of any distinct and unconnected causes of action.

To the same effect is *Birkley* v. *Presgrave*, 1 East, 220, 227 (decided in the King's Bench in 1801). In that case the court said:

"But generally speaking, a court of equity will not take cognizance of distinct and separate claims of different persons in one suit, though standing in the same relative situation."

In *Weale* v. *West Middlesex Waterworks*, 1 Jac. & Walk. Ch. Rep. 358 (decided in 1820), the Lord Chancellor, in holding that the suit would not lie, referred to the case of the *Mayor of York* v. *Pilkington*, and said:

"For where the plaintiffs stated themselves to have the exclusive right, it signified nothing what particular rights might be set up against them; because, if they prevailed, the rights of no other persons could stand; and it has long been settled, that if any person has a common right against a great many of the King's subjects, inasmuch as he cannot contend with all the King's subjects, a court of equity will permit him to file a bill against some of them; taking care to bring so many persons before the court, that their interests shall be such as to lead to a fair and honest support of the public interest; and when a decree has been obtained, then, with respect to the individuals whose interest is so fully and honestly established, the court, on the footing of the former decree, will carry the benefit of it into execution, against other individuals who were not parties."

In *Marselis* v. *The Morris Canal &c. Company*, 1. N. J. Eq. 31 (decided in 1830), it was held that the plaintiff could not maintain an action against several defendants to recover matters of different natures against them. It was a suit in equity by several land owners of different lands not coming under a common title, against the defendant for taking their lands for the purposes of its incorporation, and not paying or compensating the owners therefor. It was alleged that the company was insolvent, and it was prayed that an account might be taken and damages awarded to the complainants for the injuries already sustained, and for compensation, and an injunction restraining the company from occupying the land was

asked for. The court held the bill could not be maintained, as the same was multifarious, and said the fact that the plaintiffs had a common interest in the question and that to sustain the jurisdiction would relieve the necessity of a number of suits at law brought by the separate plaintiffs, would not confer jurisdiction on the court upon any principle of equity.

In *Demarest* v. *Hardham*, 34 N. J. Eq. 469 (decided in 1881), several persons, owning distinct parcels of land or occupying different dwellings and having no common interest, sought to restrain a nuisance in consequence of the special injury done to each particular property, and it was held that each must bring a separate suit and obtain relief, if at all, upon his own special wrong. It was said that several persons might join to restrain a nuisance which is common to all and affects each in the same way, instancing slaughter-houses in a populous part of the town and the offensive and deleterious odors there generated being allowed to diffuse themselves throughout the neighborhood. In such case all injuriously affected by them may join in the same suit, for in such a case the injury is a common one, and the object of the suit is to give protection to each suitor in the enjoyment of a common right. To the same effect is *Rowbotham* v. *Jones*, 47 N. J. Eq. 337 (decided in 1890).

Then there were cases arising by reason of the so-called *Schuyler frauds*, such as *New York & New Haven R. R. Company* v. *Schuyler*, 17 N. Y. 592, 602, on demurrer (decided in 1858); again reported on appeal from the judgment on the merits, in 34 N. Y. 30 (decided in 1865). These were very complicated questions arising by reason of the frauds referred to, and jurisdiction was maintained upon what might be termed general principles of necessity for the purpose of quieting what would otherwise have been endless litigation, and as stated by Davis, J., in 34 N. Y., the case was not decided upon any one head of equity jurisdiction.

In *Railroad Company* v. *Mayor &c.*, 54 N. Y. 159, defendants had commenced seventy-seven actions to recover penalties for violation of a city ordinance. The company commenced this action to restrain their prosecution until the right could be determined in one of the actions, and the suit was maintained

on the ground of thereby preventing vexatious litigation in a multiplicity of suits.

In *Supervisors* v. *Deyoe*, 77 N. Y. 219, questions of the indebtedness of the county upon certain certificates wrongfully issued by its treasurer were complicated with questions of the liability of the county to various holders of the certificates, and the court held a suit in equity could be sustained, making all the holders of the different certificates parties, because a multiplicity of suits would thereby be avoided and the whole question more conveniently and properly disposed of, all the defendants having in fact a common interest.

In *Meyer* v. *Phillips*, 97 N. Y. 485, the suit was sustained as one to quiet the title of plaintiff, the acts threatened by various defendants being under a claim of right, and being of exactly the same nature, the issue being the same in all.

Cases in sufficient number have been cited to show how divergent are the decisions on the question of jurisdiction. It is easy to say it rests upon the prevention of a multiplicity of suits, but to say whether a particular case comes within the principle is sometimes a much more difficult task. Each case, if not brought directly within the principle of some preceding case, must, as we think, be decided upon its own merits and upon a survey of the real and substantial convenience of all parties, the adequacy of the legal remedy, the situations of the different parties, the points to be contested and the result which would follow if jurisdiction should be assumed or denied; these various matters being factors to be taken into consideration upon the question of equitable jurisdiction on this ground, and whether within reasonable and fair grounds the suit is calculated to be in truth one which will practically prevent a multiplicity of litigation and will be an actual convenience to all parties, and will not unreasonably overlook or obstruct the material interests of any. The single fact that a multiplicity of suits may be prevented by this assumption of jurisdiction is not in all cases enough to sustain it. It might be that the exercise of equitable jurisdiction on this ground, while preventing a formal multiplicity of suits, would nevertheless be attended with more and deeper inconvenience to the defendants than

would be compensated for by the convenience of a single plaintiff, and where the case is not covered by any controlling precedent the inconvenience might constitute good ground for denying jurisdiction.

We are not disposed to deny that jurisdiction on the ground of preventing a multiplicity of suits may be exercised in many cases in behalf of a single complainant against a number of defendants, although there is no common title nor community of right or interest in the subject matter among such defendants, but where there is a community of interest among them in the questions of law and fact involved in the general controversy.

Is there, upon the complainant's theory of this case, any such common interest among these defendants as to the questions of fact that may be put in issue between them and the plaintiff? Each defendant's defence may, and in all probability will, depend upon totally different facts, upon distinct and particular contracts, made at different times, and in establishing a defence, even of like character, different witnesses would probably be required for each defendant, and no defendant has any interest with another.

In this case, from the complainant's own bill, the amount demanded is the full amount of the par value of the shares held by each defendant. In *Kennedy* v. *Gibson*, 8 Wall. 498, 505, a receiver brought suit to recover from the stockholders of an insolvent national bank the statutory liability imposed upon them, and in the course of the opinion it was stated by the court:

"Where the whole amount is sought to be recovered the proceeding must be at law. Where less is required the proceeding may be in equity, and in such a case an interlocutory decree may be taken for contribution, and the case may stand over for the further action of the court, if such action should subsequently prove to be necessary, until the full amount of the liability is exhausted."

In *Bailey* v. *Tillinghast*, 40 C. C. A. 93; 99 Fed. Rep. 801, this statement of the law was recognized, and the cases of *Casey* v. *Galli*, 94 U. S. 673, and *United States* v. *Knox*, 102 U. S. 422, were referred to as recognizing the same rule. In *United States* v. *Knox*, the court approved and reaffirmed the rules laid

down in *Kennedy* v. *Gibson*, and one of those rules was that when the whole amount was sought to be recovered, the proceeding must be at law.

The facts surrounding the present case and the reasons for holding that they do not bring it within the principle of preventing a multiplicity of suits are so well stated in the opinion of McPherson, District Judge, in this case, 102 Fed. Rep. 790, that we quote the same. After speaking of the alleged conclusiveness of the Minnesota decree upon the question therein decided, the judge continued:

"Thereafter a different question arose for determination, namely, can the assessment be lawfully enforced against the individuals charged therewith? And in this question the interest of each stockholder is separate and distinct. The bill asserts the conclusiveness of the Minnesota decree upon the defendants, so far as the necessity for the assessment and the amount charged against each stockholder are concerned. *Bank* v. *Farnum*, 176 U. S. 640. Assuming that position to be sound (and, if I do not so assume it; if these questions are still open for determination, so far as the Pennsylvania stockholders are to be affected—the bill must fail for want of necessary parties,) it is clear that only two classes of questions remain to be decided: The first is whether a given stockholder was ever liable as such; and the second is whether, if he were originally liable, his liability has ceased, either in whole or in part. Manifestly, as it seems to me, the defendants have no common interest in these questions, or in the relief sought by the receiver against each defendant. The receiver's cause of action against each defendant is, no doubt, similar to his cause of action against every other, but this is only part of the matter. The real issue, the actual dispute, can only be known after each defendant has set up his defence, and defences may vary so widely that no two controversies may be exactly or even nearly alike. If, as is sure to happen, differing defences are put in by different defendants, the bill evidently becomes a single proceeding only in name. In reality it is a congeries of suits with little relation to each other, except that there is a common plaintiff, who has similar claims against many persons. But as each of these per-

sons became liable, if at all, by reason of a contract entered into by himself alone, with the making of which his co-defendants had nothing whatever to do, so he continues to be liable, if at all, because he himself, and not they, has done nothing to discharge the liability. Suppose A to aver that his signature to the subscription list was a forgery; what connection has that averment with B's contention, that his subscription was made by an agent who had exceeded his powers? or with C's defence, that his subscription was obtained by fraudulent representations? or with D's defence, that he has discharged his full liability by a voluntary payment to the receiver himself? or with E's defence, that he has paid to a creditor of the corporation a larger sum than is now demanded? These are separate and individual defences, having nothing in common; and upon each, the defendant setting it up is entitled to a trial by jury, although it may be somewhat troublesome and expensive to award him his constitutional right. But, even if the ground of diminished trouble and expense may sometimes be sufficient, I should still be much inclined to hesitate before I conceded the superiority of the equitable remedy in the present case. Such a bill as is now before the court is certain to be the beginning of a long and expensive litigation. The hearings are sure to be protracted. Several, perhaps many, counsel will no doubt be concerned, whose convenience must be consulted. The testimony will soon grow to be voluminous. The expense of printing will be large. The costs of witnesses will not in any degree be diminished, and, if some docket costs may be escaped, this is probably the only pecuniary advantage to be enjoyed by this one cumbersome bill over separate actions at law."

We are in accord with the views thus expressed, and we therefore must deny the jurisdiction of equity, so far as it is based upon the asserted prevention of a multiplicity of suits.

2. There remains the further question of maintaining the suit on the ground that it is ancillary or auxiliary to the decree of the Minnesota court and aids in its enforcement. We think this contention cannot be sustained.

In the first place, all the non-resident stockholders were but nominal parties in the Minnesota suit. Their names were merely placed in its title. No service of process was ever made

on one of them, and as the suit was not one in which service by publication of process could be ordered, there was nothing in the nature of the suit to give them notice or to enable the court to give judgment against them without their appearing. The court did not assume to give any such judgment. Indeed, the complainant averred there were no means of obtaining jurisdiction over the non-resident stockholders, and the court assumed that it had no jurisdiction over them, and on account of such lack of jurisdiction it only gave judgment against those resident stockholders who were parties to the suit. The complainant claims that the non-resident stockholders are bound because the corporation was a party, not because they were parties to the suit. There is no decree or judgment, therefore, against the stockholders who were non-residents. The claim that they are bound by certain findings of fact by the court, because of the corporation being a party and in law representing them to that extent, assuming it for this purpose to be well founded, is far from transforming a decree against resident stockholders into one against non-residents who were not parties to the action. Even assuming that the decree concludes them upon certain facts found in that action where there was no decree against them, still, another action in another jurisdiction to enforce their liability as originally created by statute cannot within any reason be said to be one to enforce the former judgment. Indeed it is because of the very fact that no judgment was or could be obtained against the non-resident stockholders in the Minnesota suit that the Pennsylvania Federal court is asked to exercise its jurisdiction and give judgment against the defendants on their statutory liability. This does not make the Pennsylvania suit ancillary to the Minnesota decree for the purpose of enforcing it, for there is no decree against them to be enforced. There is only a claim that they are bound by certain facts found in another action to which they were not parties in any but a merely formal and nominal sense.

We think that, upon grounds discussed herein, the judgments of the courts below were right, and they are, therefore,

Affirmed.

Mr. Justice Brewer dissented.

DIAMOND MATCH COMPANY *v.* ONTONAGON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

No. 96. Argued December 1, 1902.—Decided January 19, 1903.

1. The village of Ontonagon, Michigan, has power, either under its charter or under the statute of 1899 of Michigan, to assess logs in the boom or sorting boom in the Ontonagon River belonging to plaintiff in error.
2. The legislature of Michigan could confer by statute upon the village of Ontonagon the power to tax logs in transit to Ontonagon as provided in the act of 1899 for taxing personal property; and property which was in transit through the Ontonagon River, and then by the Chicago, Milwaukee & St. Paul Railway was properly assessed at Ontonagon, that being the place in the State nearest to the last boom or sorting gap of the stream in or bordering on the State in which said property naturally would be and was intended to be last floated during the transit thereof.
3. There may be an interior movement of property within the State which does not constitute interstate commerce though the property come from or be destined to another State; and where one hundred and eighty million feet of logs are cut, hauled and put into the Ontonagon River during two seasons for the purpose of saving, protecting and preserving the same, and the owner cannot use more than twenty to forty million in any year, and it was not the intention to take all the logs down at the opening of the streams but only to take down each season the number that could be used, the logs in the sorting gap cannot be regarded as property engaged in interstate commerce so as to be exempted from taxation under the laws of Michigan. *Coe* v. *Errol*, 116 U. S. 617, followed.

THIS is a bill in equity to restrain the collection of certain taxes levied under the following law of the State of Michigan:

"Personal property of non-residents of the State, and all forest products owned by residents or non-residents, or estates of deceased persons, shall be assessed in the township or ward where the same may be, to the person having control of the premises, store, mill, dock, yard, piling ground, place of storage, or warehouse where such property is situated in such township, on the second Monday of April of the year when the assessment is made, except that where such property is in transit to some place within

the State it shall be assessed in such place, except that where such property is in transit to some place without the State it shall be assessed at the place in this State nearest to the last boom or sorting gap of the stream in or bordering on this State in which said property will naturally be last floated during the transit thereof, and in case the transit of any such property is to be other than through any watercourse in or bordering on this State, then such assessment shall be made at the point where such property will naturally leave the State in the ordinary course of its transit; and such property so in transit to any place without the State shall be assessed to the owner or the person, persons or corporation in possession or control thereof, and in case such transit will pass said logs through the booms or sorting gaps, or into the places of storage of any person, persons or corporation operating upon any such stream, then such property may be assessed to such person, persons or corporation; and the person, persons or corporation so assessed for any such property belonging to a non-resident of this State shall be entitled to recover from the owner of such property, by a suit in attachment, garnishment or for money had and received, any amount which the person, persons or corporation so assessed is compelled to pay because of such assessment, and shall have a lien upon said property as security against loss or damage because of being so assessed for the property of another and may retain possession of such property until such lien is satisfied: *Provided, further*, That any owner or person interested in said property may secure the release of the same from such lien by giving to the person, persons or corporation so assessed a bond in an amount double the probable tax to be assessed thereon, but not less than the sum of two hundred dollars, with two sufficient sureties, conditioned for the payment of such tax by said owner or person interested, and the saving of the person, persons or corporation assessed from payment thereof, and from costs, damages and expense on account of his non-payment, which bond as to amount and sufficiency of surety shall be approved by the county clerk of the county in which the assessment is made." Pub. Laws, 1899, No. 32, p. 47.

It was contended that the taxes assessed were illegal and

void, " because said taxes were assessed in violation of and repugnant to the general provisions of the Constitution of the United States; and especially because said taxes were assessed in violation of, and said statutes of the State of Michigan are in violation of and repugnant to, those parts of section 8 of article I of the Constitution of the United States, which provide that: 'The Congress shall have power . . . to regulate commerce with foreign nations, and among the several States,' and section 10 of said article, which provides that: 'No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws.'"

By stipulation the bill was dismissed as to the township of Ontonagon and the township of McMillan. As to the other defendants the bill was submitted on an agreed statement of facts and the pleadings. The court sustained the assessment and dismissed the bill. This appeal was then taken under section 5 of the judiciary act of 1891.

The following is the stipulation of facts:

" It is hereby further stipulated by and between the complainant and the defendants Village of Ontonagon, and George Ducleau, its treasurer, that the following statements of fact are true, and may be used in evidence on the hearing of said cause by either of the parties to this stipulation, subject to objections for immateriality, to wit:

" 1. The complainant is a corporation organized and existing under and by virtue of the laws of the State of Illinois, with its principal office and place of business in the city of Chicago, in said State; that it is engaged, and has been from the date of its organization, in the manufacture and sale of matches, and that in the prosecution of its business it purchased and became the owner of a large amount of pine wood, timber, etc., situate on the Ontonagon River and its tributaries in Ontonagon County and other counties in the State of Michigan, and that for many years prior to 1896 it owned and operated extensive saw mills and plant near the mouth of the Ontonagon River, and within the corporate limits of the defendant Village of Ontonagon; that, in its usual course of business, it cut or

purchased a sufficient quantity of timber to supply its mills during the following season, not exceeding forty million of feet, board measure, and placed the same during the winter upon and in said Ontonagon River and its tributaries, there to remain until the breaking up of the ice in said river in spring time, when they were and are driven down the river to the pier jams, booms and sorting grounds of the complainant, located above said mills, and outside of the limits of defendant, The Village of Ontonagon.

"2. That in the summer of the year 1894 extensive forest fires swept over said pine lands of the complainant, and other pine lands, situate on said Ontonagon River, doing great damage to the timber thereon; that in order to preserve the timber so injured by said fire, it became and was necessary to cut all of said timber and put the same into the waters of the above-named stream for preservation; that during the winter of 1894 and 1895 said complainant, in order to preserve said timber, was compelled to cut and did cut about one hundred and eighty million feet of logs, and for the sole purpose of preservation placed the same in said river and its tributaries, there to remain until the complainant could float said logs down said river and streams to its mills to be manufactured into lumber; that it was not the intention or purpose of the complainant after the opening of navigation and during the season of 1896 to remove all said logs, but only such amount as could be manufactured at its said mills during the season, and that the capacity of said mills did not exceed about the amount of forty million feet per annum, as hereinbefore stipulated.

"3. That the navigation of said river and stream is closed by reason of the formation of ice about the first of December of each year, and is not open until after the first of May, following in each year.

"4. That in the month of August, A. D. 1896, the complainant's said mills were destroyed by fire, and that thereafter it became necessary, and the complainant did transport said logs by the Chicago, Milwaukee & St. Paul Railway, from Ontonagon to its saw mills located at Green Bay, in the State of Wisconsin. That in the regular prosecution of its business of

manufacturing said logs into lumber said complainant has not during any season since 1896 transported a larger quantity of said logs than it could manufacture into lumber at its mills at Green Bay, said quantity being on an average of less than forty million feet of logs, board measure.

"5. That for the purpose of preserving said logs and preventing the same from floating down said river and into Lake Superior said complainant was compelled to and has utilized certain jam piers, booms and appurtenances, constructed by the plaintiff across said river, more than one mile above the mouth thereof, and beyond the limits of said village of Ontonagon; that by reason of said appliances said logs have been held in said river and upon the banks thereof above said jam piers, booms, etc., said complainant only passing through said piers such quantities as it could transport and manufacture into lumber at its said mills from time to time during each successive season since the year 1896; that during each successive season it has been the usual and necessary practice of the complainant to pass through said piers, booms, etc., such quantities of logs as said railway company could furnish facilities for transportation, thence down the river to the place of delivery as described in paragraph 2 of another stipulation of facts made herein to said railway company, to be loaded upon cars for transportation, and that said place of delivery was near the mouth of said river and within the corporate limits of said defendant The Village of Ontonagon; that all of said logs so delivered to said railway company are transported over its lines to Green Bay, Wisconsin, leaving the State of Michigan at a point near the village of Iron Mountain in said State.

"6. That at the close of the season of 1898 the logs in controversy were held by said complainant and detained and preserved by said jam piers, booms, etc., in said Ontonagon River, above and beyond the limits of said defendant, The Village of Ontonagon, waiting the delivery for transportation, as aforesaid, during the following season of the year 1899, and that all of said logs were a part of the entire quantity cut and put in said river during the winter of 1895 and 1896, and had since that date been so held and detained by the complainant in its

regular course of business; that all of said logs were so held and detained, and by reason of the ice in said river could not be floated down the same until about the middle of May, 1899, and that said logs so assessed, as charged in said bill of complaint, were not at the time said assessment was made, and on the second Monday of April, A. D. 1899, were not, except as stated in paragraph 4 of another stipulation, made herein, and never had been within the corporate limits of the said defendant, The Village of Ontonagon.

"7. That the logs in controversy at the time said assessment was made by said defendant, The Village of Ontonagon, were and had been for more than one year prior thereto, in the manner above described, held and detained by the complainant within the municipal limits of the township of McMillan in said county of Ontonagon, and were assessed for the purpose of levying a tax thereon, for the year 1899, by the proper officers of said township of McMillan, claiming the right so to do under the general statutes and laws of the State of Michigan.

"It is further stipulated and admitted by the parties to this stipulation that the assessment of the complainant's logs in controversy was not valid unless it shall be held as a question of law that the defendant, The Village of Ontonagon, had the legal right to assess said logs in said river outside and beyond the geographical limits of said village, as being in transit under the statutes of the State of Michigan in such case made and provided."

The other stipulation of facts referred to is as follows:

"1. Complainant shipped by rail from the village of Ontonagon to its mills at Green Bay, Wisconsin, for sawing there, the following quantities of logs, at the following times out of its logs in the Ontonagon River, described in the bill of complaint:

"Forty-two million feet in the season of 1897; thirty-seven million feet in the season of 1898, and fourteen million feet in the season of 1899 up to the date of the seizure of logs by the village of Ontonagon for the satisfaction of the tax levied and assessed in and by said village in the year last named.

"2. Within the village of Ontonagon, is, and has been, situ-

ated in and throughout the year 1899 the last boom or sorting gap in said river, from which complainant's logs in said river are taken and placed upon the railroad cars for shipment to its said mills at Green Bay, and said boom or sorting gap is the last place in said river where said logs are floated before shipment by rail as aforesaid.

"3. During the season of 1899, beginning about June 1, and up to the time of the seizure above mentioned, about — million feet of the ten (10) million feet of logs mentioned in the bill of complaint, were driven down the said river from the boom, pier jam or sorting grounds outside of said village, to the boom or sorting gap within said village, above described, and shipped thence by rail to complainant's said mills at Green Bay.

"4. About five hundred thousand feet of complainant's said logs in said river have been)in said river of slough) constantly within said village since 1898, for the purpose of shipment by rail to the destination as aforesaid.

"5. The village of Ontonagon is a duly incorporated village under the general law of Michigan, to wit: act number 3 of the Laws of Michigan of the year 1895, entitled 'An act to provide for the incorporation of villages within the State of Michigan, and defining their powers and duties,' and is situate on said river and in The Township of Ontonagon, one of the defendants herein.

"6. The water transit of said logs of complainant has heretofore always ceased since the burning of complainant's mills, described in the bill of complaint, in said village, whence the same are shipped by rail as aforesaid.

"7. Said river and its tributaries are streams of water or rivers, all within the State of Michigan and within the county of Ontonagon (and as to some small part within the counties of Gogebic and Houghton) in which county of Ontonagon said village is situated.

"8. Pursuant to and in accordance with the acts of the legislature of Michigan mentioned in the answer of said village in this suit, namely, act number 319 of the Laws of 1893, and act number 263 of the year 1895, and pursuant to and in accordance with a vote of the electors of the said village, duly held

Argument for Appellants.

therein, and pursuant to, and in accordance with the action of its council, said village, in the year 1894, borrowed the sum of thirty thousand dollars ($30,000), and issued and sold its bonds therefor, and in the year 1895 borrowed the further sum of twelve thousand dollars ($12,000), and issued its bonds therefor, and all of said bonds, being in principal and interest about forty thousand dollars ($40,000), were, at the date of filing the bill of complaint in this cause, outstanding, and said bonds outstanding constitute a valid charge against said village and against the taxable property thereof."

Mr. Edwin Walker for the appellants argued:

I. The village of Ontonagon had no power to assess property for taxation and levy taxes thereon, except as specially conferred by the general or special statutes of the State of Michigan. Compiled Laws of Michigan, vol. 1, p. 913, §§ 1, 2, 6; Cooley on Taxation, pp. 96, 209, 474; Dillon's Municipal Corporations, 4th ed. § 763; *In re Second Ave. M. E. Church*, 66 N. Y. 395; *English* v. *People of the State of Illinois*, 96 Illinois, 566.

II. The State of Michigan could not by legislative grant authorize the village of Ontonagon to impose a tax upon the property of non-residents when the situs of such property was beyond its municipal limits and jurisdiction. *Wells* v. *Weston*, 22 Missouri, 384; *In re Assessment of Lands &c.*, 66 N. Y. 398; *Trigg* v. *Glasgow*, 2 Bush, 594; *City of St. Louis* v. *Ferry Co.*, 11 Wall. 430.

III. The statute of the State of Michigan, under and by authority of which the complainant's property was assessed for taxation, is in contravention of, and repugnant to, the Constitution of the United States. *Coe* v. *Errol*, 116 U. S. 517; *The Daniel Ball*, 10 Wall. 557–565; *State Freight Tax Case*, 15 Wall. 272.

IV. Under the admitted facts equity has jurisdiction to enjoin the collection of the tax. Cooley on Taxation, 2d ed. 784; *Pacific Hotel Co.* v. *Lieb*, 83 Illinois, 602; *Railway Co.* v. *Cole*, 75 Illinois, 591; *Cook County* v. *Railroad Co.*, 35 Illinois, 460; *Bank of Kentucky* v. *Stone*, 88 Fed. Rep. 383; *Ogden City* v.

Armstrong, 168 U. S. 224; High on Injunctions, §§ 502, 530; *Smyth* v. *Ames*, 169 U. S. 515; *Hazard* v. *O'Bannon*, 36 Fed. Rep. 855; *Parmalee* v. *Railroad Companies*, 3 Dillon, 25.

Mr. T. L. Chadbourne submitted a brief on behalf of appellees.

Mr. Justice McKenna, after making the foregoing statement, delivered the opinion of the court.

The contention of appellant is presented in three propositions. (1) That the village of Ontonagon had no power to assess the property under its charter. (2) That the legislature could not confer such power. (3) That the property was in the course of transportation within the meaning of the commerce clause of the Constitution of the United States.

1. This proposition is unimportant. If the charter did not, the statute of 1899 did, authorize the assessment.

2. To sustain this proposition would embarrass the power of the State—indeed, make it impotent to deal with the conditions there existing. The statute, no doubt, was enacted as a means to subject property to taxation which had no definite or enduring locality, and because of the clash or confusion of jurisdictions. In such circumstances experience, probably, demonstrated that property escaped taxation or was difficult to tax, or that controversies arose. It was competent for the legislature to defeat either result by giving moving property a definite situs as of some day. Nor is that power impugned by the principle that protection is the consideration of taxation. There is protection during the transit through the municipalities of the State and at its termination in the State—protection accommodated to the kind of property and as efficient as links are to the continuity of a chain.

There is nothing in the cases cited by appellant which sustains the opposite view. *Trigg* v. *Glasgow*, 2 Bush, 594, seems to have turned upon the interpretation of a state statute. Under a statute of the State the town of Glasgow was authorized to subscribe to the stock of a railroad, and by the charter of

the town it was the duty of the trustees to "levy an *ad valorem* tax on the property, both real and personal, within said town, that is listed for state purposes, including the amount given in under the equalization law, sufficient," etc.

By an amendatory act it was provided that "all the taxable property in said town on the 10th of April shall be subject to taxation for the payment of said subscription;" and it also provided that the taxable property *in* said town which may have been removed without its limits between the 1st of January and the 10th of April, for the purpose of evading the tax, should be listed for taxation.

The court held, as we understand its opinion, that property to be subject to taxation under the statute must be *in* the town. If it had been taken out to avoid taxation, it was subject to taxation when brought back.

St. Louis v. *The Ferry Co.*, 11 Wall. 423, was also an interpretation of the state statute. The city of St. Louis had power to tax all property *within the city*. It was held under the circumstances of the case that the ferry boats of the ferry company had their situs in the State of Illinois. It was said:

"Their relation to the city was merely that of contact there, as one of the termini of their transit across the river in the prosecution of their business. The time of such contact was limited by the city ordinance. Ten minutes was the maximum of the stay they were permitted to make at any one time. The owner was, in the eye of the law, a citizen of that State, and from the inherent law of its nature could not emigrate or become a citizen elsewhere. As the boats were laid up on the Illinois shore when not in use, and the pilots and engineers who ran them lived there, that locality, under the circumstances, must be taken to be their home port. They did not so abide within the city as to become incorporated with and form a part of its personal property."

In *Wells* v. *Weston*, 22 Missouri, 384, and *In Assessment of Lands in the Town of Flatbush, &c.*, 60 N. Y. 398, the property taxed was real estate.

The purpose of the statute of Michigan is to assess the forest products of the State—things which are a part of the general

property of the State. Those "in transit" are assessable according to their destination. If that be "some place within the State," the property is to be "assessed in such place;" if that be "some place without the State," the property is to be assessed at the place in the State "nearest to the last boom or sorting gap of the same in or bordering on this State in which said property will naturally be the last floated during the transit thereof."

But it is also provided that "*in case the transit of any such property is to be other than through any watercourse in or bordering on this State, then such assessment shall be made at the point where such property will naturally leave the State in the ordinary course of its transit.*"

We may assume for the present that the property was in transit and to some place without the State. Was the "transit to be other than through any watercourse in or bordering on" the State? The appellant contends that it was because it was to be by water and by rail; in other words, the transit was not to be exclusively "through any watercourse." But to give that meaning to the statute words must be added to it. It must be made to read other than *exclusively* or *wholly* or *entirely* "through any watercourse." One of these words must be added to make the sense contended for. The word "other" is used to express a difference—the difference being between a transit which is and one which is not through *any* (the word is significant) watercourse.

The transit in controversy was to be through (by means of) the Ontonagon River, certainly a watercourse, and by the Chicago, Milwaukee and St. Paul Railway, and, therefore, the property was properly assessed by the village of Ontonagon, that being the place in the State nearest to the last boom or sorting gap of the stream in or bordering on the State in which said property naturally would be and was intended to be last floated during the transit thereof.

3. Was the transit interstate commerce? We agree with counsel that it is unimportant in determining an answer whether the transit "was by water or by railroad, or both water and railroad." But no purpose to burden interstate commerce is

evident in the statute, and the power of the State to tax everything which is part of what has been called "the general property" or "the general mass of property" of the State, is undoubted. But things which have been brought to a State may not have reached that condition. Things intended to be sent out of a State, but which have not left it, may not have ceased to be in that condition. The exact moment in either case may not be easy to point out—may be confused by circumstances, and the confident assignment of the property as subject or not subject to taxation is not easily made. Fortunately we are not without illustrations in prior cases, and in *Kelley* v. *Rhoads*, p. 1, *ante*, decided concurrently with this, we express the principles of decision.

In *Brown* v. *Houston*, 114 U. S. 622, the property (coal in barges) had reached the State, but was yet in the boats in which it had been brought into the State. While on the barges it was offered for sale. It was held it had become part of the property of the State and was subject to taxation. *Pittsburg &c. Coal Co.* v. *Bates*, 156 U. S. 577, had facts assimilating it to the case at bar, and it was affirmed on the authority of *Brown* v. *Houston*. As in the latter case, the tax was on coal in barges shipped from the mines in Pennsylvania, and consigned to New Orleans, Louisiana. The coal, however, had not reached, as the coal in *Brown* v. *Houston*, its exact destination. To accommodate the exigencies of the owner's business, the barges, "about one hundred in number, were stopped and moored in the Mississippi River at a convenient mooring place about nine miles above the port of Baton Rouge." The coal was held subject to taxation.

In *Coe* v. *Errol*, 116 U. S. 517, logs which had been cut in the State of Maine, and others which had been cut in the State of New Hampshire, were floated in course of transit down a stream in New Hampshire to the town of Errol, in the latter State; thence to be floated down the Androscoggin River to the State of Maine. The town of Errol assessed upon the property a county, town, school and highway tax. The tax was sustained by the Supreme Court of the State of New Hampshire as to the logs cut in that State, and abated as to

those cut in Maine. The judgment was affirmed by this court.

Mr. Justice Bradley, delivering the opinion of the court, expressed the contentions of the parties in two questions:

"Are the products of a State, though intended for exportation to another State, and partially prepared for that purpose by being deposited at a place or port of shipment within the State, liable to be taxed like other property within the State?

"Do the owner's state of mind in relation to the goods, that is, his intent to export them, and his partial preparation to do so, exempt them from taxation? This is the precise question for solution."

It is obvious that like questions could be framed upon the facts of the case at bar to express the propositions presented. Mr. Justice Bradley's observations, therefore, become pertinent and decisive. He discussed every consideration. He clearly exhibited the extent of the power of the State over the property within it, whether in motion or at rest, though destined for points out of it. He said:

"There must be a point of time when they (goods destined to other States) cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the State of their origin to that of their destination. When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as a entrepôt for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the State to the State of their destination, or have started on their ultimate passage to that State. Until then it is reasonable to regard them as not only within the State of their origin, but as a part of the general mass of property of that State, subject to its jurisdiction, and liable to taxation there if not taxed by reason of their being intended for exportation, but taxed with-

out any discrimination in the usual way and manner in which such property is taxed in the State."

And further:

"But no definite rule has been adopted with regard to the point of time at which the taxing power of the State ceases as to goods exported to a foreign country or to another State. What we have already said, however, in relation to the products of a State intended for exportation to another State will indicate the view which seems to us the sound one on that subject, namely, that such goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey. We think that this must be the true rule on the subject. It seems to us untenable to hold that a crop or herd is exempt from taxation merely because it is, by its owner, intended for exportation. If such were the rule in many States there would be nothing but the lands and real estate to bear the taxes. Some of the Western States produce very little except wheat and corn, most of which is intended for export; and so of cotton in the Southern States. Certainly, as long as these products are on the lands which produce them, they are part of the general property of the State. And so we think they continue to be until they have entered upon their final journey for leaving the State and going into another State. It is true, it was said in the case of *The Daniel Ball*, 10 Wall. 557, 565: 'Whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced.' But this movement does not begin until the articles have been shipped or started for transportation from the one State to the other. The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence, is no part of that journey."

These cases are referred to in *Kelley* v. *Rhoads*, 188 U. S. 1, as defining the taxing power of a State. And their substance is declared to be "that while property is at rest for an indef-

inite time or awaiting transportation, or awaiting sale at its place of destination, or at an intermediate point, it is subject to taxation. But if it be actually in transit to another State, it becomes the subject of interstate commerce, and is exempt from local assessment."

In further specialization of these propositions we may say that the cases establish that there may be an interior movement of property which does not constitute interstate commerce, though property come from or be destined to another State. In the one case, though it have not reached its place of disembarkation or delivery, it may be taxed. *Brown* v. *Houston*, 114 U. S. 662. In the other case, until it be shipped or started on its final journey, it may be taxed. *Coe* v. *Errol*, 116 U. S. 617.

The case at bar falls within this principle. It is alleged in the bill that during the winters of 1895 and 1896 the plaintiff cut, hauled and put into the Ontonagon River and its tributaries, one hundred and eighty million feet of logs for the purpose of saving, protecting and preserving the same; that said lumber was more than plaintiff could utilize in any one season at its mills, and it was not, therefore, the intention at the opening of the streams to make a clean drive of the same, but only to take down the streams the following spring and summer, and each succeeding driving season, the number complainant could utilize; that complainant was at the time the logs were cut and put in the streams an owner of lumber mills situated at or near the corporate limits of the village of Ontonagon; that said mills were destroyed by fire in the fall of 1896, and were not rebuilt, and that after the destruction thereof plaintiff destined the logs for its mills at Green Bay, Wisconsin, but that it was not its intention to take to said mills during any one summer any more than sufficient for its purposes, and not to exceed generally twenty million feet—according to the stipulation forty million feet. The route of the logs from the forests to the mills is described as follows:

"They are driven down the tributaries of said Ontonagon River into the stream of said river and thence down said Ontonagon River to a point at or near the mouth thereof, in the

township of Ontonagon, to the sorting grounds and pier jams of the complainant; they are then loaded aboard cars and shipped by rail to Green Bay, Wisconsin, via the Chicago, Milwaukee & St. Paul Railway, and pass out of the State of Michigan at a point near the village of Iron Mountain in said State."

The number of the logs shipped by rail from Ontonagon to Green Bay before the levy of the tax complained of is given in the stipulation of facts, and it is stipulated that "about five hundred thousand feet of complainant's said logs in said river have been (in said river of slough) constantly within said village since 1898, for the purpose of shipment by rail to the destination as aforesaid."

The appellant's contention is that the movement of the logs commenced at the opening of navigation of the river (presumably in the spring or summer of 1896 and 1897,) and from that date were in continuous transit as subjects of interstate commerce, and exempt from taxation. The contention is more extreme than that made and rejected in *Coe* v. *Errol*.

Decree affirmed.

BILLINGS *v.* ILLINOIS.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 106. Argued December 4, 1902.—Decided January 19, 1903.

The claim that section 2 of the act providing for the taxation of life estates, as construed by the highest courts of the State of Illinois, is in contravention of the Fourteenth Amendment in that the classification of life tenants is arbitrary and unreasonable and denies to life tenants the equal protection of laws because it taxes one class of life estates where the remainder is to lineals and expressly exempts life estates where the remainder is to collaterals or to strangers in blood, cannot be sustained. Inheritance tax laws are based upon the power of a State over testate and intestate dispositions of property, to limit and create estates, and to impose conditions upon their transfer or devolution. This court has already decided in regard to this law that such power could be exercised by distinguishing between the lineal and collateral relatives of a testator.

Opinion of the Court.

Whether the amount of the tax depends upon him who immediately receives, or upon him who ultimately receives, makes no difference with the power of the State. No discrimination being exercised in the creation of the class, equality is observed. *Magoun* v. *Illinois Trust and Savings Bank*, 170 U. S. 283, followed.

THE case is stated in the opinion of the court.

Mr. James F. Meagher, with whom *Mr. William D. Guthrie* was on the brief, for the plaintiff in error, contended that this case differed and should be distinguished from, *Magoun* v. *Illinois Trust and Savings Bank*, 170 U. S. 283, as that case did not decide that tenants for life or for years could be discriminated against in the manner provided in section 2 of the act, now before the court. The point could not have been considered in that case for the plain reason that Mrs. Magoun was not a tenant for life or for years, and could not have been heard to complain of discrimination in a class to which she did not belong. The whole class of life tenants or tenants for years could have been exempted, and such a classification would be within the discretion of the legislature. The constitutionality of the exemption under section 2 is now directly challenged by the plaintiffs in error because they belong to the class affected, and they contend that in their class they are discriminated against in that the tax is not similarly imposed upon others within the same class receiving substantially the same kind of property or exercising the same privilege.

Submitted by *Mr. Howland J. Hamlin*, Attorney General of the State of Illinois, for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The case presents the question of the constitutionality, under the Fourteenth Amendment of the Constitution of the United States, of section 2 of the inheritance tax law of the State of Illinois. Rev. Stat. Illinois, 1895, c. 120, par. 308. The constitutionality of the law was passed upon in *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, and is there set out. As much of section 2 as is necessary to quote is as follows:

"SEC. 2. When any person shall bequeath or devise any property or interest therein or income therefrom to mother, father, husband, wife, brother and sister, the widow of the son, or a lineal descendant during the life or for a term of years or (and) remainder to the collateral heir of the decedent, or to the stranger in blood or to the body politic or corporate at their decease, or on the expiration of such term, the said life estate or estates for a term of years shall not be subject to any tax and the property so passing shall be appraised immediately after the death at what was the fair market value thereof at the time of the death of the decedent in the manner hereinafter provided, and after deducting therefrom the value of said life estate, or term of years, the tax transcribed by this act on the remainder shall be immediately due and payable to the treasurer of the proper county, and, together with the interests thereon, shall be and remain a lien on said property until the same is paid; . . ."

It is claimed, however, that the question presented in this case was not passed upon in *Magoun* v. *Illinois Trust & Savings Bank*. If this be not so, if this case cannot be distinguished from that, it follows necessarily that the judgment sought to be reviewed must be affirmed.

The proceedings originated in the County Court of Cook County, Illinois, which entered a judgment order assessing taxes, under the law in controversy, upon the property and estates passing to the plaintiffs in error. The order was affirmed by the Supreme Court of the State. 189 Illinois, 472.

Albert M. Billings, a resident of Chicago, died in that city, February 7, 1897. He left surviving him a widow, Augusta S. Billings; a son, Cornelius K. G. Billings, one of the plaintiffs in error, and grandson, Albert M. Billings Ruddock, who is the other plaintiff in error. He also left a son by a former marriage, with whom this record is not concerned. His estate was very large, and he devised and bequeathed it all to his wife, excepting certain reservations, during her natural life. How it should be divided, then, the will proceeded to provide as follows:

"I do also herein give and bequeath to my son Cornelius

Kingsley Garrison Billings, and to my grandson Albert M. Billings Ruddock, to be held and owned by them at the death of my wife Augusta S. Billings as is hereinafter explained and set forth, all the property and estate herein bequeathed to her my wife not otherwise disposed of by my said executors hereinafter named, in the manner following to wit: Two thirds thereof to my son C. K. G. Billings and one third thereof to my grandson Albert M. Billings Ruddock to be held and owned by them as above stated during their lifetime, and should my son C. K. G. Billings die, not leaving a living child or children of his own issue, the property herein bequeathed to him shall revert and be held and owned by my grandchild Albert M. Billings Ruddock during his lifetime, and should my grandson Albert M. Billings Ruddock die not leaving a child or children of his own issue, then all the property and estate herein bequeathed to him shall revert and become the property and estate of my brother John D. Billings (should he be alive at that time) and my living nephews and nieces who shall be living at the time of the death of my said grandson, as aforesaid, said brother, nieces and nephews to share and share alike in said estate."

The will, therefore, created a life estate in the widow in the entire estate, and at her death life estates of two thirds and one third of the property bequeathed respectively to the testator's son and grandson, the plaintiffs in error.

The widow renounced the provision made for her, and elected to take in lieu thereof her dower and legal share, and the estates to the plaintiffs in error accrued at once. The County Court appointed an appraiser to fix the fair market value of the estates for the purpose of assessing the inheritance tax as provided by the statute. "The widow's dower award," to quote from the opinion of the Supreme Court, "and one third of the personalty were appraised at the total sum of $2,363,151.75, the tax upon which, after deducting the $20,000 exemption, was fixed at $23,443.53. The life interest (as it was decreed to be) of said Cornelius in the two thirds bequeathed to him was appraised at $2,472,118.75, and after deducting his exemption of $20,000, the tax to be paid by him was assessed at

$24,821.18. This included the specific devise of real estate valued at $30,000. The life interest of Albert M. Billings Ruddock in the one third interest bequeathed to him was appraised at $1,408,374.77, and after deducting his exemption of $20,000, his tax was assessed at $14,043.74. This included also the tax on a specific devise to him of real estate valued at $16,000. The court, in approving the appraiser's report, found that Cornelius K. G. Billings took a life estate in the two thirds of the residuary estate bequeathed to him, and that there was a remainder therein of the value, at the testator's death, of $864,584.70, which had not vested, and that there was a remainder in the one third bequeathed to Albert M. Billings Ruddock for life of the value of $250,976.95, which had not vested, and ordered that the tax on these remainders be postponed until they shall have become vested."

The widow was an appellant in the Supreme Court of the State, but she is not a party here.

The assignment of error is "that the statute is in contravention of the Fourteenth Amendment to the Constitution of the United States of America, in that the classification of life tenants is arbitrary and unreasonable, and denies to the plaintiffs in error, as life tenants, the equal protection of the laws; because the statute, as interpreted and enforced by the state courts, taxes life estates where the remainder is to lineals, but does not tax, and expressly exempts, similar life estates where the remainder is to collaterals or to strangers in blood."

Turning to the *Magoun* case, we find that the objection made to the statute was that it denied to the appellant the equal protection of the laws, and the somewhat elementary and lengthy discussion in the opinion was induced by the grounds upon which, and the ability with which, the statute was attacked. It is very certain that no consideration was omitted from the arguments at bar which could have aided the court to form a judgment. If there had been a proper classification there could not have been the denial of the equal protection of the laws, and we, therefore, expressed and illustrated the principle upon which it should be based. We said it was established by cases that classification must be based on some reasonable ground.

It could not be a "mere arbitrary selection." But what is the test of an arbitrary selection? It is difficult to exhibit it precisely in a general rule. Classification is essentially the same in law as it is in other departments of knowledge or practice. It is the grouping of things in speculation or practice, because they "agree with one another in certain particulars and differ from other things in those same particulars." Things may have very diverse qualities, and yet be united in a class. They may have very similar qualities, and yet be cast in different classes. Cattle and horses may be considered in a class for some purposes. Their differences are certainly pronounced. Salt and sugar may be associated in a grocer's stock for a grocer's purposes. To confound them in use would be very disappointing. Human beings are essentially alike, yet some individuals may have attributes or relations not possessed by others, which may constitute them a class. But their classification—indeed, all classification—must primarily depend upon purpose—the problem presented. Science will have one purpose, business another and legislation still another. The latter, of course, on account of the restraints upon the legislature, may not be legal—may not be within the power of the legislature. To dispute that power, however, is not the same thing as to dispute a classification, and yet that there may be dependence—more freedom of classification in some instances—has been indicated by the cases. A State cannot regulate interstate commerce, however accurate its classification of objects may be. On the other hand, the taxing power of a State is one of its most extensive powers. It cannot be exercised upon persons grouped according to their complexions. It can be exercised if they are grouped according to their occupations. A State may regulate or suppress combinations to restrict the sale of products. The power cannot be exerted to forbid combinations among those who buy products and permit combinations among those who raise or grow products. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540. And yet, exercising its taxing power, it has been decided, that a State may make that discrimination. *American Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89. Other illustrations may be taken from the cases which tend to the same end. If the

purpose is within the legal powers of the legislature, and the classification made has relation to that purpose, (excludes no persons or objects that are affected by the purpose, includes all that are,) logically speaking, it will be appropriate; legally speaking, a law based upon it will have equality of operation. And, excluding our right to consider policies or assume legislation, we have many times said that a State in its purposes and in the execution of them, must be allowed a wide range of discretion, and that this court will not make itself "a harbor in which can be found a refuge from ill-advised, unequal and oppressive legislation." *Mobile Co.* v. *Kimball*, 102 U. S. 691.

These principles were announced in the *Magoun* case and found to sustain the Illinois statute. We said: "There are three main classes in the Illinois statute, the first and second being based, respectively, on lineal and collateral relationship to the testator or intestate, and the third being composed of strangers to his blood and distant relatives. The latter is again divided into four subclasses dependent upon the amount of the estate received. The first two classes, therefore, depend on substantial differences, differences which may distinguish them from each other and them or either of them from the other class—differences, therefore, which 'bear a just and proper relation to the attempted classification'—the rule expressed in the *Gulf, Colorado & Santa Fé Railway Co.* v. *Ellis*, 165 U. S. 150. And if the constituents of each class are affected alike, the rule of equality prescribed by the cases is satisfied. In other words, the law operates 'equally and uniformly upon all persons in similar circumstances.'"

But it is insisted that the classification sustained in the *Magoun* case "related solely to the graduated feature of the tax." In the case at bar, it is said, the question is "whether or not the Illinois legislature can discriminate against *constituents of a certain class*, and apply different rules for the taxation of its members. Life tenants constitute but a single class, and the incidents of such an estate, the source thereof, the extent, the dominion over and quality of interest in the tenant, is the same irrespective of the ultimate vesting of the remainder. The tax

is not upon the property, but is upon the person succeeding to the property."

Undoubtedly, life tenants regarded simply as persons, may be in legal contemplation the same; estates for life regarded simply as estates with their attributes also in legal contemplation, may be said to be the same, but that is not all that is to be considered, nor is it determinative. We must regard the power of the State over testate and intestate dispositions of property, its power to create and limit estates, and, as resulting, its power to impose conditions upon their transfer or devolution. It is upon this power that inheritance tax laws are based, and we said, in the *Magoun* case, that the power could be exercised by distinguishing between the lineal and collateral relatives of a testator. There the amount of tax depended upon him who immediately received; here the existence of the tax depends upon him who ultimately receives. That can make no difference with the power of the State. No discrimination being exercised in the creation of the class, equality is observed. Crossing the lines of the classes created by the statute discriminations may be exhibited, but within the classes there is equality.

Judgment affirmed.

AMERICAN COLORTYPE COMPANY *v.* CONTINENTAL COLORTYPE COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 440. Submitted December 22, 1902.—Decided January 19, 1903.

An Illinois corporation transferred to a New Jersey corporation contracts of employment containing stipulations that the employés would not accept employment from any other person during specified periods and would never divulge the secrets of the trade. The New Jersey company by consent of all parties became substituted as a party to such contracts and instructed the employés, who accepted the employment, in valuable trade secrets. The employés who were not citizens of New Jersey then entered into an arrangement to work for a rival Illinois corporation.

Held, that, as whatever claim the New Jersey corporation had was based on the promise made directly to it upon a consideration furnished by it, it was not prevented from maintaining an action in the Circuit Court of the United States for the Northern District of Illinois against such employés and the Illinois corporation to restrain the employés from working for, or divulging such secrets to, the Illinois corporation on the ground that the action was to recover the contents of a chose in action in favor of an assignee, the assignor being a citizen of Illinois.

THE case is stated in the opinion of the court.

Mr. A. M. Pence, *Mr. Otto C. Butz* and *Mr. Amos C. Miller* for appellant.

Mr. John C. Mathis for appellees.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity brought in the Circuit Court for the Northern District of Illinois by a New Jersey corporation against an Illinois corporation and private persons, citizens of Illinois. Upon demurrer the bill was dismissed for want of jurisdiction on the ground, as is certified, that it was a bill to recover the contents of a chose in action in favor of an assignee, the assignors being citizens of Illinois. The case comes here by appeal. The prayers of the bill are for injunctions to prevent the defendants Maas, Fierlein, Freese and Schultz assisting the defendant company or the defendants Quetsch and Seibert in the three-color printing business, revealing secret processes, etc., until different specified dates. The main ground of the prayers is the contracts to be mentioned, and the question is whether the claim stated by the plaintiff is a claim as assignee.

The plaintiff is the assignee of the assets and good will of the National Colortype Company, the American Three-Color Company, Illinois corporations, and the Osborne Company, a New Jersey corporation, and was formed on March 1, 1902, for the purpose of consolidating the three. Among the more important contracts which purported to be transferred were two between the National Colortype Company and Maas and Fierlein respectively. By the former Maas was employed as superintend-

ent of the plat-making department, and agreed to remain in the company's employment and not to accept employment from others in the business of three-color printing for five years from December 1, 1901, and not to become interested in any way in that business in the United States, east of the Rocky Mountains, or divulge any secrets or processes relating to that business, for ten years from the day mentioned. By the other contract Fierlein was employed as salesman, and agreed to devote his whole time and attention to the interest and business of the company for two years from the same date. There was a similar contract with the defendant Freese, expiring May 1, 1903, but containing a promise by him never to divulge any of the secrets, methods or practices of the company, and agreeing that his going to work for any others engaged in similar business should be considered a breach of the promise just set forth.

The bill alleges that Maas, knowing of the transfer, consented to it, announced his intention of holding the plaintiff to the contract with him, remained in its employ in the same capacity, accepted the stipulated salary and was instructed in valuable secrets, and that the complainant by the consent of all parties became substituted as a party to the contract in place of the National Colortype Company. There are shorter but similar allegations concerning Fierlein and Freese. An independent contract with the defendant Schultz is alleged, which has expired, but it is alleged that by virtue of his employment he also has become possessed of trade secrets and processes belonging to plaintiff.

The bill goes on to allege that Maas and Fierlein while in the plaintiff's employment and pay, conspiring with the defendants Quetsch and Seibert, got up the defendant corporation as a rival to the plaintiff, induced the defendants Freese and Schultz to enter its service, have taken over their own special skill and knowledge of the plaintiff's secrets to the hostile camp, and, in short, will ruin the plaintiff if they are permitted to go on.

We are of opinion that a case is stated within the jurisdiction of the court. It is true that the starting point for the relations between the plaintiff and its employés was what purported to

be an assignment. It is true that the bill emphasizes this aspect of the case and states the evidence more accurately than the result. But those circumstances do not change the legal conclusion from the facts set forth. The allegations show that, having the old contract before them, the parties came together under a new agreement, which was determined by reference to the terms of that contract, but which none the less was personal and immediate. Maas, Fierlein and Freese, who were under contract with the National Colortype Company, agreed to work for the plaintiff instead. The plaintiff accepted their promises and gave a consideration for them by undertaking personally to pay. It does not matter that the bill calls this becoming substituted as the employer and as a party to the old contracts. The plaintiff could not become substituted to a strictly personal relation. All that it could do was to enter into a new one which was exactly like that which had existed before. Service is like marriage, which, in the old law, was a species of it. It may be repeated, but substitution is unknown. *Arkansas Valley Smelting Co.* v. *Belden Mining Co.*, 127 U. S. 379, 387.

It may be that the form of the allegation was suggested by the hope to get some help from the written documents when the plaintiff comes to the proof, as against difficulties raised by the statute of frauds. We have nothing to do with that. It is quite manifest that the plaintiff, if it prevails, will not do so on the ground that, by virtue of the transfer to it, it can claim the beneficial interest in the original agreements, and thus is an assignee within the definition given in *Plant Investment Co.* v. *Jacksonville, Tampa & Key West Ry. Co.*, 152 U. S. 71, 77; if it recovers it will recover on a promise made directly to it upon a consideration which it has furnished. This test is recognized in *Thompson* v. *Perrine*, 106 U. S. 589, 593, although the doctrine there quoted from Mr. Justice Story, that the holder of a note payable to bearer recovers on a new promise made directly to himself, has been controverted elsewhere, and, indeed, long has smouldered as a dimly burning question of the law. Holzendorff, Rechtslexicon, sub v. Inhaberpapiere, ad fin. (3d ed. 365, 371). Compare *Abbott* v. *Hills*, 158 Massachusetts, 396, 397; Story, Confl. of Laws, 8th ed. § 344.

What we have said suggests the answer to the objection that a novation is not set forth. The allegations seem to mean that the old company was discharged, but this is not a question of novation. We are dealing with a new bilateral contract made up of mutual undertakings to serve and to pay. The implication that the old contract is discharged is material only so far as it shows that the plaintiff's rights can be enforced without unjustly disregarding the rights of a third person.

It is unnecessary to consider whether an independent ground of jurisdiction is shown in the threatened revelation of trade secrets, or to discuss the different position of the defendant Schultz. Whether the obligation not to disclose secrets be independent of the express contract or not, a case is made out. The question of independence will not arise unless a difficulty is encountered in the evidence because of the statute of frauds, but that is not a matter of pleading. We have not to consider how far the injunction should go in case the plaintiff succeeds, or anything except the objection that the plaintiff is suing as an assignee.

Decree reversed.

NELSON *v.* NORTHERN PACIFIC RAILWAY COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 44. Argued October 16, 17, 1902.—Decided January 26, 1903.

The grant of public lands made by the act of July 2, 1864, c. 217, to the Northern Pacific Railroad Company, embraced only the odd-numbered alternate sections of which the United States had at the time of definite location "full title, not reserved, sold, granted or otherwise appropriated, and free from preëmption or other claims or rights," provided that whenever prior to such definite location any sections or parts of sections had been granted, sold, reserved, "occupied by homestead settlers" or preempted or otherwise disposed of, other lands should be selected by the company "in lieu thereof" not more than ten miles beyond the limits of the alternate sections. By the same act the president was directed to cause

the lands to be surveyed forty miles in width on both sides of the entire line of road after the general route was fixed and as fast as might be required by the construction of the road; and it was provided that the odd sections of land "hereby granted" should not be liable to sale or entry or preëmption before or after they were surveyed, except by the company as provided in the act. The general route of the road was fixed in 1873, and in the same year the land office directed the local officers to withhold from "sale or entry" all odd-numbered sections falling within the forty-mile limits of the grant along the line of road.

In 1880 Congress passed an act for the relief of settlers on the public lands. In 1881 Nelson, qualified to enter public lands under the homestead acts, went upon the tract in question and thereafter continuously occupied it as his residence with the intention in good faith to avail himself of the benefit of the homestead acts. In 1884 the railroad company definitely located its line of road, and by November 18, 1886, had completed a section of forty miles coterminous with the land here in controversy.

The land, when occupied by Nelson as a residence, was unsurveyed, and was not surveyed until 1893; but as soon as surveyed, he attempted to enter it under the homestead laws; but his application was rejected by the local land officers. In 1895 the railroad company was given a patent to the land in question. *Held:*

(1) Although the company held a patent for the land in controversy, the occupant was entitled under the local law to judgment if it appeared that he was equitably entitled to possession as against the company.

(2) The occupancy of Nelson, as a homestead settler was protected by the act of Congress of 1864, although prior to such occupancy the land office had issued the order of withdrawal from entry or sale, based upon the map of general route.

(3) The railroad company acquired no vested interest in the granted lands prior to definite location; and as Nelson was in the occupancy of the land in question as a homestead settler at the time of such location, the land did not pass by the grant to the railroad company, and his title was the better one.

(4) The title of Nelson, if not otherwise protected, was protected by the third section of the act of May 14, 1880, c. 89, which contains a confirmation of the rights of qualified settlers on public lands, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws.

(5) The order of withdrawal directing the local land office to withhold from "sale or entry" the odd-numbered sections within the limits of the general route could not prevent the occupancy of land within those sections prior to definite location by one who in good faith intended to claim the benefit of the homestead law; such right of occupancy being distinctly recognized by the act of 1864, and such order of withdrawal not being required by that act. But if this were not so, the act of 1880, in its application to public lands, which had not become already vested in some company or person, must

be held to have so modified the order of withdrawal based merely on general route, that such order would not affect any occupancy or settlement made in good faith, as in the case of Nelson, after such withdrawal and prior to definite location.

THE Northern Pacific Railway Company brought this action in one of the courts of the State of Washington to recover from the plaintiffs in error the southeast quarter of section twenty-seven, township twenty, north of range fourteen, east of the Willamette meridian, in Kittitas County, in that State—the company claiming to be the owner in fee and alleging that the defendants were in unlawful possession of the land.

The defendants denied each of the allegations of the petition, and the case was tried under a stipulation of facts, which for the purpose of the trial were conceded to be true. The facts so conceded were as follows:

The company is a corporation of Wisconsin, and succeeded, prior to the commencement of this action, to whatever right, title or claim the Northern Pacific Railroad Company had, if any, to the land in dispute. The latter corporation was created by an act of Congress approved July 2, 1864, c. 217, granting lands in aid of the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific coast by the northern route, and by the acts and joint resolutions of Congress supplemental thereto and amendatory thereof. 13 Stat. 365. We will hereafter refer to those sections of the act, upon the construction of which the decision of this case mainly depends.

The railroad company duly accepted in writing the terms of the act of Congress, and on the 29th day of December, A. D. 1864, such acceptance was served on the President of the United States.

The company fixed the *general* route of its road extending coterminous with said land, and within forty miles thereof, by filing a plat of such route with the Commissioner of the General Land Office August 20, 1873. Thereafter, on November 1, 1873, that officer transmitted to the register and receiver of the land office for the district in which the land was situate the following letter of instructions:

Statement of the Case.

"Gentlemen: The Northern Pacific Railroad Company having filed in this department a map showing the general route of their branch line, from Puget Sound to a connection with their main line near Lake Pend d'Oreille in Idaho Territory, I have caused to be prepared a diagram which is herewith transmitted, showing the forty-mile limits of the land grant along said line, extending through your district, and you are hereby directed to withhold from *sale* or *entry* all the odd-numbered sections falling within these limits not already included in the withdrawal for the main-line period. The even sections are increased in price to $2.50 per acre, subject to preëmption and homestead entry only. This withdrawal takes effect from August 15, 1873, the date when the map was filed by the company with the Secretary of the Interior, as required by the sixth section of the act of July 2, 1864, organizing said company."

The letter of the Commissioner and the diagram therein referred to were received and filed in the local land office November 17, 1873.

The land in dispute was within the forty-mile limit of the land grant as designated in the diagram.

On December 6, 1884, the railroad company *definitely located* the line of its railroad, coterminous with and within less than forty miles of the land in controversy, by filing a plat of such line, approved by the Secretary of the Interior, in the office of the Commissioner of the General Land Office; and prior to November 18, 1886, it constructed and completed a section of forty miles of railroad and telegraph line extending over the line of definite location and coterminous with the land here in controversy. The President of the United States having appointed three commissioners to examine the same, and the commissioners having performed that duty reported to the Secretary on the 18th day of November, 1886, that the lines were completed in all respects as required by the act of Congress.

On the 30th of November, 1886, the Secretary transmitted that report to the President with a recommendation that the railroad and telegraph line be accepted and on the 7th day of December, 1886, the President approved that recommendation.

Counsel for Parties.

The United States executed and delivered, May 10, 1895, to the railroad company its letters patent, purporting to convey to the company the above tract under the terms and provisions of the act of 1864, and the various acts and joint resolutions of Congress supplemental thereto and amendatory thereof.

In the year 1881, *three* years *before* the *definite location* of the road, the defendant Henry Nelson went upon the above land and *occupied* it, and has since *continuously resided* thereon. It is agreed that he was at the time qualified to enter public lands under the act of Congress approved May 20, 1862, entitled "An act to secure homesteads to actual settlers on the public domain," and under the various acts supplemental thereto and amendatory thereof.

The land when occupied was unsurveyed, and was not surveyed until 1893. But *as soon as surveyed* Nelson attempted to enter it under the homestead laws of the United States in the proper United States district land office. His application was, however, rejected by the register and receiver because, in their opinion, it conflicted with the grant to the Northern Pacific Railroad Company.

The defendant Peter Nelson is in the occupancy of a portion of the land in question under license from his codefendant Henry Nelson.

Upon the facts so stipulated, the judgment was that the railroad company was not the owner, had no claim to and was not entitled to the possession of the land in dispute, and that the defendant Henry Nelson was entitled to remain in possession by virtue of the homestead laws of the United States. Upon appeal to the Supreme Court of Washington that judgment was reversed, and the cause remanded with directions to enter judgment for the company. 22 Washington, 521.

Mr. James Hamilton Lewis for plaintiffs in error. *Mr. C. H. Aldrich*, *Mr. Thomas B. Hardin* and *Mr. Ralph Kaufman* were with him on the brief.

Mr. James B. Kerr for defendant in error. *Mr. C. W. Bunn* was with him on the brief.

Opinion of the Court.

MR. JUSTICE HARLAN, after making the foregoing statement of facts, delivered the opinion of the court.

1. Before considering the merits of the case it is proper to remark that although the railroad company holds the patent of the United States for the land in controversy, the defendant, according to the laws of the State, was entitled to judgment, if it appeared that he was equitably entitled to possession as against the plaintiff. 2 Hills' Codes, § 530 *et seq.*; *Burmeister* v. *Howard*, 1 Wash. Ty. 207.

2. We have seen that the Northern Pacific Railroad Company was created by the act of Congress of July 2, 1864, c. 217, making a grant of lands in aid of the construction of the road from Lake Superior to Puget Sound. When that grant was made substantially the entire country between those points was untraveled as well as uninhabited except by Indians, very few of whom, at that time, were friendly to the United States. The principal object of the grant, as will appear from its language, was to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores, by means of a railroad and telegraph, and to that end and in order to bring the public lands into market it was deemed important to encourage the settlement of the country along the proposed route. The public lands in that vast region were unsurveyed, and it was not known when they would be surveyed. Congress, of course, knew that if immigrants accepted the invitation of the Government to establish homes upon the unsurveyed public lands, they would do so in the belief that the lands would be surveyed, that their occupancy would be respected, and that they would be given an opportunity to perfect their titles in accordance with the homestead laws.

Such was the situation when the act of July 2, 1864, was passed. Necessarily the act must be interpreted in the light of that situation. It should not be so interpreted as to justify the charge that the Government laid a trap for honest immigrants who risked the dangers of a wild, unexplored country, in order that they might establish homes for themselves and their families. And it should not be supposed that Congress had in view

only the interests of the company, which, with the aid of a munificent grant of lands, was empowered to connect Lake Superior and Puget Sound with a railroad and telegraph line.

Let us now see what is the fair import of the act of 1864, under which both parties claim possession.

By the third section of that act it was, among other things, provided as follows, to wit: "That there be, and hereby is, granted to the 'Northern 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, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, 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 *definitely fixed*, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, *prior to said time*, [of definite location,] 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. . . . "

By the sixth section of the act it was, among other things, provided as follows:

"§ 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." The stipulation of facts omits the latter part of section 6; but of the words omitted this court will take judicial notice. They are as follows: "But the provisions of the act of September, eighteen hundred and forty-one, granting preëmption rights, and the acts amendatory thereof, and of 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 hereby granted to said company. And the reserved alternate sections shall not be sold by the Government at a price less than two dollars and fifty cents per acre, when offered for sale."

The railroad company insists that after the order of withdrawal from "sale or entry" made in 1873 by the Commissioner of the Land Office, and based upon its map of general route, no right could be acquired by a settler upon any odd-numbered alternate section of land within the forty-mile limit indicated by the map of general route. As the lands in question were not surveyed until 1893, the company's contention means that during the twenty years succeeding the withdrawal in 1873 *all* the sections covered by the map of general route which would, upon a survey appear to be odd-numbered alternate sections, were absolutely excluded from occupancy by any settler having in view the homestead laws.

The defendant insists that the act of 1864 recognized the right of an immigrant to occupy any section of the public lands on the general route up to the time of the definite location of the road, provided it was done in good faith with the intention to perfect his title under the homestead laws whenever it became possible to do so, and that if at the time of *definite location* it appeared that he was in the occupancy of an odd-numbered alternate section the railroad company could not disturb him.

By the sixth section of the act of July 2, 1864, it was declared that the odd sections "hereby granted," that is, by that act granted, should not be liable to sale, entry or preëmption before

or after they were surveyed, except by the company, as provided in the act. But we have also seen, looking at the third section, which was the granting section of the act, that Congress did not *grant* every odd-numbered alternate section within the general limits specified, but *only* the odd-numbered alternate sections to which the United States had full title, and which had *not* been previously reserved, sold, granted or otherwise appropriated, *and* which were *free* from preëmption or "other claims or rights" *at the time* the line of the road was *definitely fixed*—giving to the railroad company the right to select lands, within certain limits, in place of such as were found, *at the date of definite location*, to have been disposed of or to be "*occupied by homestead settlers.*"

The first inquiry is whether the railroad company acquired any *vested* interest in the land in dispute by reason merely of the acceptance by the Land Department of its map of *general* route or by reason merely of the withdrawal order of 1873. In other words, did the land, after the *general* route was established, become segregated from the public domain and cease to be a part of the public lands, so as not to be subject to occupancy, in good faith, by homestead settlers, prior to definite location? These questions have a direct bearing on the present issues; for, if Congress did not intend—as, we think, it did not—that the railroad company should acquire any *vested* interest in these lands, prior to definite location, we can understand why it excluded from its grant any lands "occupied by homestead settlers" at the time of the *definite location* of the road.

The above questions are, we think, distinctly answered in the negative by recent decisions of this court. Let us see if such be not the case.

In *St. Paul & Pacific* v. *Northern Pacific*, 139 U. S. 1, 5, it was held that after a map of a *general* route was filed and *up to definite location*, the grant to the railroad company was in the nature of a "float," and land which previously to definite location had been reserved, sold, granted or otherwise appropriated, or upon which there was a preëmption "or other claim or right" *did not pass by the grant* of Congress.

In *United States* v. *Northern Pacific Railroad Company*, 152

U. S. 284, 296, 298, the court said: "The act of 1864 granted to the Northern Pacific Railroad Company *only* public land, . . . free from preëmption *or* other claims or rights *at the time its line of road was definitely fixed*, and a plat thereof filed in the office of the Commissioner of the General Land Office."

In *Northern Pacific Railroad Company* v. *Sanders*, 166 U. S. 620, 634, 636, it was adjudged that the railroad company "acquired, by fixing its *general* route, *only* an *inchoate* right to the odd-numbered sections granted by Congress, and no right attached to any specific section until the road was *definitely located* and the map thereof filed and accepted. Until such definite location it was competent for Congress to dispose of the public lands on the general route of the road as it saw proper." In the same case the court, after observing that as the lands there in dispute were not free from claims at the date of definite location, it was of no consequence what was done with them after that date, proceeded: "The only ground upon which a contrary view can be rested is the provision in the sixth section of the act of 1864, 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 by this act.' But this section is not to be construed without reference to other sections of the act. It must be taken in connection with section three, which manifestly contemplated that rights of preëmption *or other claims and rights might accrue or become attached to the lands granted after the general route of the road was fixed and before the line of definite location was established.* Literally interpreted, the words above quoted from section six would tie the hands of the Government so that even it could not sell any of the odd-numbered sections of the lands after the general route was fixed—an interpretation wholly inadmissible in view of the provisions in the third section. The third and sixth sections must be taken together, and so taken it must be adjudged that nothing in the sixth section prevented the Government from disposing of any of the lands prior to the fixing of the line of definite location, or, for the reasons stated, from receiving, under the existing statutes, applications to purchase such lands as mineral lands."

The principles announced in the *Sanders* case were reaffirmed in *Menotti* v. *Dillon*, 167 U. S. 703, 720, the court adding: "It is true, as said in many cases, that the object of an executive order withdrawing from preëmption, private entry and sale, lands within the general route of a railroad is to preserve the lands, unencumbered, until the completion and acceptance of the road. But where the grant was, as here, of odd-numbered sections, within certain exterior lines, '*not* sold, reserved or otherwise disposed of by the United States, and to which a preëmption or homestead claim may not have attached, at the time the line of said road is definitely fixed,' the filing of a map of general route and the issuing of a withdrawal order did not prevent the United States, by legislation, at any time prior to the definite location of the road, from selling, reserving or otherwise disposing of any of the lands which, but for such legislation, would have become, in virtue of such definite location, the property of the railroad company."

In *United States* v. *Oregon &c. Railroad*, 176 U. S. 28, 43, which involved the conflicting claims of two railroad companies to certain lands and required the court to determine the effect of a map of general route filed by the Northern Pacific Railroad Company, as well as the extent of the grant made to it, the court said: "If therefore the Perham map of 1865 were conceded for the purposes of the present discussion to have been sufficient as a map of 'general route'—and nothing more can possibly be claimed for it—these lands could not be regarded as having been brought by that map (even if it had been accepted) within the grant to the Northern Pacific Railroad Company, and thereby have become so segregated from the public domain as to preclude the possibility of their being earned by other railroad companies under statutes enacted by Congress after the filing of that map and before any definite location by the company of its line." In the same case: "In opposition to the views we have expressed it may be said that the clause in the act of July 25, 1866, providing for the selection under the direction of the Secretary of the Interior of lands for the Oregon Company in lieu of any that should 'be found to have been granted, sold, reserved, occupied by homestead set-

tlers, preëmpted or otherwise disposed of,' shows that Congress did not intend to include in but intended to exclude from the grant to that company any lands that could have been earned by the Northern Pacific Railroad Company by definitely fixing its route and filing its map of definite location. Undoubtedly those lands would be regarded as having been appropriated when the route of the Oregon road was definitely located, if prior to that date the route of the Northern Pacific Railroad had been definitely fixed, and if such lands were within the exterior lines of that route. But, as we have said, these lands were within the limits of the grant of July 25, 1866, and had not, *at that time*, or when the route of the Oregan road was definitely located, been appropriated for the benefit of the Northern Pacific Railroad Company, for the reason that the latter company had not then filed any map of definite location. *The Northern Pacific Railroad Company could take no lands except such as were unappropriated at the time its line was definitely fixed.* It accepted the grant of 1864 subject to the possibility that Congress might, before its line was definitely fixed, authorize other railroad corporations to appropriate lands within its general route, allowing it to select other lands in lieu of any so appropriated. The lands here in dispute were consequently subject to be disposed of by Congress when the act of 1866 was passed; and (the line of the Northern Pacific Railroad not having been definitely located prior to the passage of the forfeiture act of 1890) the Oregon Company became entitled to take the lands and to receive patents therefor in virtue of its accepted map of definite location." See also *Wilcox* v. *Eastern Oregon Land Co.*, 176 U. S. 51, and *Messinger* v. *Same*, 176 U. S. 58.

The cases above cited definitely determine that the railroad company acquired no vested interest in any particular section of land until after a definite location as shown by an accepted map of its line; and that until definite location the land covered by the map of general route was a "float," that is, at large.

In support of the proposition that the railroad company acquired an interest in the lands in dispute, upon its general route being established, reference has been made to some expressions

in the opinion of Mr. Justice Field in *Buttz* v. *Northern Pacific Railroad*, 119 U. S. 55, 71 and 72, to the effect that when the general route of that road was made known by a map duly filed and accepted, "the *law* withdraws from sale or preëmption the odd sections to the extent of forty miles on each side. The object of the law in this particular is plain; it is to preserve the land for the company to which, in aid of the construction of the road, it is granted." But it is evident, in view of both prior and subsequent decisions, that this language is not to be taken literally or apart from the other portions of the opinions of the eminent jurist who delivered the judgment of the court. If, upon the filing and acceptance of the map of *general* route, the *law* withdrew the odd-numbered sections, then the previous holding in many cases that until definite location the grant was a float, with no interest in specific sections being acquired by the railroad company, would be meaningless; and there would be some difficulty in Congress appropriating such lands prior to definite location. Indeed, it is manifest that the court did not mean to announce any new doctrine in the *Buttz* case; for Mr. Justice Field, when delivering judgment in that case, said that the charter of the Northern Pacific Railroad Company contemplated "the filing by the company, in the office of the Commissioner of the General Land Office, of a map showing the *definite location* of the line of its road, and *limits* the *grant* to *such* alternate odd sections as have not *at that time*, been reserved, sold, granted, or otherwise appropriated, and free from preëmption, grant, *or other claims or rights*; . . . Nor is there anything inconsistent with this view of the sixth section as to the general route, in the clause in the third section making the grant operative *only* upon such odd sections as have *not* been reserved, sold, granted, or otherwise appropriated, and to which preëmption and other rights and claims have not attached, *when a map of the definite location has been filed*."

Further, we had occasion in *Northern Pacific Railroad* v. *Sanders* and *United States* v. *Oregon &c. Railroad Company*, above cited, to limit the broad language in the *Buttz* case which implied that after the general route was fixed the land was withdrawn by the *law* for the railroad company. We

said in the last named case: "This language was too broad if it is construed to express the thought that public lands, when within the exterior lines of a 'general route,' are 'appropriated' from the time the map of such route is filed, so as to prevent them from being granted by Congress to and from being earned by another railroad corporation prior to the filing of a map of definite location by the company designating such general route."

It results that the railroad company did not acquire any *vested* interest in the land here in dispute in virtue of its map of general route or the withdrawal order based on such map; and if such land was not "free from preëmption or other claims or rights," or was "occupied by homestead settlers" at the date of the definite location on December 8, 1884, it did not pass by the grant of 1864. Now, prior to that date, that is, in 1881, Nelson, who is conceded to have been qualified to enter public lands under the homestead act of May 20, 1862, went upon and occupied this land and has continuously *resided* thereon. The land was not surveyed until 1893, but as soon as it was surveyed he attempted to enter it under the homestead laws of the United States, but his application was rejected, solely because, in the judgment of the local land officers, it conflicted with the grant to the Northern Pacific Railroad Company. He was not a mere trespasser, but went upon the land in good faith, and, as his conduct plainly showed, with a view to residence thereon, not for the purposes of speculation, and with the intention of taking the benefit of the homestead law by perfecting his title under that law, whenever the land was surveyed. And for fourteen years before the railroad company by an *ex parte* proceeding, and without notice to him, so far as the record shows, obtained from the Land Office a recognition of its claim, and for sixteen years before this action was brought, he maintained an actual residence on this land. It is so stipulated in this case. As the railroad had not acquired any vested interest in the land when Nelson went upon it, his continuous occupancy of it, with a view, in good faith, to acquire it under the homestead laws as soon as it was surveyed, constituted, in our opinion, a *claim* upon the land

within the meaning of the Northern Pacific act of 1864; and as that claim existed when the railroad company definitely located its line, the land was, by the express words of that act, excluded from the grant.

This view protects the *bona fide* settler in his home, established upon the invitation of the Government under great difficulties, and does no injustice to the railroad company; for, after restricting the grant to such odd-numbered sections of lands, within specified lateral limits, as were free from preemption or "other claims or rights" at the time the line of the road was definitely fixed, Congress, in the act of 1864, as we have seen, proceeded: "And whenever, prior to said time [of definite location] *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*," etc. The words "occupied by homestead settlers" show that Congress intended by the charter of the Northern Pacific Railroad Company—whatever it may have intended as to other companies receiving grants of public lands—that occupancy by a homestead settler, with the intention to take the benefit of the homestead laws, constituted a *claim* which, existing at the date of definite location, would exclude from the grant land that might otherwise be covered by it. If Congress did not intend thus to protect the occupancy of homestead settlers, the reference to lands being "occupied by homestead settlers," at date of definite location, was meaningless, and it was useless to reserve to the company the privilege of selecting lands in lieu of those lost by such occupancy. Congress knew, when passing the act of 1864, that one going west to establish his home could not know whether the unsurveyed land occupied by him would be an even-numbered or odd-numbered section. Hence, the provision in section 3 in relation to odd-numbered sections "occupied by homestead settlers." The efficacy of such a provision could not be destroyed except by further legislation. It is as if Congress had in words declared that among the "other claims or rights" of which the land must be free at the time of definite location in order that the railroad company might take, were claims aris-

ing out of occupancy by homestead settlers. Such settlers Congress, in effect, declared should be protected in their rights, and the railroad company should be reimbursed by lieu lands near by. Nelson's occupancy, we have seen, commenced in 1881, while the definite location of the road occurred in 1884. That he occupied and continuously resided upon the land in dispute as a homestead settler after 1881 is admitted.

If it be said that Nelson's claim was that of mere occupancy, unattended by formal entry or application for the land, the answer is that that was a condition of things for which he was not in anywise responsible, and his rights, in law, were not lessened by reason of that fact. The land was not surveyed until twelve years after he took up his residence on it, and under the homestead law he could not initiate his right by formal entry of record until such survey. He acted with as much promptness as was possible under the circumstances.

In *Ard* v. *Brandon*, 156 U. S. 537, 543, this court said: "The law deals tenderly with one who, in good faith, goes upon the public lands, with a view of making a home thereon. If he does all that the statute prescribes as the condition of acquiring rights, the law protects him in those rights, and does not make their continued existence depend alone upon the question whether or no he takes an appeal from an adverse decision of the officers charged with the duty of acting upon his application." In the same case the court quoted with approval these words from *Clements* v. *Warner*, 24 How. 394, 397: "The policy of the Federal Government in favor of settlers upon public lands has been liberal. It recognizes their superior equity to become the purchasers of a limited extent of land, comprehending their improvements, over that of any other person."

In the recent case of *Tarpey* v. *Madsen*, 178 U. S. 215, 219 —which was a contest between the Central Pacific Railroad Company and a preëmptor who sought to avail himself of the act of September, 1841—it was found as a fact that the land in dispute had on it, at the date of definite location, (which was on October 20, 1868,) the improvements of a *bona fide* settler; and one of the questions in the case was how far the rights of the settler, based upon a *bona fide* occupancy, were affected by

the absence of a local land office in which could be made some record of his application or entry. This court said: "It is true that there was then no local land office in which those seeking to make preëmption or homestead entries could file their declaratory statements or make entries, and the want of such an office is made by the Supreme Court of the State one of the main grounds for holding that the land did not pass to the railroad company. We agree with that court fully in its discussion of the general principles involved in the failure of the Government to provide a local land office. The right of one who has *actually occupied, with intent to make a homestead or preëmption entry, cannot be defeated by the mere lack of a place in which to make a record of his intent.* . . . If Olney was in possession of this tract before October 20, 1868, [date of definite location] *with a view of entering it as a homestead or preëmption claim,* and was simply deprived of his ability to make his entry or declaratory statement by the lack of a local land office, he could undoubtedly, when such office was established, have made his entry or declaratory statement in such way as to protect his rights." In the present case, the settler waited from 1881 to 1893 for the land to be surveyed, and as soon as that was done he attempted to enter it under the homestead law in the proper office, but his claim was overruled upon the theory, unfounded in law, that the land was covered by the railroad grant.

So far we have proceeded on the ground that as the act of 1864 granted to the railroad company the alternate sections to which at the time of definite location the United States had full title, not reserved, sold, granted or appropriated, *and* which were *free* from preëmption or other claims or rights at date of definite location, and authorized the company to select other lands in lieu of those then found to be "occupied by homestead settlers," Congress excluded from the grant any land so occupied with the intention to perfect the title under the homestead laws whenever the way to that end was opened by a survey.

3. But the case of the appellant does not depend entirely upon this view of the act of 1864. It is placed on impregnable ground by the act of May 14, 1880, c. 89, entitled "An act for the relief of settlers on public lands," and which was in force when,

in 1881, Nelson settled upon the land in dispute. The act is as follows: "1. That when a preëmption, homestead or timber-culture claimant shall file a written relinquishment of his claim in the local land office the land covered by such claim shall be held as open to settlement and entry without further action on the part of the Commissioner of the General Land Office. § 2. In all cases where any person has contested, paid the land office fees, and procured the cancellation of any preëmption, homestead, or timber-culture entry, he shall be notified by the register of the land office of the district in which such land is situated of such cancellation, and shall be allowed thirty days from date of such notice to enter said lands: *Provided*, That said register shall be entitled to a fee of one dollar for the giving of such notice, to be paid by the contestant, and not to be reported. § 3. That any settler who has settled, or who shall *hereafter settle*, on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States Land Office as is now allowed to settlers under the preemption laws to put their claims on record, and his right shall relate back to the date of settlement, the same as if he settled under the preëmption laws." 21 Stat. 140.

The third section of this statute is a distinct confirmation of the rights of a qualified person who had theretofore settled or should *thereafter* settle "on *any* of the public lands of the United States, whether *surveyed or unsurveyed*, with the intention of claiming the same under the homestead laws;" though, of course, no lands could be deemed of that character which had prior to such settlement become vested in a railroad company in virtue of an accepted map of *definite location*. It is, as we have seen, a fixed principle in the law relating to the administration of the public lands that a railroad grant is a mere float until definite location, and that prior to that date all lands, within the exterior limits of a general route, are entirely at the disposal of the Government, to be appropriated as it desires. The railroad company, as already shown, acquired, by its accepted map of general route, no interest in any specific lands,

but only a right to take those to which, at the date of definite location, the United States had full title, and upon which there was no claim, and which were not "occupied by homestead settlers." It was, therefore, competent for the United States by the act of 1880—which was four years prior to the definite location of the Northern Pacific Railroad—to give additional rights to those who had then settled, or might thereafter in good faith settle upon any of the public lands. Some who have made comments on this act seem to overlook the broad language of section three, and to forget that that section embraces not only those who had theretofore, but those who might *thereafter*, settle on the public lands, whether surveyed or *unsurveyed*. Nelson settled on unsurveyed public land, in which the railroad company had no vested or specific interest and the third section of the act of 1880 was purposeless if it did not allow him to perfect his title under the homestead laws, *as soon as the land was surveyed.*

The meaning we have given to the words "occupied by homestead settlers" in the act of 1864, and what has been said about the act of 1880, finds support in decisions of the Land Department. It will be well in view of the far-reaching consequences of the decision in the present case to refer to some of those decisions.

In *Southern Pacific Railroad (Branch)* v. *Lopez*, 3 L. D. 130, 131 (1884), Secretary Teller said that the act of July 27, 1866, 14 Stat. 292, relating to the Southern Pacific Railroad Company, "granted only such lands as were 'not reserved, sold, granted, or otherwise appropriated, and free from preëmption or *other claims or rights*' at date of definite location; and provided that 'whenever prior to said time any of said sections or parts of sections shall have been *occupied by homestead settlers*, preëmpted,' etc., lieu lands might be taken." It will be observed that this was the language of the Northern Pacific Act of 1864. The Secretary proceeded: "Now a homestead entry, which must be made on surveyed lands, would be within the descriptive terms 'other claims' without doubt; but the question material to the case before me, wherein the land was not surveyed, is whether a homestead settlement on unsurveyed

land, with a view to entering it when surveyed, is within said terms. I think it is. Construing together the granting words and those respecting the lieu land selection, it is evident that one of the 'other claims or rights' excepting land from the operation of the grant was 'occupation [occupied] by homestead settlers.' The word 'occupied' and the idea conveyed by it were foreign to the homestead law at date of this act, as an essential element in the reservation of land. I need not recite the numerous decisions of the courts and of the Land Department, which settle the principle that under the homestead law it is the 'entry' which reserves land (except for the short period during which it is reserved by settlement under the act of May 14, 1880,) and not any occupation by the claimant before or after it. The language of the granting act is therefore peculiar in this respect, and we are to suppose that it was used deliberately, with knowledge of then-existing law, and for a special and important purpose. We must interpret it in accordance with this evident purpose. *Congress was aware that by this act it was making grants of lands far beyond the line of the government surveys, in regions occupied and to be occupied largely by settlers awaiting the advent of the surveyor to prefer their claims.* By section 6 the homestead law was extended to the even sections after survey, and expressly withheld from the odd sections before and after survey, and yet in section 3 land '*occupied by homestead settlers*' was *excepted from the grant. Congress knew that unsurveyed land could not be 'entered' as homestead; it had in terms prohibited homestead 'entry' on these lands; it was aware that only by such 'entry' could a claim be appropriated and reserved from the grant, without express exception; and therefore in the use of the words 'occupied by homestead settlers' it intended to make such express exception, and to indicate a different kind of appropriation by a class of settlers not within the letter of the homestead law, though clearly within its spirit, namely, those who had made a home on the public domain in advance of the surveys, with the intention of subsequently claiming it under said law.* If this was not the purpose, then the employment of the peculiar language referred to was a vain and useless thing; and such a

thing we are not to suppose Congress had done. 92 U. S. 733. It therefore follows that the land claimed by Lopez, whose proofs are not questioned in any particular, and who preferred his claim promptly upon survey, was 'occupied by a homestead settler' *when the grant to this company took effect, and hence excepted from the operation of the grant.*"

In *Northern Pacific Railroad Company* v. *Anrys*, 10 L. D. 258–9 (1890), which was a contest between the Northern Pacific Railroad Company and a homesteader who had settled on unsurveyed public lands, Secretary Noble said: "It is urged that the land was not subject to the operation of the homestead law at the date of Newland's settlement, because unsurveyed, and that the homestead claim could have attached only by entry. But it must be remembered that the rights of the parties here must be determined by a proper construction of the *railroad grant* rather than of the general *homestead law.* It must be admitted that the ruling in the case at bar is in line with those of the Department for many years. In the case of *Southern Pacific Railroad Company* v. *Lopez*, 3 L. D. 130, the question here presented was fully discussed in connection with a grant framed in words identical with those used in the grant for the Northern Pacific Company, and it was held that a homestead settlement on unsurveyed land with a view to entering it when surveyed is within the term 'other claims,' and that 'it is evident that one of the "other claims or rights" excepting land from the operation of the grant was "occupation by homestead settlers."' In support thereof it was urged that Congress was aware that by the act in aid of a road extending across the western half of the continent, it was making a grant far beyond the line of government surveys, in regions occupied and to be occupied largely by settlers awaiting the advent of the surveyor to prefer their claims. In this view I concur. It seems beyond question that it was to protect such settlers as described above that Congress excepted from the operation of the grant tracts 'occupied by homestead settlers.' Had Congress intended to extend its protection only to those who had made entry, it would have said so, in other and appropriate words. The ordinary exception of 'lands to which

a homestead right has attached' would have fully protected that class of settlers. But Congress went further and made occupation the test, instead of entry. I do not deem it necessary to cite cases to show that the views of the Department on this point have not changed."

In *Spicer* v. *Northern Pacific R. R. Co.*, 10 L. D. 440, 443, the rights of an Indian were disputed by the Northern Pacific Railroad Company under the act of March 3, 1875, 18 Stat. 402, 420, c. 131, extending the benefit of the homestead laws of the United States, with certain restrictions upon the title when obtained, to Indians twenty-one years of age, or the head of a family having abandoned the tribal relations. Secretary Noble said: "The provisions of this act were in force at the date when the company's rights attached on definite location of its road, and, if the matters alleged relative to the claim of the Indian, Enoch, be true, he was *at that date, and had been for many years prior thereto, living upon the land in question, as his home, with the intention to acquire title thereto as a homestead; he had valuable and permanent improvements thereon, and had cultivated the same for many years, during all of which time he claimed it as his home.* Such a claim, it seems to me, is clearly covered by the excepting clause of the grant to the company, and, if proven, would be sufficient, in my judgment, to defeat the claim of the company to the land. True, the Indian had put no claim of record for the land, but it is well settled by departmental rulings that while such omission might defeat the claim as against a subsequent settler who duly places his claim of record, it will not defeat such claim as against the United States, and the land covered thereby *will be excepted from the operation of any grant for the benefit of a railroad company attaching subsequently to the inception of the settlement right. Northern Pacific Railroad Company* v. *Evans*, 7 L. D. 131, and authorities there cited. It is also well settled that a claim *resting on settlement, residence and improvements*, acquired prior right to the date when the company's rights attached under its grant, is sufficient to except the land covered thereby from the operation of such grant."

In *Northern Pacific Railroad Company* v. *McCrimmon*, 12

L. D. 554, it was said: "In support of this appeal, counsel for the railroad company contend that Thomas did not claim the land as government land, but as railroad land, and that, although the land was excepted from the withdrawal on general route, yet Thomas did not insist upon the right to take it as government land, but was satisfied to claim it under the railroad company. Under the ruling of the Department, as announced in the cases of *Northern Pacific Railroad Company* v. *Bowman*, 7 L. D. 238, and *Northern Pacific Railroad Company* v. *Potter*, 11 L. D. 531, the only question to be determined is, *whether there was a settlement on the land at date of definite location* by *one having the qualification to enter the land under the settlement laws*, and, if these facts are shown, *the land would be excepted from the operation of the grant*, although such settler might not have known of his right, but held the land under the belief that it was railroad land."

In *Northern Pacific Railroad Company* v. *Plumb*, 16 L. D. 80, it appeared that the land in dispute was within the primary limits of the company's grant as shown by map of definite location filed July 6, 1882, and was also within the limits of the withdrawal on map of general route filed February 21, 1872. Secretary Noble said: "The only question raised by the appeal is as to whether the occupancy shown by Plum was sufficient to defeat the grant. It appears that in 1881 Plumb took possession of the tract in question, together with an adjoining forty-acre tract, upon which he resided. In the spring of 1882 he broke the entire tract in question and enclosed it with a fence, and has since had possession of and improved the land. He had never exercised the preëmption right, and was therefore duly qualified to claim the land under his settlement right. In 1886 he contracted to purchase the adjoining forty acres, upon which he had resided, from the company, and at the hearing it was sought to show that he also claimed the land in question under the grant at the date of the definite location of the road, but the testimony will not warrant such a finding. *Being in possession of the land in question at the date of the definite location of the road with valuable improvements thereon, and duly qualified to assert a right thereto under the settlement*

laws, he had such a right to the land as served to defeat the grant, and the fact that the claim subsequently asserted by him was under a different law from those providing for settlement can in nowise affect his rights in the premises. Being excepted from the grant by reason of his settlement, Plumb was at liberty to seek title from the Government under any law under which such lands might be taken."

In *Northern Pacific Railroad Company* v. *Benz*, 19 L. D. 229, the land in dispute was within the limits of the grant to the company, as shown by map of definite location filed July 6, 1882, and was covered by the withdrawal upon general route of February 21, 1872. Secretary Smith said: "The present contest is between the railroad company on one part, and Hoy and Benz on the other. If it can be made to appear affirmatively, by good and sufficient testimony, that either of these parties, Hoy or Benz, was *in possession of* said land July 6, 1882, *when the line of the road opposite thereto was definitely fixed, and, at the same time, had the right to perfect title to the same under the preëmption or homestead laws, such possession excepted the land from the grant to the railroad company* and reduced the contest to one between Hoy and Benz; or, rather, to one between Hoy and the legal representatives of Benz, he having died since entering his appeal." It was found that on July 6, 1882, Hoyt was a competent entryman under the homestead laws.

What has been said as to the meaning and scope of the acts of 1864 and 1880 is not inconsistent with anything decided in *Maddox* v. *Burnham*, 156 U. S. 544, and *Wood* v. *Beach*, 156 U. S. 548.

In *Maddox* v. *Burnham* the question was as to the rights of a homestead occupant as against a certain railway company. Referring to the third section of the act of 1880, the court said: "By this section for the first time the right of a party entering land under the homestead law was made to relate back to the time of his settlement. But this act was passed *long after the rights of the railway company had accrued and the legal title had passed to it.* It is not operative, therefore, to divest such legal title, or enlarge *as against such title* any equitable rights which the defendant theretofore had." This was a case therefore in

which the claim based upon occupancy accrued after the legal title had become vested in the railroad company, not a case in which the grant was, as here, a float with no right attached to any specific section.

In *Wood* v. *Beach*—which was a contest between a homestead settler and a railway company—it appeared that the map of the line of definite location was filed December 6, 1866, and a withdrawal followed in 1867, while the occupation and settlement of the homesteader did not commence until June 8, 1870. Of course, the legal title to the sections granted vested in the railway company upon the filing and acceptance of the map of definite location. Besides the withdrawal in 1867 was pursuant to the express command of the act of Congress of July 26, 1866, 14 Stat. 290, § 4, which provided that as soon as the railway company should "file with the Secretary of the Interior maps of its line, designating the route thereof, it shall be the duty of said Secretary to withdraw from the market the lands granted by this act in such manner as may be best calculated to effect the purpose of this act and subserve the public interest." It might well be, therefore, that one whose right, resting upon occupancy, had accrued, as in *Maddox* v. *Burnham*, after the legal title passed to the railroad company, or one who, as in *Wood* v. *Beach*, did not settle upon the public lands until after the railroad company had definitely located its road, and after the lands had been withdrawn from market pursuant to the directions of an express act of Congress, could not, as against the railroad company, acquire an interest in them in virtue of the act of 1880.

Nor is there any conflict between the decision now rendered and *Northern Pacific Railroad* v. *Colburn*, 164 U. S. 383; for, as appears from the opinion and record in that case, the land there claimed to have been occupied by a homestead settler, at the date of definite location, was *surveyed* public land, and the good faith of the occupation was not manifested by an entry, or an attempt at entry, at any time in the local land office. It was held that the inchoate right of the homesteader must be initiated by a filing in the land office. In the present case, as we have seen, the land occupied was unsurveyed, and at the

time of such occupancy, the land being unsurveyed, there could not then have been any filing or entry in the land office.

The case before us is altogether different. Nelson's occupancy occurred after the passage of the act of 1880. While that act did not apply to a railroad company which had acquired the legal title, by a definite location of its road, it distinctly recognized the right prior to such time to settle upon the public lands, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws. In occupying the land here in dispute Nelson did not infringe upon any *vested* right of the railroad company; for there had not been at the date of such occupancy in 1881 any definite location of the line of the railroad, and the land, so occupied, with other lands embraced by the map of *general* route, constituted only a "float," the company having, at most, only an inchoate interest in them, a right to acquire them, *if, at the time of definite location*, it was not "occupied by homestead settlers" nor incumbered with "other claims or rights." The withdrawal merely from "sale or entry" in 1873, based only on a map of the general route of the road, did not identify any specific sections, was not expressly directed or required by the act of 1864, was made only out of abundant caution and in accordance with a practice in the Land Department, and did not and could not affect any rights given to homestead occupants by Congress in the acts of 1864 and 1880. Besides, the order made in 1873 to withhold from *sale* or *entry* all the odd-numbered sections falling within the limits of the general route was without practical value so far as the land in dispute was concerned; for such land had not been surveyed, and there could not have been any sale or entry of unsurveyed lands. At any rate, the order of withdrawal directing the local land office to withhold from "sale or entry" the odd-numbered sections within the limits of the *general* route could not prevent the *occupancy* of one of those sections prior to definite location by one who in good faith intended to claim the benefit of the homestead law; this, because such right of occupancy was distinctly recognized by the act of 1864. But if this were not so, the act of 1880, in its application to public lands, which have not become already vested in some

company or person, must be held to have *so modified the order of withdrawal based merely on general route, that such order would not affect any occupancy or settlement made in good faith, as in the case of Nelson, after the passage of that act, and prior to definite location.* This conclusion cannot be doubted, because the act of 1880 made no exception of public lands covered by orders of withdrawal from sale or entry based merely on general route, and because also public lands, which had not become vested in the railroad company, by the definite location of its line, were subject to the power of Congress.

It results that the Supreme Court of the State of Washington erred in not affirming the judgment of the court of original jurisdiction in favor of the defendants.

The judgment must be reversed, and the cause remanded for such further proceedings as may not be inconsistent with this opinion.

MR. JUSTICE BREWER, with whom MR. JUSTICE BROWN and MR. JUSTICE SHIRAS concur, dissenting.

I dissent from the judgment in this case. It overrules a unanimous judgment of this court, one which for nearly twenty years has been a guide to the Land Department in the construction of the Northern Pacific Railroad grant. Further, in effect it declares that an entire section in the act of Congress making the grant, a section which from the inception of the work of construction has always been regarded by the parties interested as a provision intended to secure to the company the full measure of lands granted, is meaningless, and gave the company absolutely no protection whatever.

It is admitted that the company fixed the general route of its road coterminous with the road in controversy and within forty miles thereof, by filing a plat of such route with the Commissioner of the General Land Office on August 20, 1873, and that on November 1, 1873, the odd-numbered sections within the forty-mile limits of this route were by the Land Department withdrawn from sale or entry and the even-numbered sections increased in price to $2.50, notice of which

order was immediately filed in the local land office. In 1881, eight years thereafter, the plaintiff in error for the first time entered upon the lands and commenced its occupation. It is also admitted that by construction of its road the company has perfected its title to its land grant. Now, when the company filed its map of general route and obtained from the Land Department the order of withdrawal, it believed that it acquired something. It did not suppose that it was doing a vain and useless thing. It did not believe that Congress had cheated it with a delusive expectation of a benefit which it did not intend to give.

Was it justified in such belief? To answer this it is well to look back to the condition of things at the time the granting act was passed. In 1862, Congress created the Union Pacific Railroad Company to build a railroad from the Mississippi River to the Pacific Ocean along the only then frequented line of travel. It made to the company a land grant, one fourth the size of the Northern Pacific grant, and agreed to lend it $16,000 and upwards per mile to aid in the construction, taking a first mortgage on the road as security for the loan. Notwithstanding this grant of land, this loan of money, and the fact that the road was to be along the only frequented line of travel, capital could not be induced to invest in the enterprise. Two years thereafter, and in 1864, Congress passed an amendatory act which doubled the land grant, making it half as large as that of the Northern Pacific, and agreed to take as security for its loan a second mortgage, giving to the company the right to place a first mortgage on the road in an amount equal to the government loan. And only after this large financial assistance and increased land grant was the work of construction commenced. On the same day Congress passed the act incorporating the Northern Pacific Railroad Company and making to it its grant. It promised no assistance in money, but only in lands. In order to give the company assurance that it would obtain its full grant it placed in the act section 6, the section which this court now holds is absolutely ineffectual therefor. That section reads:

"*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 preëmption 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 of 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 hereby granted to said company. And the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre, when offered for sale."

At the time of the passage of the act the entire body of the country from the western boundary of Minnesota to the Cascade Range was unoccupied, untraveled, and almost wholly unexplored. As said by Senator Hendricks, when the bill was before the Senate: "Everybody can see at a glance that it is a work of national importance. It proposes to grant lands in a northern latitude where, without the construction of a work like that, the lands are comparatively without value to the government. No person acquainted with the condition of that section of country supposes that there can be very extensive settlements until the government shall encourage those settlements by the construction of some work like this." And by Senator Harlan, the chairman of the Committee on Public Lands: "The Committee on Public Lands agree to report this bill favorably on account of the vast consequence that will attach to the completion of the road. The land is to be conveyed to the company only as the road progresses. The committee were of opinion that if the road should be built the government could well afford to give one half the land, for the distance of forty miles on each side of the road, to secure its completion. If it should not be built, no lands will have been conveyed." In other words, the proposition was to give half of the lands within forty miles

of the road to the company—not to give as much land as would be equal to half the lands within forty miles of the road, but to give half of those lands. The difference is obvious. The construction of a railroad increases the value of contiguous lands. Congress doubles the price of the even-numbered sections which it retains. It makes no little difference to a company whether it receives lands along the line of the road which it constructs, lands which have been increased in value by reason thereof, or an equal amount of lands hundreds of miles away and not so increased in value.

The withdrawal was not left to the discretion of the company, but was to be made by the President, after the general route had been fixed, and "as fast as may be required by the construction of said railroad." True, the language is that he "shall cause the lands to be surveyed;" but this, coupled with the prohibition against sale or entry, was tantamount to a direction to withdraw, and has always been so regarded by the Land Department and all parties interested. Thus he was to determine whether the time had arrived for a withdrawal. The withdrawal was in fact made. The President exercised his judgment and decided that the time had arrived for a withdrawal, and the Land Department through all its officials proceeded to act accordingly. The direction in the withdrawal was "to withhold from sale or entry all the odd-numbered sections falling within these limits." Surely this action of the President and the Land Department is entitled to the highest consideration. As said by Chief Justice Marshall in *Cohens* v. *Virginia*, 6 Wheat. 264, 418: "Great weight has always been attached, and very rightly attached, to contemporaneous exposition." See the many authorities on this proposition collected in *Fairbank* v. *United States*, 181 U. S. 283, 307.

But notwithstanding this section, notwithstanding the action of the executive officers in directing a withdrawal of this land from sale or entry, it is now held by the court that it was subject to homestead entry, and that the entryman acquired a right to obtain title by an entry made eight years after the withdrawal. Of course, as I said, such a ruling nullifies the section. A withdrawal from sale or entry which leaves un-

affected the right of purchase or entry is an irreconcilable contradiction. But can there be any reasonable doubt as to the meaning of section 6 or that Congress intended exactly what was done by the executive officers, to wit, the withdrawal of all the odd sections within the forty-mile limit from sale, entry or preëmption? The significant words are these: "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." Now it is said in the opinion of the majority that section 3 defines what is "hereby granted" as "every alternate section" to which "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 definitely fixed," that those lands, and those only, are the ones not liable to sale, entry or preëmption, except by the company. It will help to write out the sentence with a substitution for the words "hereby granted" of the definition thereof which is presented, and it will read substantially as follows: The odd sections of land within the withdrawal limits to which 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 the road is definitely fixed shall not from the time of the withdrawal until the filing of the map of definite location be liable to sale, entry or preëmption before or after they are surveyed, except by the company. Or, to put it in another form, the odd sections within the withdrawal limits, which no one purchases or enters before the filing of the map of definite location, shall not be purchased or entered by anybody except the company. It would be a failure of due respect to Congress to use language adequately expressive of the absurdity of such legislation. But Congress never meant any such thing. While it may be that the use of the words "hereby granted" was unfortunate, yet what was intended is clear. Congress intended to grant the odd-numbered sections and retain the even-numbered, and while in the granting clause some qualifications were placed in respect to the odd-numbered sections, in order to protect individual rights then existing, or which Congress might

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thereafter specifically create, yet as Congress was here not attempting a precise definition of what should pass by the grant, it used the term "granted lands" as descriptive generally of the odd-numbered sections, to distinguish them from the land retained, the even-numbered sections. It obviously intended that no rights should be acquired, either by sale, entry or preemption, to any of the odd-numbered sections after the filing of the map of general route, and this whether the lands were surveyed or unsurveyed. This is made clear by the last sentence in the paragraph. It says, "and the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre." Clearly that meant all the even-numbered sections, and not simply those which happened to be alternate to odd-numbered sections passing to the company. The truth is that in section 3 Congress defines specifically and carefully the lands which it granted. Its attention was directed in that clause to the matter of definition. While in section 6 it was not attempting to define, but to provide for a withdrawal before the filing of the map of definite location, and was simply endeavoring to make effective rights which it intended should accompany such withdrawal.

Again, in *Hewitt* v. *Schultz*, 180 U. S. 139, it was held that the withdrawal directed by Congress in section 6, coupled with the provision extending homestead and preëmption rights to all other lands on the line of the road, created an implied prohibition of any withdrawal of lands within the indemnity limits provided in section 3. It is unquestioned that, whenever a grant had been made of lands, the power of the Land Department to withdraw such body of lands, as might seem reasonably necessary for the satisfaction of the grant, had been frequently upheld by this court. See the long list of cases cited in the dissenting opinion on page 159. There is no express prohibition of like action by the Land Department in respect to lands within the Northern Pacific indemnity limits, and the judgment was based solely on the implied prohibition above referred to. The opinion of the court rested mainly on the rulings of the Land Department, as primarily expressed in the opinion of Secretary Vilas in *Northern Pacific Railroad Com-*

pany v. *Miller*, 7 Land Dec. 100, from whose opinion large quotations were made, and in respect to rulings of the Land Department generally, it was said, conceding that the question involved was one of doubt (p. 157):

"'It is the settled doctrine of this court,' as was said in *United States* v. *Alabama Great Southern Railroad*, 142 U. S. 615, 621, 'that, in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced.'"

Turning to the opinion of Mr. Secretary Vilas, we find him saying (pp. 110, 111, 113, 119):

"But a peculiarity in legislation of this character is found in the sixth section of the act, in which a provision authorized the 'general route' to be fixed, and required lands to be surveyed for forty miles in width on both sides of the entire line so fixed, and directed that the odd-numbered sections granted by the act should not be liable to sale or entry or preëmption before or after they were surveyed, except by said company. In the language of the Supreme Court, in *Buttz* v. *Northern Pacific R. R.*, 119 U. S. 71: 'The act of Congress not only contemplates the filing by the company, in the office of the Commissioner of the General Land Office, of a map showing the definite location of the line of its road, and limits the grant to such alternate odd sections as have not, at that time, been reserved, sold, granted, or otherwise appropriated, and are free from preemption, grant, or other claims or right; but it also contemplates a preliminary designation of the general route of the road, and the exclusion from sale, entry, or preëmption of the adjoining odd sections within forty miles on each side until the definite location is made.'

"The facts which have been recited, show beyond all reasonable question that the privilege given to the company of fixing, first, a line of general route, upon the basis of which the odd-numbered sections within forty-mile limits on either side were

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to be withdrawn from sale or entry or preëmption before and after survey, was fully exercised by the company in Washington Territory, from the eastern boundary to the mouth of the Walla Walla River, and thence along the Columbia to the first range line west of the Willamette principal meridian, and thence north to the international boundary, by its filing and the department's approval of its maps of location on the 30th of July, 1870. These maps and the action taken thereon fully met every requirement of the statute in that behalf. The company, by resolution fixed this line as the basis of withdrawal, made its formal request that the land should be withdrawn thereon, the line was plainly and sufficiently described, the department accepted it, and applied the statutory consequence by directing the local land officers in Washington Territory to withdraw the odd-numbered sections along that line as far north as the town of Steilacoom, first, for a width of twenty miles on either side, and, later in the same year, within the limit of an additional twenty miles; and also by increasing the minimum price of the even-numbered sections within the same limits to two dollars and fifty cents per acre. Thus the action of the company and of the department coöperated to give official determination to the fact upon which the statute became applicable, both to withdraw the odd-numbered sections and to double the minimum price of the even-numbered sections, and both effects were formally recognized and declared. It cannot be doubted that, had no other action been taken before the line of the road for construction was definitely located, this action in regard to the line of the general route of 1870, must have remained continuously operative upon all lands within the limit of forty miles on either side of the line so established. So obvious is this, indeed, that from the mouth of the Walla Walla River, westwardly along the Columbia, that withdrawal remains to this day obligatory and operative by force of the statute and of that location. . . . By virtue of that withdrawal the odd-numbered sections within forty miles of all that portion of the route lying east of the Columbia remained for nearly two years at least segregated from the public domain, and all purchasers of the even-numbered sections

were required to pay the double minimum price for the land they bought. . . . Having provided the condition upon which a withdrawal of the public domain should be operative upon a preliminary general route for the benefit of this company, without any latitude of authority for any other, the legislative will must be regarded as exclusive of any other. . . . Thus, *the meaning of the act appears to be that the provisional line of general route should, in the first place, be taken as the line upon which the grant was made, and, during the period while no other line was fixed than such line of general route, the lands in the odd-numbered sections within forty miles should be taken as the granted lands, and, therefore, they are declared by the statute to be the 'hereby granted' lands.*" (The italics are mine.)

Thus the court held that, because by section 6 the odd-numbered sections were withdrawn from sale or entry, and at the same time it was declared that the homestead and preëmption laws should apply to all other lands, there was an implied prohibition upon the Land Department's withdrawal of odd-numbered sections within the indemnity limits. Now it is held that the withdrawal directed by section 6 and made by the Secretary of the Interior was absolutely meaningless and secured nothing to the company. If the withdrawal directed by section 6 intended nothing, accomplished nothing, it should not have been made the basis for an implied prohibition of the hitherto unquestioned power of the Land Department to withdraw lands in indemnity limits. There is an incongruity in the two decisions which, to my mind, is, to use no stronger expression, both sad and startling.

Further, the Land Department did in fact withdraw from sale or entry all the odd-numbered sections within the forty-mile limits of the general route—and this withdrawal included the tract in controversy as well as the other odd-numbered sections—and notice thereof was filed in the local land office, and this many years before the plaintiff in error went upon the land. As heretofore stated, the power of the Land Department to withdraw from private entry lands which it has reason to believe may be necessary to satisfy a land grant has never been

denied. It is a power which has been exercised again and again from the inception of land grants. In one case, (*Wolcott* v. *Des Moines Company*, 5 Wall. 681,) we sustained a withdrawal made by the department beyond the real terminus of the grant on the ground that there was some doubt where the grant terminated, and therefore the department was justified in making the withdrawal cover any possible conclusion as to such terminus. There was in the Northern Pacific act no prohibition on the Land Department's exercise of this customary power. Indeed, as I have shown, it was held in *Hewitt* v. *Schultz*, 180 U. S. 139, *supra*, that the express direction to withdraw lands in the place limits was the foundation of an implied prohibition on a withdrawal of lands within the indemnity limits. The purpose and effect of a withdrawal are not to vest any title in the beneficiary of the grant, but to preserve the lands from private entry in order that when the time arrives the grantee may receive the full measure of its grant. As said in *Menotti* v. *Dillon*, 167 U. S. 703, 720, 721:

"It is true, as said in many cases, that the object of an executive order withdrawing from preëmption, private entry and sale, lands within the general route of a railroad is to preserve the lands, unencumbered, until the completion and acceptance of the road. . . . That order took these lands out of the public domain as between the railroad company and individuals, but they remained public lands under the full control of Congress, to be disposed of by it in its discretion at any time before they became the property of the company under an accepted definite location of its road."

This language was quoted with approval in *United States* v. *Oregon &c. Railroad Company*, 176 U. S. 28, 48.

Again, in *Northern Pacific Railroad* v. *Musser-Sauntry Company*, 168 U. S. 604, 607, we said:

"The withdrawal by the Secretary in aid of the grant to the State of Wisconsin was valid, and operated to withdraw the odd-numbered sections within its limits from disposal by the land officers of the government under the general land laws. The act of the Secretary was in effect a reservation."

And the same doctrine has been affirmed in many cases.

Turning to the rulings of the Land Department, in *Hestetun* v. *St. Paul &c. Railway Company*, 12 Land Dec. 27, 28, it was said by Secretary Noble:

"The legal effect of the withdrawal is to preclude the disposal of the land covered thereby, under any of the land laws. In other words, so long as the withdrawal remains in force the land covered thereby is simply held for the purpose for which the withdrawal was made."

And again, in the same volume, in *In re Chicago &c. Railway Company*, pp. 259, 261:

"In the case of *Riley* v. *Wells*, referred to and quoted in the *Shire* case, it was said by the Supreme Court that settlement upon and possession of land within the limits of an executive withdrawal were 'without right,' and that the subsequent recognition by the land officers of such settlement and possession, and the permission to the party to make proof and entry under the preëmption law, and the issuing patent 'were acts in violation of law and void.' This case of *Riley* v. *Wells* has never been overruled or modified, but has been referred to and approved in a number of the decisions of the Supreme Court, and must therefore be accepted as expressing the opinion of that tribunal as to the absolute invalidity of settlements upon lands withdrawn by executive order."

In *In re Hans Oleson*, 28 Land Dec. 25, 31, Secretary Bliss thus defined the word "withdrawal":

"In the nomenclature of the public land laws the word 'withdrawal' is generally used to denote an order issued by the President, Secretary of the Interior, Commissioner of the General Land Office, or other proper officer, whereby public lands are withheld from sale and entry under the general land laws, in order that presently or ultimately they may be applied to some designated public use, or disposed of in some special way. Sometimes these orders are not made until there is an immediate necessity therefor, but more frequently the necessity for their making is anticipated."

And in the same volume (*Inman* v. *Northern Pacific Railroad*) the same Secretary uses this language (pp. 95, 100):

"From the authorities cited the following rules are clearly

deducible: First. Subject only to the control and power of disposition remaining in Congress, an anticipatory withdrawal, whether legislative or executive, during the time it remains in force, withholds the lands embraced therein from other appropriation or disposition, and prevents the acquisition of any legal or equitable title or right by settlement or entry in violation of such withdrawal."

Similar declarations may be found in almost every volume of the Land Decisions.

In the execution of this Northern Pacific land grant many withdrawals were made as called for from time to time along the line of general route and the Land Department has uniformly recognized the validity and effect of such withdrawals. In *Northern Pacific Railroad* v. *Pressey*, 2 Land Dec. 551, it appeared that Pressey settled upon a tract within forty miles of the line of general route; that the lands at the time of his settlement were unsurveyed; that after survey he made application for a homestead entry, and it was held that he acquired no rights by his settlement, inasmuch as the land had been withdrawn by order of the Land Department, Secretary Teller saying (p. 553):

"The settlement by Pressey upon the odd section was clearly in violation of the order of withdrawal, and he could acquire no rights or equities under such a settlement."

In *Northern Pacific Railroad* v. *Miller*, 7 Land Dec. 100, a case in which the implied prohibition of the withdrawal of indemnity lands was first distinctly decided in the Land Department, Secretary Vilas said (p. 110) in reference to the withdrawal of lands within the place limits of the line of general route:

"Thus the action of the company and of the department cooperated to give official determination to the fact upon which the statute became applicable, both to withdraw the odd-numbered sections and to double the minimum price of the even-numbered sections, and both effects were formally recognized and declared. It cannot be doubted that, had no other action been taken before the line of the road for construction was definitely located, this action in regard to the line of the general route of 1870, must have remained continuously operative upon

all lands within the limit of forty miles on either side of the line so established. So obvious is this, indeed, that from the mouth of the Walla Walla River, westwardly along the Columbia, that withdrawal remains to this day obligatory and operative by force of the statute and of that location.

"If authority be wanting to so manifest a proposition, it is found in the following language of the Supreme Court in the case already referred to."

In *McClure* v. *Northern Pacific Railroad*, 9 Land Dec. 155, in an opinion by Secretary Noble, it was held that, "when the map of general route was filed, the withdrawal thereunder became at once effective, and reserved from general disposal the odd-numbered sections embraced therein."

In *Northern Pacific Railroad* v. *Collins*, 14 Land Dec. 484, it was again decided by the same Secretary that "lands withdrawn for the benefit of said grant are not subject to settlement."

In *Central Pacific Railroad* v. *Beck*, 19 Land Dec. 100, which was also a settlement upon unsurveyed land within the place limits of the general route of the road, and in which a withdrawal had been ordered in accordance with the provisions of the act making the grant, Secretary Smith, sustaining the title of the railroad company, said (p. 103):

"I am clearly of the opinion that after the withdrawal made upon the map of general route, no rights could be acquired adverse to the company by settlement upon the land, and that a settlement so made, even though it existed at the date of the filing of the map of definite location, would not serve to except the land settled upon from the operation of the grant to said company."

In the very last volume of the Land Decisions (vol. 30, p. 247,) in respect to the Southern Pacific Railroad Company, whose granting act contained a similar provision in reference to withdrawal on the filing of a map of general route, it was said by Secretary Hitchcock (p. 249):

"As between individual claimants and the company no claim could be predicated upon settlement or entry made after the filing of the map of general route, and as against such claims

the grant in effect was operative from April 3, 1871, the date upon which the map of general route was filed."

So that from the beginning until the present time in construing this grant and others containing like provision there has been an unbroken line of decisions in the Land Department to the effect that a withdrawal made on the filing of the map of general route prevents any private claims attaching to the odd-numbered sections of land; and this whether the lands were surveyed or unsurveyed. Indeed, when Congress in the sixth section expressly declared that the lands "shall not be liable to sale, or entry, or preëmption before or after they are surveyed," it would seem as though it had made every provision which language was capable of expressing to reserve from private entry for the benefit of the railroad company all odd-numbered sections, surveyed or unsurveyed, within the place limits of the line of general route.

I have already quoted from *Hewitt* v. *Schultz*, 180 U. S. 139, in reference to the duty of following, in case of ambiguity, the construction given to a statute by the department charged with the execution of such statute. That doctrine was there applied although it appeared that the practice of the department during the building of the railroad had been one way and only changed after its completion, and the latter construction was upheld by this court as the ruling of the department. It was said (p. 156):

"It was admitted at the hearing that the construction of the Northern Pacific act of 1864 announced by Secretary Vilas had been adhered to in the administration of the public lands by the Land Department. We are now asked to overthrow that construction by holding that it was competent for the Land Department, immediately upon the definite location of the line of the railroad, to withdraw from the settlement laws all the odd-numbered sections within the indemnity limits as defined by the act of Congress. If this were done 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 homes under the preëmption and homestead laws, in reliance upon the ruling of Secretary Vilas and his successors in office, would be destroyed."

Now we have a case in which the ruling of the department has been unchanged from the commencement to the present time—a ruling which Secretary Vilas in 7 Land Dec. *supra*, called "so manifest a proposition," and it is wholly disregarded. The recent and temporary ruling of the Land Department was in the former case sustained in order, as was said, to protect the settler. Here the continuous practice of the department is disregarded and the patent issued by it to the railroad company is overthrown.

Still again, the company, by reason of section 6, believing that a withdrawal was to be made which should operate to its benefit, filed a map of general route, and a withdrawal was made of the odd-numbered sections of land. It is now held that such withdrawal did not withdraw the odd-numbered sections from entry and sale, but they remained still open to entry or purchase under the land laws. If that be the true construction, it follows that, whereas, if the company had filed no map of general route, no one would know where its line of road was to be until after it filed the map of definite location, and then the title would attach to all odd-numbered sections not burdened with existing claims. But by filing the map of general route, as it did eleven years before filing the map of definite location, it notified everybody of the proposed route, and so all settlers could take advantage of that knowledge and enter the odd-numbered sections contiguous thereto. Having this knowledge of where the line was to be located, of course settlers would come as near to that line as possible, in order to take advantage of the increased value coming from the construction of the road, and so taking advantage of the notice given would deplete the grant of lands which Congress had intended for the benefit of the company.

But this question has been definitely decided by this court. *Buttz* v. *Northern Pacific Railroad Company*, 119 U. S. 55. That was an action brought by the railroad company for the possession of a tract of land within forty miles of the general route as also of the line of definite location of plaintiff's road. The defendant entered upon the land in October, 1871, he at the time possessing all the qualifications of a preëmptor and in-

tending to obtain title by preëmption. At that time the tract was, with others, in the occupation of the Sioux Indians. An agreement for the surrender by the Indians of all their rights was ratified on May 19, 1873. On May 26, 1873, the company filed in the Land Department its map of definite location. The defendant was therefore in occupation of the tract with intent to preëmpt it for seven days after the rights of the Indians had ceased and before the filing of the map of definite location. So if the opinion of the court now announced had prevailed the defendant was entitled to hold that tract as against the company. On the 11th of August, 1873, he presented his application for entry, which was refused, and refused because it was within the forty-mile limit, as shown by a map of general route filed on February 21, 1872. This presents the precise question here involved. The unanimous opinion of the court sustained the action of the Land Department in refusing defendant's application to enter and confirmed the title of the railroad company. In the course of the opinion, by Mr. Justice Field, it was said (p. 72):

"When the general route of the road is thus fixed in good faith, and information thereof given to the Land Department by filing the map thereof with the Commissioner of the General Land Office, or the Secretary of the Interior, the law withdraws from sale or preëmption the odd sections to the extent of forty miles on each side. The object of the law in this particular is plain; it is to preserve the land for the company to which, in aid of the construction of the road, it is granted. . . . Nor is there anything inconsistent with this view of the sixth section as to the general route, in the clause in the third section making the grant operative only upon such odd sections as have not been reserved, sold, granted, or otherwise appropriated, and to which preëmption and other rights and claims have not attached, when a map of the definite location has been filed. The third section does not embrace sales and preëmptions in cases where the sixth section declares that the land shall not be subject to sale or preëmption. The two sections must be so construed as to give effect to both, if that be practicable."

This decision, rendered seventeen years ago, has never hitherto

been overruled. It was reaffirmed in *St. Paul & Pacific Railroad Company* v. *Northern Pacific Railroad Company*, 139 U. S. 1, 17, 18, in which, speaking for a unanimous court, Mr. Justice Field said:

"Besides, the withdrawal made by the Secretary of the Interior of lands within the forty-mile limit, on the 13th of August, 1870, preserved the lands for the benefit of the Northern Pacific Railroad from the operation of any subsequent grants to other companies not specifically declared to cover the premises. The Northern Pacific act directed that the President should cause the lands to be surveyed forty miles in width on both sides of the entire line of the road, after the general route should be fixed, and as fast as might be required by the construction of the road, and provided that the odd sections of lands granted should not be liable to sale, entry or preëmption before or after they were surveyed, except by the company. They were therefore excepted by that legislation from grants, independently of the withdrawal by the Secretary of the Interior. His action in formally announcing their withdrawal was only giving publicity to what the law itself declared. The object of the withdrawal was to preserve the land unencumbered until the completion and acceptance of the road. . . . After such withdrawal, no interest in the lands granted can be acquired, against the rights of the company, except by special legislative declaration, nor, indeed, in the absence of its announcement, after the general route is fixed."

In the opinion of the majority some later cases are referred to which are said to qualify the decision in *Buttz* v. *Northern Pacific Railroad Company*. But even the slightest attention to what was decided in those cases shows that in no manner do they qualify or limit that decision so far as it affects the present question. Before noticing those cases it is well to consider what was the purpose and effect of section 6. It was not a granting section. It did not purport to give title to anything to the company. Its whole scope and effect was to withdraw from sale, entry or preëmption the odd-numbered sections in order that when the company filed its map of definite location it might secure those odd-numbered sections. The grant was

made only by section 3 and attached to particular lands when the map of definite location was filed, but the proposition laid down in the *Buttz* case—and the proposition I am contending for here—is that this plaintiff in error could acquire nothing by his entry upon an odd-numbered section after the filing of the map of general route and the withdrawal; that the tract was therefore free from a claim of any kind when the map of definite location was filed, and so there was nothing to prevent the railroad company from receiving title.

Now the cases referred to are *St. Paul & Pacific* v. *Northern Pacific*, 139 U. S. 1; *United States* v. *Northern Pacific Railroad Company*, 152 U. S. 284; *Northern Pacific Railroad Company* v. *Sanders*, 166 U. S. 620; *Menotti* v. *Dillon*, 167 U. S. 703; *United States* v. *Oregon &c. Land Company*, 176 U. S. 28; *Wilcox* v. *Eastern Oregon Land Company*, 176 U. S. 51, and *Messinger* v. *Same*, 176 U. S. 58. After quoting from the opinions in some the court sums up by saying "the cases above cited definitely determine that the railroad company acquired no vested interest in any particular section of land until after a definite location was shown by an accepted map of its line." This is a proposition among the A, B, C's of public land law and needed no authorities in support thereof. But that proposition throws no light on the question as to the scope of the withdrawal given by section 6, and when the cases themselves are referred to not one of them conflicts with the proposition I have heretofore laid down. I have already shown what was decided in *St. Paul & Pacific* v. *Northern Pacific*, and need not repeat. In *United States* v. *Northern Pacific Railroad Company* it appeared that the Northern Pacific Railroad Company had attempted to locate a line from Portland directly north to Puget Sound, and in 1865 had filed a map of the general route thereof. Such a line was not within the authority granted by the act of Congress incorporating the Northern Pacific Railroad Company. On May 4, 1870, Congress made a land grant to the Oregon Central Railroad Company which included some of the lands within the forty-mile limits of the above-mentioned general route. On May 31, 1870, and twenty-seven days after the grant to the Oregon Central Railroad

Company, Congress passed an act which authorized the Northern Pacific Company to construct a line from Portland to Puget Sound, with the privileges and grants provided for in the original act of incorporation, and it was held that the rights of the Oregon Central Railroad Company antedated and were superior to those of the Northern Pacific. First in time, first in right, is as to lands within place limits the settled rule of railroad land grants. What possible bearing this decision can have upon the case before us it is hard to conceive. In *Northern Pacific Railroad Company* v. *Sanders*, 166 U. S. 620, the lands in controversy were claimed as mineral lands, and applications for entry of them as such were pending in the Land Department. The court had held in *Barden* v. *Northern Pacific Railroad Company*, 154 U. S. 288, that mineral lands did not pass under the grant to the railroad company, and that whether they were known or not known to be mineral lands at the time of the filing of the map of definite location was immaterial. Of course, it followed that whether they were known or not known at the time of the filing of the map of general route was also immaterial. The lands were of such a character as could not in any event pass to the railroad company any more than the even-numbered sections. They were not withdrawn by filing the map of general route; they did not pass by filing the map of definite location. The four remaining cases all proceeded upon the one proposition that the mere filing of the map of general route does not preclude Congress from making subsequently thereto and prior to the filing of the map of definite location—that is, prior to the time when title vested in the company—any other specific grant of the reserved lands. In other words, until the proposed grantee shall have done all that is necessary to vest title in it, there remains in Congress the power to make other disposition of the lands. But this was no new doctrine in the public land law. It was laid down in *Frisbie* v. *Whitney*, 9 Wall. 187; in the well-known *Yosemite Valley Case*, 15 Wall. 77, and has been followed in many cases since. Of course, Congress could at any time before the filing of the map of definite location and while the title of the company was still inchoate, reserve any

JUSTICES BREWER, BROWN and SHIRAS dissenting.

of the lands for military or other purposes or make a specific grant of them to individuals or corporations. But as said in *St. Paul & Pacific Railroad Company* v. *Northern Pacific Railroad Company*, 139 U. S. 1, 18, "after such withdrawal, no interest in the lands granted can be acquired, against the rights of the company, except by special legislative declaration," and in this case there has been no such legislative declaration.

But it is said that the case of the plaintiff in error is "placed on impregnable ground by the act of May 4, 1880, c. 89." I pass the proposition that this is a general act for the relief of settlers on public lands and the familiar doctrine that a general law passed after a special act does not interfere with the provisions of that act, provided there is room for the operation of both, and there is ample room for the operation of this act on public lands generally without interfering with the special provisions made in the Northern Pacific grant. But the act itself has no force whatever as applied to the present question. The provision is that one who is a settler on any of the public lands of the United States "with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States land office as is now allowed to settlers under the preëmption laws to put their claims on record, and his right shall relate back to the date of settlement, the same as if he settled under the preëmption laws." If we turn to the preemption law we find, Revised Statutes, section 2264, that a person intending to preëmpt shall "within thirty days after the date of such settlement, file with the register of the proper district a written statement." That is, the preëmptioner had thirty days after settlement within which to make his entry, while when we turn to the homestead law, Revised Statutes, section 2290, we find that a party seeking to homestead "shall, upon application to the register of the land office in which he is about to make such entry, make affidavit . . . that his entry is made for the purpose of actual settlement and cultivation." In other words, his right is initiated by the application to enter, and does not relate back to any settlement, and this statute simply gives him a right of thirty days' occupancy be-

fore making his application to enter. How such a statute, equalizing the rights of one seeking to make a homestead entry with those of one seeking to make preëmption, can have any pertinency to the question before us passes my comprehension.

Again, several pages of the opinion are taken up with references to quotations from opinions in the Land Department as to the meaning of the term "occupied by homestead settlers." Here again I am unable to see the pertinency of these references. If there had been no withdrawal and the question arose as to the effect of plaintiff in error's occupancy of the land as against the rights of the company obtained by the map of definite location these authorities might be worth considering, but they throw no light upon the effect of the withdrawal, which is the question before us.

The fact that this tract was not surveyed at the time the plaintiff in error entered upon it nor until after the completion of the road is immaterial. By the terms of section 6 the prohibition against sale, entry or preëmption extended to lands "before or after they are surveyed." Reference is made to several cases in which we held that the rights of a settler were not lost by the failure of the government to make a survey prior to his occupation. But those decisions were to the effect that the settler loses nothing by the neglect of the government. Here it is held that he gains something. If the survey had been completed before he commenced his occupation, and he could not then enter an odd-numbered section, surely he could not, in face of the prohibition of the section, enter the land after it had been surveyed. If instead of going upon lands that had been surveyed the settler chose to go into unsurveyed territory, he took his chances of placing his improvements upon an odd or even-numbered section. If he placed them upon what proved to be an odd-numbered section, he acquired no right as against the grant to the company. If he put them on what proved to be an even-numbered section, he would be compelled to pay the government double price. In the latter event does any one for a moment suppose that it would be an answer to the demand for a double price that the government had failed to make a survey before he chose to occupy the land and make

improvements thereon? The construction placed by the majority not only takes from the railroad company the land which was granted to it, but deprives the government of that which it intended to obtain, a double price for the lands it reserved for sale.

Finally, I may say this decision clouds the title to all the lands granted to the railroad company. At the time the map of definite location was filed, as well as at the time the road was completed, there was not on the records of the Land Department a single word or mark which indicated to anybody that plaintiff in error was on the land or claiming it, or that the title of the railroad company was other than perfect. But because plaintiff in error was on the land it is held that the patent of the government to the railroad company conveyed to it no title, and that this occupant by parol testimony may show the fact of his occupancy and overthrow the record title. Yet this court unanimously held in *Northern Pacific Railroad* v. *Colburn*, 164 U. S. 383, that mere occupation, unaccompanied by the filing of a claim in the land office, did not exclude a tract from the operation of the land grant. And that there was no oversight or lack of attention to this particular matter is shown by the fact that the United States promptly filed a brief of thirty-six pages, quoting the principal land decisions referred to in the opinion of the majority, and asked the court to reconsider its decision, which application was denied without dissent. Indeed, as appears from the authorities cited in that opinion, the conclusion was in accord with prior rulings, to the effect that there must be something of record in the Land Department to support the contention of an adverse right. That unanimous opinion of the court is put one side by the assertion that the land there in controversy had been surveyed while in this it had not been. No distinction was made in the discussion between surveyed and unsurveyed lands, no suggestion that it affected the question in the slightest degree, and, as we have seen, the prohibition against sale, entry or preëmption in section 6 extended to lands unsurveyed as well as surveyed. How can one say in respect to any tract claimed by the railroad company that it was not at the time of the filing of the map of definite

location in the occupation of some one intending to preëmpt or homestead it? If such occupation is sufficient to avoid the patent of the United States, has the company sure title to any lands?

I think the judgment ought to be affirmed.

SMYTHE *v.* UNITED STATES.

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

No. 88. Argued November 12, 1902.—Decided January 26, 1903.

An action upon the official bond of a superintendent of the Mint at New Orleans, conditioned among other things that he would "faithfully and diligently perform, execute and discharge all and singular the duties of said office according to the laws of the United States" and "receive and safely keep, until legally withdrawn, all moneys or bullion which shall be for the use or expenses of the Mint." The claim was that the defendant had received and not paid over to the United States $25,000 in treasury notes which had come to his hands. The defence was that the treasury notes had been totally destroyed by fire, without any negligence on the part of the superintendent, except that $1182 of such notes had been recovered in a charred condition and turned over to the United States, being in such condition that they could be identified as to amount and date of issue. *Held:*

(1) That the obligations of the superintendent were not determinable by the law of bailment but by the terms of his bond, and he could not escape responsibility for treasury notes that came to his hands and which were lost, unless such loss was attributable to overruling necessity or the public enemy; that their loss by reason of fire constituted no defence.

(2) No deduction could be allowed on account of the $1182 of charred notes, because no previous application had been made to the proper accounting officers for the allowance of such a credit.

(3) The superintendent was liable on his bond for interest at six per cent from the date on which his accounts were stated at the Treasury Department.

THIS was an action upon the official bond of Andrew W. Smythe as Superintendent of the Mint of the United States at

Statement of the Case.

New Orleans to recover the sum of twenty-five thousand dollars with six per cent interest from April 1, 1893, until paid—that being the amount found due to the United States at the date of the examination, adjustment and statement of his accounts by the proper officers of the Treasury. The sureties on the bond were Edward Conery and David Chambers McCan.

The bond was conditioned that the Superintendent should "faithfully and diligently perform, execute and discharge all and singular the duties of said office according to the laws of the United States, then this obligation to be void and of no effect, otherwise to remain in full force and value."

When this bond was executed it was provided by section 3500, Rev. Stat., that every officer of the Mint, before entering upon the duties of his office, should take an oath faithfully and diligently to perform the duties thereof; by section 3501, that the Superintendent, before entering upon his office, should become bound to the United States, with one or more sureties, in a named sum, "with the condition for the faithful and diligent performance of the duties of his office;" by section 3503, that the Superintendent of each Mint "shall have the control thereof, the superintendence of the officers and persons employed therein, and the supervision of the business thereof, subject to the approval of the Director of the Mint;" by section 3504, that "he shall keep and render, quarter-yearly, to the Director of the Mint, for the purpose of adjustment according to such forms as may be prescribed by the Secretary of the Treasury, regular and faithful accounts of his transactions with the other officers of the Mint and the depositors;" and by section 3506, that "the Superintendent of each Mint shall receive and safely keep, until legally withdrawn, all moneys or bullion which shall be for the use or the expenses of the Mint."

It appeared in the evidence that the defendant Smythe, as Superintendent of the Mint, received various sums of money in United States treasury notes, and that upon a statement of his accounts by the proper officers of the Treasury there was a deficit of $25,000.

The defence was that the $25,000 of treasury notes was placed by the Superintendent in a tin box in the steel vault

provided by the Government for the safekeeping of public funds in his custody, and that the notes while in that box were charred, burnt and destroyed by fire that occurred in the vault, without any negligence on the part of the Superintendent, or his agents or employés.

The Government insisted at the trial that even if the treasury notes were destroyed, in the manner and to the amount claimed, without negligence on the part of the Superintendent, nevertheless, he was liable on his bond—its contention being that he was under the obligations, practically, of an insurer in respect of all public funds coming to his hands, and could not be relieved, unless the loss occurred by the act of God or the public enemy. This view was approved by the Circuit Court, which, at the conclusion of the evidence, directed a verdict against the defendants, and judgment was accordingly rendered for the full amount claimed by the United States. The court added the following words to its memorandum of reasons for that direction: "In this cause there has been no charge or intimation that Dr. Smythe was personally at fault or blamable in any way. Such fault or negligence as may have been shown in the cause is attributable to his subordinates and in no manner to him."

The Circuit Court of Appeals approved the view taken by the Circuit Court, and affirmed the judgment. The opinion of the former court is reported in 107 Fed. Rep. 376.

Mr. William A. Maury, with whom *Mr. William Grant*, *Mr. Walker Brainerd Spencer*, *Mr. J. D. Rouse*, *Mr. B. McCloskey* and *Mr. E. Howard McCaleb* were on the brief, for the plaintiffs in error.

In *United States* v. *Thomas*, 15 Wall. 337, Mr. Justice Bradley came to the conclusion that the liability of a fiscal officer of the United States was that of a simple bailee, notwithstanding the conditions contained in a bond of the character of the one here involved. He, therefore, very logically held that the officer did not become a debtor on his bond until he had committed a breach of duty.

The general rule is well settled that a bailee is excused from

liability for property destroyed in his possession by fire. 2 Am. & Eng. Ency. of Law (2d ed.), 748; Story on Bailments, sec. 29; *Meridian Fair* v. *North Birmingham Railway*, 70 Mississippi, 808.

This being the rule, there is no reason why a fire is not as much an overruling necessity in this case as *vis major* was held to be in the *Thomas* case.

The Federal cases cited as establishing a different doctrine, go no further than to hold that a receiver of public money cannot plead theft to relieve himself of liability as an ordinary bailee may. This exception to the general rule is predicated on a supposed public policy, which cannot be said to extend beyond that class of cases, and which certainly has not as yet been applied by the courts to cases where public money has been destroyed by fire, shipwreck, earthquakes or other overruling causes. *Boyden* v. *United States*, 13 Wallace, 17; *United States* v. *Humason*, 6 Sawyer, 199; *Preston* v. *Prather*, 137 U. S. 604.

The bond executed by the plaintiffs in error was an ordinary penal bond obligating them to repair and make good any damage which the Government might suffer by reason of the neglect or breach of duty. *United States* v. *Morgan*, 11 How. 154; Murfree on Official Bonds, section 612. Originally, upon breach of the condition, the liability for the entire amount of the stipulated penalty became absolute. 2 Blackstone's Commentaries, 341; *Burridge* v. *Fortescue*, 6 Mod. 60; Statute of 4 and 5 Anne, chapter 16. The practical effect of changes in the law is that the penalty of a bond now never operates as a forfeiture or penalty, but merely fixes the maximum of the liability of the obligor. *Davis* v. *Gillett*, 52 New Hampshire, 126; *Astley* v. *Weldon*, 2 Bos. & P. 346; *Street* v. *Rigley*, 6 Ves. Jr. 815; *Price* v. *Greene*, 16 Mees. & W. 346; *Davies* v. *Penton*, 6 Barn. & C. 216; *Higginson* v. *Well*, 14 Gray, 165; *Smith* v. *Wainright*, 24 Vermont, 97; *Richards* v. *Edict*, 17 Barbour, 260; *Tayloe* v. *Sandiford*, 7 Wheaton, 13; *Wallis* v. *Carpenter*, 13 Allen, 19, 25; *Swift* v. *Crow*, 17 Georgia, 609; *Leighton* v. *Wales*, 3 Mees. & W. 545. If, however, the contract be to perform several acts, or else to pay the sum specified, that sum, it is well settled, will always be regarded by the courts as a penalty and not as

liquidated damages. *Kemble* v. *Farren*, 6 Bing. 141; *Niver* v. *Rossman*, 18 Barbour, 50; *Lyon* v. *Clark*, 8 New York, 148; *Harris* v. *Clapp*, 1 Massachusetts, 308; *Brangwin* v. *Parrot*, 2 W. Blackstone, 1190; *Clark* v. *Bush*, 3 Cowen, 151. Officers of the Government have always construed the condition of such bonds to be an obligation to indemnify. Even in this case, the Government did not sue for the penalty of the bond, but for the amount of a loss thought to have been sustained by it by the loss or theft of this money. *Bobyshell Case*, 77 Fed. 944. In the cases of *United States* v. *Prescott*, 3 Howard, 578; *United States* v. *Dashiel*, 4 Wall. 182; *United States* v. *Keehler*, 9 Wall. 83; *Boyden* v. *United States*, 13 Wall. 17; *United States* v. *Bevans*, 13 Wall. 56, and *United States* v. *Thomas*, 15 Wall. 337, the amount sued for was the damage sustained by the Government and not the penalty of the bond. *United States* v. *Morgan*, 11 Howard, 154, which held that a bond for the faithful performance of the duties of a public office was an obligation to indemnify against loss. See also *United States* v. *Moore*, 2 Brock. 317; 26 Fed. Cases, 1301, in which Chief Justice Marshall held that the measure of liability was the extent of the injury received by the plaintiff produced by the failure of the marshal to properly perform the duties of his office. The cases cited conclusively show that under the terms of this bond the Government had the right to recover only such damages as it might have proven had been occasioned by the breach of duty on the part of Dr. Smythe in not safely keeping this paper currency. And if this contention be correct, then we think it follows that under the evidence the plaintiffs in error were entitled to have the jury instructed as requested by them. For if, as a matter of fact, there were $25,000 of treasury notes or other obligations of the Government in the bank box, and the same were burned, and the entire débris thereof was delivered to the Government, how can it be claimed that the Government has suffered any substantial damages by the destruction of its own promissory notes or obligations? It seems plain to us under such a state of facts that the only loss suffered by the Government was the value of the paper and the expense of printing the notes, and as no evidence was offered

to show these items, nothing but nominal damages were recoverable for the technical breach of the obligation to safely keep these notes.

Mr. Assistant Attorney General Beck for defendant in error. *Mr. Charles H. Robb* was with him on the brief.

The judgment rendered in the court below should be affirmed.

I. The line of cases from *United States* v. *Prescott*, 3 Howard, 578, to *Boyden* v. *United States*, 13 Wallace, 17, clearly establish that liability on such a bond is absolute, saving only the act of God and the public enemy. *United States* v. *Thomas*, 15 Wallace, 337, did not modify this doctrine, notwithstanding the criticism of certain expressions in prior opinions.

These cases, therefore, clearly establish appellant's liability inasmuch as the destruction of the currency was not due either to the act of God or the public enemy. *United States* v. *Dashiel*, 4 Wall. 182; *United States* v. *Keehlen*, 9 Wall. 83; *United States* v. *Bevans*, 13 Wall. 56; *Bisbyshell* v. *United States*, 77 Fed. Rep. 944, affirming 73 Fed. Rep. 616.

See also decisions in state courts: *Commonwealth* v. *Comly*, 3 Barr (Pa.), 372; *Inhabitants* v. *Hazard*, 12 Cushing, 112; *Inhabitants* v. *McEachron*, 33 N. J. L. 339; *State* v. *Harper*, 6 Ohio, 607; *Halbert* v. *State*, 22 Indiana, 125; *State* v. *Jackson Township*, 28 Indiana, 86; *Ross* v. *Hatch*, 5 Iowa, 149; *Taylor* v. *Morton*, 37 Iowa, 551.

The results reached in the decisions may be summarized as follows:

1. That the execution of a bond in such cases superimposes upon the implied contract of bailment an express contract, which carries with it a greater liability. As was said by Judge Strong in *United States* v. *Bevans*, "There is an established difference between a duty created merely by law and one to which is added the obligation of an express undertaking.

2. That a bond conditioned for the *safe-keeping* of money is not discharged upon proof that the money had been burned or destroyed while in the hands of the obligor without his fault or negligence.

While it is true that in many of the cases the words *and pay*

over were added in the bond, the necessity of such a clause has never been admitted in this country. No United States cases have rested on such strained and technical distinction. The case at bar, however, could not in any event be made to rest on this distinction, for the additional words, "*Until legally withdrawn*," are a portion of the bond.

3. Apart from the execution of a particular bond, *public policy* demands that receivers of public moneys and property be held to a stricter accountability than that required of ordinary bailees at common law.

4. Only two defences have in such cases been held by the United States Supreme Court to be sufficient to discharge from liability. These defences are, "the act of God," and "the act of a public enemy." Even robbery is not regarded as sufficient.

II. Appellant's argument that the Government has not been prejudiced by the destruction of its own obligation is ingenious but cannot hold. Under the statutes requiring this bond, the appellant made an absolute obligation to "safely keep . . . all moneys," etc. Admittedly, he did not fulfill this obligation; and at common law, he was liable to the full sum of the bond, as it was not a mere indemnifying bond, but one that carried with it absolute liability. Only under equitable principles can he claim relief from this obligation, and these will only avail him so far as public policy justifies.

Public policy will not permit a custodian of public money, who permits its destruction, to claim that the Government is not injured. To do so would be to open the door to fraud, as the Government, in most cases, could have no knowledge as to whether the moneys in the hands of a public custodian were in fact destroyed.

If they were embezzled, the Government would have been prejudiced and the court properly held that, as the Superintendent of the Mint could not deliver the money, public policy would not permit him to suggest its destruction and then claim that the Government was only damaged to the extent of the nominal value of the paper.

III. As to the $1182 of partially destroyed money, the appellant can claim no credit on account of his failure to conform

to the provisions of Rev. Stat. § 951, and no such claim can be made for the first time at the trial. See *Yates* v. *United States*, 90 Fed. Rep. 57; *United States* v. *Fletcher*, 147 U. S. 664.

IV. Under Rev. Stat. § 3624, the interest was properly calculated from the time the Superintendent received the money.

Mr. Justice Harlan, after making the foregoing statement, delivered the opinion of the court.

As the Circuit Court and the Circuit Court of Appeals both held that the question of the liability of Smythe was determined for the Government by the decisions of this court—which view the defendants controverted—we must ascertain the import of those decisions. This course is made necessary by the contention of the defendants that the latest decision of this court, to which reference will be presently made, modified the earlier decisions upon which the Government relies.

The first case is that of *United States* v. *Prescott*, 3 How. 578, 587. That was an action on the bond of a receiver of public moneys, conditioned for the faithful performance of his duties, and that he "should well, truly and faithfully keep, safely, without loaning or using, all the public money collected by him, or otherwise at any time placed in his possession and custody, till the same had been, or should be ordered by the proper department or officer of the Government, to be transferred or paid out," etc.

The defence was that the money for the non-payment of which the United States sued had been feloniously stolen, taken and carried away from his possession by some unknown person or persons without fault or negligence on his part, and notwithstanding he had used ordinary care and diligence in keeping it. The receiver contended that he was liable only as a depositary for hire, unless his liability was enlarged by the special contract to keep safely, which he insisted was not the case.

The court said: "This is not a case of bailment, and, consequently, the law of bailment does not apply to it. The liability of the defendant, Prescott, arises out of his official bond,

and principles which are founded upon public policy." Again: "The condition of the bond has been broken, as the defendant, Prescott, failed to pay over the money received by him, when required to do so; and the question is, whether he shall be exonerated from the condition of his bond, on the ground that the money had been stolen from him? The objection to this defence is, that it is not within the condition of the bond; and this would seem to be conclusive. The contract was entered into on his part, and there is no allegation of failure on the part of the Government; how, then, can Prescott be discharged from his bond? He knew the extent of his obligation, when he entered into it, and he has realized the fruits of this obligation by the enjoyment of the office. Shall he be discharged from liability, contrary to his own express undertaking? There is no principle on which such a defence can be sustained. The obligation to keep safely the public money is absolute, without any condition, express or implied; and nothing but the payment of it, when required, can discharge the bond. . . . Public policy requires that every depositary of the public money should be held to a strict accountability. Not only that he should exercise the highest degree of vigilance, but that 'he should keep safely' the moneys which come to his hands. Any relaxation of this condition would open the door to frauds, which might be practiced with impunity. A depositary would have nothing more to do than to lay his plans and arrange his proofs, so as to establish his loss, without laches on his part. Let such a principle be applied to our postmasters, collectors of the customs, receivers of public moneys, and others who receive more or less of the public funds, and what losses might not be anticipated by the public? No such principle has been recognized or admitted as a legal defence. . . . As every depositary receives the office with a full knowledge of its responsibilities, he cannot, in case of loss, complain of hardship. He must stand by his bond, and meet the hazards which he voluntarily incurs."

The next case is that of *United States* v. *Morgan*, 11 How. 154, 158. That was an action upon the bond of a collector of customs, conditioned that he "has truly and faithfully executed and discharged, and shall continue truly and faithfully to ex-

ecute and discharge, all the duties of the said office." The condition was alleged to have been broken in that the collector had not paid over large sums of money collected for the United States, and by not making seasonable returns of his accounts.

The court characterized as an erroneous impression that the collector "was acting as a bailee, and under the responsibilities of only the ordinary diligence of a depositary as to the cancelled notes, when in truth he was acting under his commission and duties by law, as collector, and under the conditions of his bond. The collector is no more to be treated as a bailee in this case than he would be if the notes were still considered for all purposes as money. He did not receive them as a bailee, but as a collecting officer. He is liable for them on his bond, and not on any original bailment or lending. And if the case can be likened to any species of bailment in forwarding them, by which they were lost, it is that of a common carrier to transmit them to the Treasury, and in doing which he is not exonerated by ordinary diligence, but must answer for losses by larceny and even robbery. 2 Salk. 919; 8 Johns. 213; Angell on Carriers, §§ 1, 9."

In *United States* v. *Dashiel*, 4 Wall. 182—which was an action on the bond of a paymaster in the army for not paying over or accounting for public money that came into his hands—the defence was that without any want of proper care and vigilance on the part of the paymaster a certain part of the moneys had been stolen from him. The trial court held that the theft or robbery, if satisfactorily proved, was a good defence. But this court held otherwise upon the authority of *United States* v. *Prescott* and *United States* v. *Morgan*, above cited, and reversed the judgment.

Substantially the same question arose in *United States* v. *Keehler*, 9 Wall. 83, which was an action upon a bond of a postmaster in North Carolina. The bond was conditioned, among other things, that the obligor would well and truly discharge the duties of postmaster, and keep safely, without lending, using, depositing in banks, or exchanging for other funds, than as allowed by law, all the public money at any time in his custody, till the same was ordered by the Postmaster General to be

transferred or paid out. In the spring of 1861, after the civil war commenced, the postmaster was still in office, and had in his hands $330 of post office money belonging to the United States. At that time the United States was indebted to one Clemmens, a mail contractor in that region, for postal service, in a sum exceeding $300. In August, 1861 the Confederate Congress passed an act appropriating the balances in the hands of such postmasters of the United States as at the commencement of the war resided within the limits of the Confederate States, to the *pro rata* payment of claims against the United States for postal service. The postmaster paid the $330 in his hands to Clemmens—relying upon the above act of the Confederate Congress and an official order from the Confederate Post Office Department directing him to make such payment. It was admitted in the case that throughout the year 1862 the Confederate Government had force sufficient at its command to enforce its orders, and did enforce the orders of such Government, in that part of North Carolina in which Salem was situated, and "that no protection was afforded to the citizens of that part of the State by the Government of the United States during that period."

After observing that the postmaster had no right to select a creditor of the United States and pay what he might suppose the Government owed him, the court said that "the acts of the Confederate Congress could have no force, as law, in divesting or transferring rights, or as authority for any act opposed to the just authority of the Federal Government." Referring to the statement of facts made in the case, and which were substantially as above recited, it said: "This statement falls far short of showing the application of any physical force to compel the defendant to pay the money to Clemmens. Nor is it in the least inconsistent with the fact that he might have been desirous and willing to make the payment. It shows no effort or endeavor to secure the funds in his hands to the Government, to which he owed both the money and his allegiance. Nor does it prove that he would have suffered any inconvenience, or been punished by the Confederate authorities, if he had refused to pay the draft of the insurrectionary Post Office

Department on him. We cannot see that it makes out any such loss of money, by inevitable overpowering force, as could even on the mere principle of bailment discharge a bailee. We cannot concede that a man, who, as a citizen, owes allegiance to the United States, and as an officer of the Government holds its money or property, is at liberty to turn over the latter to an insurrectionary Government, which only demands it by ordinances and drafts drawn on the bailee, but which exercises no force or threat of personal violence to himself or property, in the enforcement of its illegal orders." The court, reaffirming the doctrine of the *Prescott*, *Morgan* and *Dashiel* cases, held that in an action on the bond of an officer receiving public funds the right of the Government to recover does not rest on an implied contract of bailment, but on the express contract in the bond to pay over the funds.

In *Boyden* v. *United States*, 13 Wall. 17, 21, which was an action upon the bond of a receiver of public moneys—the defence being that the receiver had been by irresistible force robbed of the moneys sued for—the court said: "Were a receiver of public moneys, who has given bond for the faithful performance of his duties as required by law, a mere ordinary bailee, it might be that he would be relieved by proof that the money had been destroyed by fire, or stolen from him, or taken by irresistible force. He would then be bound only to the exercise of ordinary care, even though a bailee for hire. The contract of bailment implies no more except in the case of common carriers, and the duty of a receiver, *virtute officii*, is to bring to the discharge of his trust that prudence, caution, and attention which careful men usually bring to the conduct of their own affairs. He is to pay over the money in his hands as required by law, but he is not an insurer. He may, however, make himself an insurer by express contract, and this he does when he binds himself in a penal bond to perform the duties of his office without exception. There is an established difference between a duty created merely by law and one to which is added the obligation of an express undertaking. The law does not compel to impossibilities, but it is a settled rule that if performance of an express engagement becomes impos-

sible by reason of anything occurring after the contract was made, though unforeseen by the contracting party, and not within his control, he will not be excused." Again, in the same case: "It is true that in *Prescott's* case the defence set up was that the money had been stolen, while the defence set up here is robbery. But that can make no difference, unless it be held that the receiver is a mere bailee. If, as we have seen, his liability is to be measured by his bond, and that binds him to pay the money, then the cause which renders it impossible for him to pay is of no importance, for he has assumed the risk of it."

At the same term of the court the case of *Bevans* v. *United States*, 13 Wall. 56, 60, was determined. That was a suit upon a bond executed by Bevans, a receiver of public moneys, in a land district of Arkansas. The court reaffirmed the rule announced in the *Prescott* case, and said that "it is not to be overlooked that Bevans was not an ordinary bailee of the Government. Bailee he was undoubtedly, but by his bond he had insured the safekeeping and prompt payment of the public money which came to his hands. His obligation was, therefore, not less stringent than that of a common carrier, and in some respects it was greater"—citing *United States* v. *Prescott*. In the same case the court, in reference to that part of the defence attributing the loss of the money in question to the action of the Confederate power, said: "It may be a grave question whether the forcible taking of money belonging to the United States from the possession of one of her officers, or agents lawfully holding it, by a government of paramount force, which at the time was usurping the authority of the rightful government, and compelling obedience to itself exclusively throughout a State, would not work a discharge of such officers or agents, if they were entirely free from fault, though they had given bond to pay the money to the United States. This question has been thoroughly argued, but we do not propose now to consider it, for its decision is not necessary to the case."

The question thus reserved from decision arose and was decided in *United States* v. *Thomas*, 15 Wall. 337, 341–2, 346–7, 350, 352. That was an action on the bond of a surveyor of

customs at Nashville, he being also a depositary of public moneys at that city. The special defence was that the moneys in question were seized by the Confederate authorities against the will and consent of the surveyor, and by the exercise of force which he was unable to resist, he being a loyal citizen and endeavoring faithfully to perform his duty. The court said: "This case brings up squarely the question whether the forcible seizure, by the rebel authorities, of public moneys in the hands of loyal government agents, against their will, and without their fault or negligence, is, or is not, a sufficient discharge from the obligations of their official bonds. This precise question has not as yet been decided by this court. As the rebellion has been held to have been a public war, the question may be stated in a more general form, as follows: Is the act of a public enemy in forcibly seizing or destroying property of the Government in the hands of a public officer, against his will, and without his fault, a discharge of his obligation to keep such property safely, and of his official bond, given to secure the faithful performance of that duty, and to have the property forthcoming when required? . . .

"That overruling force arising from inevitable necessity, or the act of a public enemy, is a sufficient answer for the loss of public property when the question is considered in reference to an officer's obligation arising merely from his appointment, and aside from such a bond as exists in this case, seems almost self-evident. . . . These provisions [prescribing the conditions of the bonds of receivers, etc.] show that it is the manifest policy of the law to hold all collectors, receivers, and depositaries of the public money to a very strict accountability. The legislative anxiety on the subject culminates in requiring them to enter into bond with sufficient sureties for the performance of their duties, and in imposing criminal sanctions for the unauthorized use of the moneys. Whatever duty can be inferred from this course of legislation is justly exacted from the officers. No ordinary excuse can be allowed for the non-production of the money committed to their hands. Still they are nothing but bailees. To call them anything else, when they are expressly forbidden to touch or use the public money except as

directed, would be an abuse of terms. But they are special bailees, subject to special obligations. It is evident that the ordinary law of bailment cannot be invoked to determine the degree of their responsibility. This is placed on a new basis. To the extent of the amount of their official bonds, it is fixed by special contract; and the policy of the law as to their general responsibility for amounts not covered by such bonds may be fairly presumed to be the same." Referring to the adjudged cases, the court said: "It appears from them all (except perhaps the New York case) that the official bond is regarded as laying the foundation of a more stringent responsibility upon collectors and receivers of public moneys. It is referred to as a special contract, by which they assume additional obligations with regard to the safekeeping and payment of those moneys, and as an indication of the policy of the law with regard to the nature of their responsibility. But, as before remarked, the decisions themselves do not go the length of making them liable in cases of overruling necessity." The opinion concludes: "No rule of public policy requires an officer to account for moneys which have been destroyed by an overruling necessity, or taken from him by a public enemy, without any fault or neglect on his part."

We think the Government is quite correct in its conclusion that the *Thomas* case does not materially modify the decisions in previous cases. The general rule announced in those cases —and the question need not be discussed anew—is that the obligations of a public officer, who received public moneys under a bond conditioned that he would discharge his duties according to law, and safely keep such moneys as came to his hands, by virtue of his office, are not to be determined by the principles of the law of bailment, but by the special contract evidenced by his bond conditioned as above stated; consequently, it is no defence to a suit brought by the Government upon such a bond that the moneys, which were in the custody of the officer, had been destroyed by fire occurring without his fault or negligence. This rule, so far from being modified by the *Thomas* case, is reaffirmed by it, subject, however, to the exception (which, indeed, some of the prior cases had, in effect,

intimated) that it was a valid defence that the failure of the officer to account for public moneys was attributable to overruling necessity or to the public enemy. The case now before us is not embraced by either exception. The result is that the special defence here made cannot, in view of former adjudications, avail the Superintendent or his sureties.

It is appropriate here to say that the rule established by this court in the *Prescott* case has been enforced by numerous decisions in state courts. In *Commonwealth* v. *Comly*, 3 Barr, 372 —which was an action on the bond of a collector of tolls, conditioned that he would "account for and pay over all moneys he may receive for tolls," and in which the defence was that the moneys sued for had been stolen from the collector—the court said: "The opinion of the court in the case of the *United States* v. *Prescott* is founded in sound policy and sound law. The responsibility of a public receiver is determined not by the law of bailment, which is called in to supply the place of a special agreement where there is none, but by the condition of his bond. The condition of it in this instance was to 'account for and pay over' the moneys to be received; and we would look in vain for a power to relieve him from the performance of it. . . . The keepers of the public moneys, or their sponsors, are to be held strictly to their contract, for if they were to be let off on shallow pretenses, delinquencies, which are fearfully frequent already, would be incessant. A chancellor is not bound to control the legal effect of a contract in any case; and his discretion, were he at liberty to use it, would be influenced by considerations of public policy." To the same effect are *Inhabitants* v. *Hazzard*, 12 Cush. 112; *Inhabitants* v. *McEachron*, 33 N. J. L. 339; *State* v. *Harper*, 6 Ohio St. 607; *Halbert* v. *State*, 22 Indiana, 125; *Morbeck* v. *State*, 28 Indiana, 86; *Ross* v. *Hatch*, 5 Iowa, 149; *Taylor* v. *Morton*, 37 Iowa, 551.

We hold that as the accounts of the defendant Smythe showed a deficit of $25,000 in the moneys in his custody as Superintendent of the Mint, the Government was entitled to a judgment for that amount unless, as the defendants contend, they were entitled to at least a credit for $1182, which, it is alleged, was the amount of treasury notes not entirely destroyed

by the fire, but were only charred and which were taken possession of by government agents after the fire, and found to be in condition to be identified as to amount and date of issue.

A complete answer to this suggestion is to be found in sections 951 and 957 of the Revised Statutes—reproduced from the act of March 3, 1797, 1 Stat. 514, c. 20. Those sections are as follows:

§ 951. "In suits brought by the United States against individuals, no claim for a credit shall be admitted, upon trial, except such as appear to have been presented to the accounting officers of the Treasury, for their examination, and to have been by them disallowed, in whole or in part, unless it is proved to the satisfaction of the court that the defendant is, at the time of the trial, in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting a claim for such credit at the Treasury by absence from the United States or by some unavoidable accident."

§ 957. "When suit is brought by the United States against any revenue officer or other person accountable for public money, who neglects or refuses to pay into the Treasury the sum or balance reported to be due to the United States, upon the adjustment of his account it shall be the duty of the court to grant judgment at the return term, upon motion, unless the defendant, in open court, (the United States attorney being present,) makes and subscribes an oath that he is equitably entitled to credits which had been, previous to the commencement of the suit, submitted to the accounting officers of the Treasury, and rejected; specifying in the affidavit each particular claim so rejected, and that he cannot then safely come to trial. If the court, when such oath is made, subscribed, and filed, is thereupon satisfied, a continuance until the next succeeding term may be granted. Such continuance may also be granted when the suit is brought upon a bond or other sealed instrument, and the defendant pleads *non est factum*, or makes a motion to the court, verifying such plea or motion by his oath, and the court thereupon requires the production of the original bond, contract, or other paper certified in the affidavit. And no continuance shall be granted except as herein provided."

Opinion of the Court.

The defendants do not appear to have submitted to the accounting officers of the Treasury any request or claim for a credit for the $1182, and no such claim could be made for the first time at the trial. Before it could have been made there should have been affirmative proof by the defendants that it was presented to the proper accounting officer, and rejected, unless, indeed, such facts had appeared from the exemplified accounts produced and relied upon by the Government. If such claim had been presented to the proper officers before suit and been disallowed it would still have been open to the defendants at the trial to insist upon its being recognized and allowed. These conclusions are unavoidable in view of the former decisions of this court. *United States* v. *Giles*, 9 Cranch, 212, 239; *Thelusson* v. *Smith*, 2 Wheat. 396; *United States* v. *Wilkins*, 6 Wheat. 135, 143; *Walton* v. *United States*, 9 Wheat. 651; *Cox* v. *United States*, 6 Pet. 172, 202; *United States* v. *Ripley*, 7 Pet. 18, 25; *United States* v. *Fillebrown*, 7 Pet. 28, 48; *United States* v. *Robeson*, 9 Pet. 319; *United States* v. *Hawkins*, 10 Pet. 125; *United States* v. *Laub*, 12 Pet. 1; *United States* v. *Bank of Metropolis*, 15 Pet. 377; *Gratiot* v. *United States*, 4 How. 80, 112; *United States* v. *Buchanan*, 8 How. 83, 105; *DeGroot* v. *United States*, 5 Wall. 419, 431; *United States* v. *Eckford*, 6 Wall. 484; *United States* v. *Gilmore*, 7 Wall. 491; *Halliburton* v. *United States*, 13 Wall. 63.

It is said, however, that the Government has not suffered any substantial damage by the destruction of its own obligations, and that in no event is it entitled to a judgment for more than nominal damages, or at most for only such amount in damages as would meet the cost of reprinting new treasury notes to take the place of those destroyed by fire. If this view be sound, a public officer, receiving United States treasury notes for the Government, under a bond to safely keep them and pay them over to the United States whenever required by law or ordered to do so, could deliberately destroy or burn them, and, then admitting that he had done so, could prevent any judgment against him, except one that would cover merely the cost and trouble of printing new notes. Such a proposition cannot be entertained for a moment. The plea of *non damnificatus* has

no place in such a case as this. The treasury notes that came to the hands of Superintendent Smythe was money belonging to the United States and could be used, at its pleasure, in the business of the Government. By their destruction, if they were destroyed by fire in the manner claimed, the United States was deprived of so much money, and the condition of the officer's bond that he would safely keep the moneys in his custody and turn them over to the Government, when required, cannot be met by the suggestion that the Government, if it so elects, can replace the notes destroyed by other notes and thus make itself whole, less the cost of printing new notes. It is for the Government, guided by the legislation of Congress, to determine when it shall or may issue new treasury notes, and it cannot be compelled to issue them in order to reimburse itself for the loss of those in the hands of an officer who was required, by the terms of his bond, to deliver them to the Treasury, but did not do so. The Government can stand upon the terms of its special contract with the Superintendent, and insist that he has not discharged his duties by safely keeping the moneys that came to his hands, and which he undertook to pay over, when required. It is sufficient in this case to say that the loss of the notes here in question cannot be attributed to overruling necessity or to any public enemy, and as they came to the hands of Superintendent Smythe, and as he did not keep the condition of his bond, the Government can look for reimbursement to that bond.

This view, it is contended, is not consistent with what was said in *United States* v. *Morgan*, 11 How. 154, above cited. It appeared in evidence in that case that the collector received nearly $100,000 for duties in treasury notes, and cancelled them. The notes were then put up in a bundle to be sent to the Treasury Department, through the post office, and orders were given to the servant accustomed to deliver packages there to deliver those. But the bundle was stolen or lost. It appeared, also, that two of the notes for $500 each were altered and soon afterwards presented to the collector in payment of other duties, and were received by him as genuine. The court, in that case, as already shown, reaffirmed the principle announced in *United*

States v. *Prescott*, 3 How. 578. After observing that the duty of the collector was to return the cancelled notes to the Treasury Department, and that he was technically liable for not having done so, the court said: "The rule of damage would be the amount of the notes, unless it appeared, as here, that they had been cancelled, and unless it was shown that the Government had suffered, or was likely to suffer, damages less than their amount. How much is the real damage, under all the circumstances, is a question of fact for the jury, and should be passed on by them at another trial. Only that amount rather than the whole bond need, in a liberal view of the law, and of his bond, be exacted; and that amount neither he nor his sureties can reasonably object to paying, when he, by the neglect of himself or his agent, has caused all the injury which he is in the end required to reimburse. And if any equities exist to relieve him from that, none of which are seen by us, it must be done by Congress and not the courts of law. Anything less than this—any less strict rule, in the public administration of the finances—would leave everything loose or unsettled, and cause infinite embarrassments in the accounting offices, and numerous losses to the Government. . . . Finally, we decide on this last question as a matter of law this, and this only, namely, that the collector is liable for all the actual damages sustained by his not returning the notes as required by law and official circulars; or for not putting them in the post office so as to be returned. 5 Stat. 203. But how much this damage was is a matter of proof before the jury, fixing the real amount likely to happen from their getting into circulation again, as two of them did here, from delay and inconvenience in obtaining the proper vouchers to settle accounts, from the want of evidence at the Department that the notes had been redeemed, or from any other direct consequence of the breach of the condition of his bond and of his instructions under it." The court had previously said, in its opinion: "We doubt whether, under all the circumstances, after cancelled, they [the treasury notes] can be regarded as money, or money's worth, for the purpose of sustaining this action, yet it is clear that they still possess some value as vouchers, and as evidence for the Treasury Department

that they have been redeemed. It is still clear, also, that, though cancelled, the Treasury Department, unless having possession of them, is exposed to expense and loss by their being altered, and the cancellation removed or extracted, and their getting again into circulation, as two did here, and being twice paid by the Government."

The injury that might probably have come to the Government by reason of the neglect of the collector in the *Morgan* case was such that the court could not, as in the present case, give any peremptory instruction to the jury. It could not have said, in the former case, that cancelled treasury notes were to be regarded as money, or that the Government was entitled to judgment for the face amount of those notes, prior to their being cancelled. Nor could it say, as matter of law, that the Government was, in fact, damaged by not having the cancelled treasury notes as vouchers. Such being the case, it was held that it was for the jury, under such evidence as might be adduced, to say what actual injury, if any, accrued to the United States by reason of the non-delivery of the cancelled treasury notes.

The present case cannot be controlled by the rule laid down in the *Morgan* case. Here the treasury notes received by Smythe were not cancelled and could be used as money. They were not safely kept nor were they destroyed through overruling necessity or by the public enemy. Hence, there was a breach of his bond, and as the amount of the treasury notes which he failed to deliver to the Government was clearly shown, there was nothing in this case to refer to the jury. There was no question of damage to be ascertained by a jury; for if under the circumstances disclosed the defendants were liable at all, the Government, as matter of law, was entitled to a judgment for the full amount shown to have been received by the Superintendent and not paid over by him, as required by his bond.

It remains to consider some minor objections to the judgment. It is contended that it was error to give interest on the amount of the judgment from April 1, 1893, the date from which the accounts of the Superintendent were stated at the Treasury Department.

Opinion of the Court.

The alleged fire occurred June 24, 1893, and on February 9, 1894, notice of the deficiency in the Superintendent's account was given to his sureties, as required by the act of August 8, 1888, 25 Stat. 387, c. 787. And this action was brought August 7, 1894. Interest, it is insisted, was recoverable at most only from the date of the notice to the sureties. This objection is met by section 3624 of the Revised Statutes, which provides: "Whenever any person accountable for public money neglects or refuses to pay into the Treasury the sum or balance reported to be due to the United States, upon the adjustment of his account, the First Comptroller of the Treasury shall institute suit for the recovery of the same, adding to the sum stated to be due on such account, the commissions of the delinquent, which shall be forfeited in every instance where suit is commenced and judgment obtained thereon, and an interest of six per centum per annum, from the time of receiving the money until it shall be repaid into the Treasury."

This statute is mandatory, and the sureties on the bond of Superintendent Smythe must be held to have signed it in view of the requirement as to the date from which interest should be computed. It is not denied that the treasury notes in question were received at least as early as April 1, 1893.

It is also said that it was error, under the law of Louisiana, to have rendered an absolute judgment against Byrnes, the administrator of the succession of Conery, deceased; that if any judgment was rendered it should have been against the administrator, payable only in due course of administration. This objection is quite technical. If by the law of Louisiana the judgment is so payable, it will be thus interpreted and enforced, subject, of course, to the priority given to the Government in the distribution of the proceeds of the estate of any person indebted to the United States whose estate is insufficient to pay all debts against it. Rev. Stat. secs. 3466, 3467.

The judgment of the Circuit Court of Appeals, affirming the judgment of the Circuit Court, is

Affirmed.

Justices Peckham and Shiras, dissenting.

Mr. Justice Peckham, with whom concurred Mr. Justice Shiras, dissenting.

I dissent from the conclusion arrived at in the opinion of the court, and from the judgment thereon. I agree as to the general character and extent of the liability of an officer entrusted with the care and custody of public moneys, as stated in the cases cited in the opinion upon that subject. But those cases do not touch the question involved. It is undisputed that the property, for the loss of which the defendants have been held, consisted of $25,000 of treasury notes of the government of the United States; in other words, it consisted of the written promise of the government to pay money upon presentation of the notes. There was evidence also, at least sufficient to go to the jury, to prove that most of these notes were wholly destroyed by fire, so that there was no possibility of their being thereafter presented for payment or redemption. Treasury notes amounting to about eleven hundred dollars were not so far destroyed as to be incapable of identification or presentation for payment, and they were taken possession of and retained by the government, and yet the government also recovered judgment for their amount. Assuming the liability of the obligors in the bond to respond for all the damage sustained by the government by reason of this destruction by fire, the question is, what damage has the government suffered?

Within the case of *The United States* v. *Morgan*, 11 How. 154, cited in the opinion of the court, that question should have been submitted to the jury under instructions that the defendant was not liable for the amount of the face of the notes in case they had been totally destroyed by the fire, but only for such cost and expense as the government might incur by reason of the replacing of the notes destroyed, including cost of paper, printing, engraving, and the trouble and inconvenience caused the government, etc., together with the cost, if necessary or more convenient to the government, of the transportation of other notes to take the place of those destroyed.

This suit is upon the bond, which, as it seems to me, is plainly one of indemnity. The legal purport of such a bond is to indemnify the government from any loss occasioned by any

JUSTICES PECKHAM and SHIRAS, dissenting.

dereliction of the obligor. In case of a breach of the bond, the amount which the government would be entitled to recover would be measured by the loss incurred. If the loss were shown to have been the sum of five dollars or merely nominal, the plaintiff could not recover a thousand dollars, or the penalty of the bond. It is conceded in the present case that what the defendant and his sureties have been adjudged to answer for as a breach of the bond, was because $25,000 (less about eleven hundred dollars) of treasury notes of the United States, in the custody of the superintendent, had been burnt and destroyed by fire. I concede that the bondsmen would be responsible for any loss thereby occasioned to the United States, even though without negligence on the part of the officer in whose custody the money had been placed.

In *Morgan's* case, *supra*, there was a suit by the United States against a collector of revenue. It appeared in evidence that the collector had collected about $100,000 for duties in treasury notes, and had cancelled them. The notes were then put in a bundle and sent to the Treasury Department through the post office, but the bundle was lost or stolen. The Circuit Court gave judgment to the government in the amount of the penalty of the bond, which judgment this court reversed, and in its opinion said:

"The rule of damage would be the amount of the notes—unless it appeared, as here, that they had been cancelled, and unless it was shown that the government had suffered, or was likely to suffer, damages less than their amount. How much is the real damage, under all the circumstances, is a question of fact for the jury, and should be passed on by them at another trial. Only that amount rather than the whole bond need, in a liberal view of the law, and of his bond, be exacted; and that amount neither he nor his sureties can reasonably object to paying, when he, by the neglect of himself or his agent, has caused all the injury which he is in the end required to reimburse. . . . Finally, we decide on this last question as a matter of law this, and this only, namely, that the collector is liable for all the actual damages sustained by his not returning the notes as required by law and official circulars; or for not putting

them in the post office so as to be returned. 5 Stat. 203. But how much this damage was is a matter of proof before the jury, fixing the real amount likely to happen from their getting into circulation again, as two of them did here, from delay and inconvenience in obtaining the proper vouchers to settle accounts, for the want of evidence at the department that the notes had been redeemed, or from any other direct consequence of the breach of the condition of his bond, and of his instructions under it."

The attempt made to distinguish the present case from that of *United States* v. *Morgan*, does not seem to me to be successful. Indeed the case before us presents a stronger case of a substantial defence than that of Morgan's.

To refuse this defence of a burning and total destruction of the notes leaves the strange and anomalous spectacle of a recovery by the government on account of a damage which in fact and in law it has not sustained. The recovery must be upon the contract, evidenced by the bond, to safely keep and pay over, and in default to pay the damage up to the penalty of the bond. This is the contract, and that there has been a breach may be admitted at once, but the question on the part of the obligors in the bond then comes back, what damage has the government suffered by reason of the failure to keep the contract, for it is only the damage which the government in fact has sustained that we have contracted to pay. How can it be said, with the slightest reference to fact, that the damage amounts to the face of the notes when those notes are simply the promise of the government to pay upon their presentation, and the possibility of such presentation has ceased to exist?

But the right to set up and prove a defence of this character seems to be denied on some view of public policy, the propriety of which I admit I fail to recognize, and I also fail to recognize the legal power of the court to deny to the obligors the validity of a defence which shows that no damage or a less amount than claimed has been sustained, because of any assumed public policy. It is a case of contract and not of policy.

The denial of the sufficiency of the defence seemingly rests upon the ground that it is against the interests of the govern-

ment, and therefore is against the public policy of the United States to permit any defence to be interposed in an action upon this kind of a bond; that no matter how clearly it may be proved that no damage has been sustained by the government, and therefore there is nothing which the obligors have contracted to pay, still the full amount of the face of the notes must be paid to the government in order to reimburse it for a loss it has never in fact sustained. And it is proof of this very fact which is refused on the ground of public policy. Can the government maintain the proposition that if it has suffered in truth no loss it can nevertheless recover either the penalty of the bond or any less sum? This is to change the legal import of the bond. But it is nevertheless maintained that it is against public policy to permit proof of a fact which if it really existed would undoubtedly constitute a defence to the claim made by the government. That kind of a public policy which prevents a legal defence I cannot understand. I can and do appreciate a public policy that refuses to admit the sufficiency of a defence that the property was lost by or stolen from the officer without any fault on his part. The officer and his sureties have frequently endeavored to have the government bear the loss which has actually been sustained, because it happened without any fault on the part of the officer; but the courts have held that such defence is insufficient on the ground that it is against public policy to recognize it as an answer to defendant's obligation to pay over, because it would tend to diminish the care which the officer would otherwise take of the property entrusted to his custody and would lead the government into an investigation of the facts surrounding or causing the loss, under very great disadvantages, and therefore as the loss had in fact occurred, and one or the other of the parties must bear it, the courts have said he must bear it in whose custody it had been placed by the government when it was stolen or destroyed, and the proffered answer has been held to be no defence to the contract to pay over existing in the bond, which has therefore been enforced. The courts simply decided what the contract between the parties meant, but they did not decide that a legal defence, showing there was no damage, could not be interposed.

Here, however, it seems to me plain there is no question of public policy as to what should constitute a defence. The amount of damage is what the defendants have promised to pay and nothing more. Consequently, what is damage must be shown. Now that is a question of fact, and if no damage has in fact been sustained, it is the legal right of the defendant to prove it, and it cannot, as I think, be denied him on any question of public policy. This is to me a new application of the doctrine of public policy to a strictly legal defence to the obligation contained in a contract sued upon, where both parties acknowledge the validity of such contract and the defence is founded upon the terms of the contract about whose legal meaning there cannot, as it seems to me, be any difference of opinion.

Upon the other branch of the subject, the case shows that at least $1182 in treasury notes were saved, although charred, and were taken possession of by the agents of the government and were identified as to the amount and date of issue. The defendants insisted there could be no recovery for this sum, as the government already had the notes in its possession, but this objection was overruled. The sections of the Revised Statutes of the United States, §§ 951, 957, set forth in the opinion, are said to render this defence insufficient, for the reasons that the defendants had not submitted their claim for audit to the accounting officers of the Treasury. These sections are, as stated, simply reproductions of the act of 1797, which was in force when the *Morgan* case, 11 How. 154, *supra*, was decided, and it is not mentioned therein as an answer to the defence set up by defendants. Probably the provision was not regarded as applicable, although it must be admitted the record does not affirmatively show the non-presentation of the matter to the Treasury officials. But, in my judgment, the sections have no application to this case. The defendants are not seeking a claim or credit against the government, and the provision applies to such a case, while here the question is as to how much the government has been damaged, and when it is shown that, in any event, it has in fact received $1182 of the $25,000 it claimed, it seems to me that, upon any basis of liability, such fact reduces the claim on the part of the government, not by rea-

son of a credit, but because the defendant never was liable to the extent claimed, and in proving the facts which show there never was any such liability, it cannot, as it seems to me, be said that the defendants thereby claim a credit. They claim no such thing, but they do claim, first, that the government has failed to prove a cause of action for any more than a nominal sum; or, second, for any greater sum than $23,818, being the difference between $25,000 and the $1182 already received, and this is the extent of the cause of action proved by the government, after all the facts are in evidence.

The recovery in this case was not for the whole penalty of the bond, which was $100,000, but judgment was prayed for and recovered to the extent of $25,000, the whole amount of the notes, not deducting the $1182 already received by the government. This shows that the recovery was at least based upon the amount of the damage and not upon the penalty, and it therefore further shows that it was indemnity, pure and simple, which the government claimed. Therefore it was necessary for it to prove the damage, and in proving the defence at least as to $1182, the defendants were not proving a credit, but disproving to that extent the cause of action of the plaintiff.

For the reasons thus stated, I am in favor of reversing the judgment of the court below, and I dissent from the opinion of this court directing an affirmance.

I am authorized to state that MR. JUSTICE SHIRAS concurs in this dissent.

BEALS *v.* CONE.

ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

No. 84. Argued November 11, 12, 1902.—Decided January 26, 1903.

There is no general right to a writ of error from this court to the courts of a State; nor does the mere fact that the action was brought under sections 2325 and 2326 of the Revised Statutes in support of an adverse claim, entitle the defeated party to a writ of error to the state court. There is but a special right to bring such cases, and such cases only, as disclose a Federal question distinctly ruled adversely to the plaintiff in error. Where no title, right, privilege or immunity of a Federal nature was set up and claimed, nor the validity of any Federal statute denied in the state court, nor the validity of any state statute challenged prior to the judgment of affirmance in the highest court of the State, on the ground of its repugnance to paramount Federal law, this court is not justified in taking jurisdiction.

Generally speaking estoppel and *res judicata* present questions of local, and not of Federal, law.

THIS is what is known in the mining regions as an "adverse suit," brought under the authority of sections 2325 and 2326, Rev. Stat., in the District Court of the county of El Paso, Colorado, to contest the right of defendants to a patent for the Ophir lode mining claim. The plaintiff claimed a portion of this ground as a part of his own mining claim, and the question presented was as to the priority of right thereto of the respective parties by virtue of discovery and location. Judgment was rendered in the District Court in favor of the defendants, which judgment was affirmed by the Supreme Court of the State. 27 Colorado, 473. Thereupon the case was brought here on writ of error.

In the complaint plaintiff averred that on or about January 1, 1893, and ever since, he was the owner and in possession of the Tecumseh lode mining claim; that on or about April 1, 1896, the defendants wrongfully entered upon a parcel of said claim, to wit, all that part thereof included within the exterior lines of the Ophir lode mining claim, and that they have ever since

Counsel for Parties.

wrongfully withheld the possession of said parcel from the plaintiff. The answer denied the allegations of the complaint, and pleaded as a second defence that before the alleged discovery of the Tecumseh lode mining claim, to wit, on February 3, 1892, the defendants, or their grantors, were and defendants still are the owners of the Ophir lode mining claim; and that by reason of such ownership they are entitled to the possession of the ground in dispute. To this answer a replication was filed, setting forth that defendants on February 10, 1893, made a mineral entry which included said Ophir lode; that subsequently plaintiff, with others, filed a protest against that portion of the entry which related to the Ophir lode—such protest charging, among other things, that there had been no discovery of any vein, lode, ledge or deposit of mineral therein; that on a hearing there was an adjudication by the Commissioner of the General Land Office, affirmed by the Secretary of the Interior, that no discovery had been made, and canceling the entry. Plaintiff also alleged that at the hearing on said protest Cone, one of the defendants, testified that no vein had been discovered in the Ophir claim and no work done on any lode therein during the year 1893, and that the plaintiff was induced by such testimony to go to large expenditures in exploring for mineral in the ground in conflict between the two claims, the defendants knowing at all times that such expenditures were being made in reliance upon the truth of such testimony. In other words, the plaintiff in his replication pleaded two defences to defendants' claim of title, first *res judicata* by reason of the action of the Secretary of the Interior in setting aside the original application for entry of the Ophir lode; and, second, estoppel by reason of the testimony given by one of the defendants. A demurrer to this replication was sustained, and the case went to trial upon the complaint and answer.

Mr. H. B. Johnson for plaintiff in error.

Mr. Charles S. Thomas for defendants in error. *Mr. William H. Bryant* and *Mr. Harry H. Lee* were with him on the brief.

Opinion of the Court.

MR. JUSTICE BREWER, after making the foregoing statement, delivered the opinion of the court.

The jurisdiction of this court is denied. The validity of a treaty or statute of or authority exercised under the United States was not drawn in question in the state courts, nor was the validity of a statute of or authority exercised under the State of Colorado challenged on the ground of being repugnant to the Constitution, treaties or laws of the United States. So that the jurisdiction of this court depends on whether some title, right, privilege or immunity of a Federal nature was specially set up and claimed by the plaintiff in error and denied by the state courts. Rev. Stat. sec. 709.

The mere fact that this is an action brought under sections 2325 and 2326, Rev. Stat., in support of an adverse claim does not of itself entitle the defeated party to a writ of error. Although brought under the authority of a Federal statute, the questions involved may be only of general or local law. *Blackburn* v. *Portland Gold Mining Company*, 175 U. S. 571; *Shoshone Mining Company* v. *Rutter*, 177 U. S. 505.

Two questions of law arose on the pleadings. Both were presented by the demurrer to the replication; one, a question of estoppel; the other, of *res judicata*. The estoppel was not one of record, but *in pais*, arising, as contended from contradictory statements made by one of the defendants, at a different time and place. Whether such statements work an estoppel depends not upon the Constitution or any law of Congress, involves no Federal question, but is determined by rules of general law.

With respect to the other question, this may be said: The validity of the denial of the original application for entry was not challenged. It was accepted as conclusive, and a subsequent entry was relied upon. The rule of *res judicata* was, however, invoked by plaintiff on the ground that a question of fact had been decided in the first application, which, as alleged, was conclusive between the parties in this action. But the applicability of the rule depends on the fact that the parties to the two actions or proceedings are the same and also acting in the same right. Here the parties to the prior proceeding were the ap-

plicants for the patent and the United States, and the matters decided bound them, and them only. The fact that this plaintiff, with others, filed a protest against the entry did not make them parties to the application to the extent that they were concluded by a decision either way. There is no suggestion in the pleadings that the protestants were in any way interested in the ground applied for, or that they were acting other than as good citizens, seeking to prevent a wrong upon the government. Their standing in the proceeding was in the nature of *amici curiæ*. As such, whatever the result, no rule of *res judicata* could be invoked by or against them. Hence the ruling on the demurrer was not concerning the effect of a decision made by the Land Department upon the parties to the proceeding, but a mere determination that one who was not a party could not claim the advantages of a party. It is not open to question that the trial court properly sustained the demurrer to this portion of the replication. To call this the decision of a Federal question adverse to the plaintiff is so manifestly without foundation that it may rightfully be disregarded.

The record of the trial, which took place before a jury, is voluminous—the bill of exceptions containing the testimony, the instructions and the proceedings on the motion for a new trial filling 436 printed pages. The testimony was mainly directed to such matters of fact as the time and place of discovery of mineral, the character of the veins, the per cent of mineral and the general nature of the rock formations in which the veins were alleged to have been discovered. From the beginning of the trial to the end of the testimony there appears no single distinct claim based upon the Constitution or statutes of the United States. No statute of the State of Colorado was questioned, nor was any title, right, privilege or immunity under the Constitution or laws of the United States specially set up or claimed. In the instructions asked and refused, as well as in those given, there is only a general mention of the laws of the United States and none of any particular statute. In the motion for a new trial as well as in the assignments of error in the Supreme Court of the State there is not the slightest reference to the Constitution, the laws of the United States or

any section or part thereof. And in the opinion of the Supreme Court, outside of the matters of estoppel and *res judicata* before referred to, there is nothing to even suggest that it was requested to consider any question of a title, right, privilege or immunity under the Constitution or laws of the United States. Indeed, while this case has evidently been hotly contested, yet the matters which were subjects of controversy and determination were questions of fact concerning the time, extent and effect of the alleged discoveries of mineral, and also alleged wrongs in respect to the jury. To those matters, and to those alone, was the attention of the parties and the courts directed. Counsel for plaintiff in error has filed an elaborate brief of 249 printed pages, which is able and exhaustive, both on questions of mining law and the conduct of the trial. One cannot, however, fail to be impressed, after a perusal thereof, with the fact of a failure to recognize that there is no general right to a writ of error from this court to the courts of a State; that there is but a special right, a right to bring such cases, and such cases only, as disclose a Federal question distinctly ruled adversely to the plaintiff in error. We fail to see that any title, right, privilege or immunity of a Federal nature was specially set up and claimed. Very likely the construction and the effect of Federal statutes were, in a general way, discussed and considered, but nowhere do we find that special setting up or claiming of a Federal right which justifies us in taking jurisdiction. As we have stated, the validity of no Federal statute was denied in the state courts. Neither did the plaintiff in error, prior to the judgment of affirmance in the Supreme Court, challenge the validity of any state statute on the ground of its repugnance to paramount Federal law.

The writ of error is

Dismissed.

BLACKSTONE *v.* MILLER.

ERROR TO THE SURROGATE'S COURT OF NEW YORK COUNTY, STATE OF NEW YORK.

No. 423. Argued January 5, 6, 1903.—Decided January 26, 1903.

Where a deposit made by a citizen of Illinois in a Trust Company in the City of New York remains there fourteen months, the property is delayed within the jurisdiction of New York long enough to justify the finding of the state court that it was not *in transitu* in such a sense as to withdraw it from the power of the State if it were otherwise taxable, even though the depositor intended to withdraw the funds for investment.

Under the laws of New York such deposit is subject to the transfer tax, notwithstanding that the whole succession had been taxed in Illinois, including this deposit.

The fact that two States, dealing each with its own law of succession, both of which have to be invoked by the person claiming rights, have taxed the right which they respectively confer, gives no ground for complaint on constitutional grounds.

Power over the person of the debtor confers jurisdiction, and a State has an equal right to impose a succession tax on debts owed by its citizens as upon tangible assets found within the State at the time of the death.

Where a state law imposing a tax upon transfer is in force before the funds come within the State the tax does not impair the obligation of any contract, deny full faith or credit to a judgment taxing the inheritance in another State, or deprive the executrix and legatees of the decedent of any privilege or immunity as citizens of the taxing State, nor is it contrary to the Fourteenth Amendment.

THE case is stated in the opinion of the court.

Mr. Edward W. Sheldon for plaintiff in error.

I. The debts in question have no tangible *situs* within the State of New York. They were intangible, unidentifiable and incapable of physical *situs*, and were not subject to levy or sale, or to be replevied; it was not necessary to take out letters of administration in New York to collect them. *Toronto General Trust Co.* v. *C., B. & Q. Railroad Co.*, 123 N. Y. 37, 47. The relation between bank and depositor is that of debtor and creditor. *Shipman* v. *Bank*, 126 N. Y. 318, 327; *United States* v. *Wardell*, 172 U. S. 48, 53; *Clason* v. *City*, 46 La. Ann. 1, 5;

Bluefield Banana Co. v. *Board of Assessors*, 49 La. Ann. 43; *New Orleans* v. *Stempel*, 175 U. S. 309, 314; *Liverpool, L. & G. Ins. Co.* v. *Board of Assessors*, 51 La. Ann. 1028; *Compton National D'Escompte de Paris* v. *Board of Assessors*, 52 La. Ann. 1319, 1329. There is a distinction between trust companies and ordinary banks. *People* v. *Binghamton Trust Co.*, 139 N. Y. 185, 189; *United States Trust Co.* v. *Brady*, 20 Barbour, 119; *Jenkins* v. *Neff*, 163 N. Y. 320, 330; 186 U. S. 230, 234; *Mercantile National Bank* v. *New York*, 121 U. S. 138, 159.

1. The established principles of taxation prohibit the taxation of intangible property owned by non-residents. *McCulloch* v. *Maryland*, 4 Wheat. 316, 429; *Railroad Co.* v. *Jackson*, 7 Wall. 262, 267, 268; *State Tax on Foreign-held Bonds Case*, 15 Wall. 300, 319; *Savings Society* v. *Multnomah Co.*, 169 U. S. 421; *New Orleans* v. *Stempel*, 175 U. S. 309; *Bristol* v. *Washington County*, 177 U. S. 133; *In re Jefferson*, 35 Minnesota, 215; *City and County of San Francisco* v. *Mackey*, 22 Fed. Rep. 602, 608; *Walker* v. *Jack*, 60 U. S. App. 124, 128; *De Vignier* v. *New Orleans*, 4 Woods, 206, 207; *Yost* v. *Lake Erie Transportation Co.*, 112 Fed. Rep. 746; *Kirtland* v. *Hotchkiss*, 42 Connecticut, 426, 438, affirmed 100 U. S. 491; *Balk* v. *Harris*, 124 N. C. 467; *Scripps* v. *Board of Review*, 183 Illinois, 278; *Haywood* v. *Board of Review*, 189 Illinois, 235; *Matzenbaugh* v. *People*, 194 Illinois, 108; *Street Railroad Co.* v. *Morrow*, 87 Tennessee, 438; *Village of Howell* v. *Gordon*, 127 Michigan, 517; *Inhabitants of Ellsworth* v. *Brown*, 53 Maine, 519; *Catlin* v. *Hall*, 21 Vermont, 152; *Flanders* v. *Cross*, 10 Cushing, 510; *State* v. *Ross*, 3 Zabriskie (N. J.), 517; *Hopkins* v. *Baker*, 78 Maryland, 363, 370; *Mayor, etc., of Mobile* v. *Baldwin*, 57 Alabama, 61; *City Council of Augusta* v. *Dunbar*, 57 Georgia, 387; *Johnson* v. *De Bary-Baya Merchants Line*, 37 Florida, 499, 519; *State* v. *Smith*, 68 Mississippi, 79; *Insurance Co.* v. *Board of Commissioners*, 51 La. Ann. 1028; *Court* v. *O'Connor*, 65 Texas, 334; *Prairie Cattle Co.* v. *Williamson*, 5 Oklahoma, 488; *Worthington* v. *Sebastian*, 25 Ohio St. 1, 8; *Buck* v. *Miller*, 147 Indiana, 586; *City of Louisville* v. *Shirley*, 80 Kentucky, 71; *Hutchinson* v. *Board of Commissioners*, 67 Iowa, 183; *Finch* v. *York Co.*, 19 Nebraska, 50; *Sanford* v. *Town of Spencer*, 62 Wiscon-

sin, 230; *In re Jefferson*, 35 Minnesota, 215, 220; *Commissioners of Arapahoe County* v. *Cutter*, 3 Colorado, 349; *Holland* v. *Commissioners*, 15 Montana, 460; *Johnson* v. *Oregon City*, 2 Oregon, 327; *Walla Walla* v. *Moore*, 16 Washington, 339; *Estate of Fair*, 128 California, 607; *Barnes* v. *Woodbury*, 17 Nevada, 383; Tax Law of New York of 1896, § 2, subd. 5; Cooley on Taxation (2d ed.), pp. 21, 22; Rorer on Interstate Law, p. 281; Judson on Taxation (1903), § 397, p. 507.

2. These principles have been embodied in the New York statutory scheme. New York Tax Law, ch. 908 of the Laws of 1896, art. I, §§ 1–14, entitled "Taxable Property and Place of Taxation" is applicable to the entire law. *Matter of Huntington*, 168 N. Y. 399. The phrase, "property within the State," used in § 220 is as old as New York's taxing system and has been frequently construed to exclude intangible property of non-residents. *People ex rel. Lemmon* v. *Feitner*, 167 N. Y. 1; *Matter of Hellman*, Appellate Division, First Department, 1902; *Matter of King*, 30 Misc. N. Y. 575. A non-resident is entitled to the same exemptions as a resident and the taxation of non-residents is purely *in rem*. *People* v. *Barker*, 154 N. Y. 128; *City of New York* v. *McLean*, 170 N. Y. 374, 387; *Dewey* v. *Des Moines*, 173 U. S. 193, 203; *Bristol* v. *Washington County*, 177 U. S. 133; *People* v. *Equitable Trust Co.*, 96 N. Y. 387; *Matter of Enston*, 113 N. Y. 174, and cases therein cited.

3. These principles apply with equal force to transfer or succession taxes; jurisdiction of the person of the decedent or of his property must exist. *Kintzing* v. *Hutchinson*, 14 Fed. Cas. 644; *Matter of Bronson*, 150 N. Y. 1; *Matter of Preston*, 75 App. Div. 250; *Matter of Phipps*, 77 Hun, 325, affirmed 143 N. Y. 641; *Matter of Chabot*, 44 App. Div. 340; 167 N. Y. 280; *Matter of Abbett*, 29 Misc. N. Y. 567; *Coleman's Estate*, 159 Pa. St. 231; *Matter of Sutton*, 3 App. Div. 208; *Callahan* v. *Woodbridge*, 171 Massachusetts, 595.

4. The few decisions where money in bank has been subjected to a transfer tax are distinguishable from the present case. *Matter of Houdayer*, 150 N. Y. 37. The authority for the decision of the Court of Appeals in this case cited and distinguished. That was a bank deposit although deposited in a trust

company. In this case the deposit was not virtually money and could not be converted into money on demand. Substitutes for money are not to be deemed money for taxation unless they are exact equivalents. *Hubbard* v. *N. Y. & H. R. R.*, 14 Abb. Pr. 275; *United States* v. *Wilson*, 106 U. S. 620; then citing and distinguishing *Matter of Romaine*, 127 N. Y. 80; *Matter of Morejon*, N. Y. Law Journal, July 3, 1891; *Matter of Simoni*, N. Y. Law Journal, January 20, 1896; *Estate of Spears*, 6 Ohio Decisions, 598; *Matter of Burr*, 16 Misc. N. Y. 89; balances held not to be cash in *Matter of Bentley*, 31 Misc. N. Y. 656; *Matter of Horn*, N. Y. Law Journal, October 31, 1902.

II. If the indebtedness of the Trust Company was property within the State of New York, it was not taxable because it was only transitorily there, and in the case of property of non-residents *in transitu* the requisite jurisdiction to tax does not exist. *Hays* v. *Pacific Mail S. S. Co.*, 17 How. 596; *People, etc.*, v. *Commissioners*, 23 N. Y. 242; *People ex rel. Hoyt* v. *Commissioners*, 23 N. Y. 224, 240; 24 Am. & Eng. Ency. of Law, 435; 25 Am. & Eng. Ency. of Law, 142; Rorer on Interstate Law, 281; *Metropolitan Life Ins. Co.* v. *Newark*, 62 N. J. Law, 74; *Herron* v. *Keeran*, 59 Indiana, 472; *Standard Oil Co.* v. *Bachelor*, 89 Indiana, 1; *Coe* v. *Errol*, 116 U. S. 517, affirming 62 New Hampshire, 303; *Corning* v. *Township of Masonville*, 74 Michigan, 177; *State* v. *Engel*, 34 N. J. Law, 425; *State* v. *Carrigan*, 39 N. J. Law, 35; *Commonwealth* v. *Am. Dredging Co.*, 122 Pa. St. 386; *Matter of Leopold*, 35 Misc. N. Y. 370; *State Trust Co.* v. *Chehalis County*, 48 U. S. App. 190. The burden is on the taxing authorities to establish the jurisdictional conditions. *Corn* v. *Cameron*, 19 Mo. App. 573; *McLean* v. *Jephson*, 123 N. Y. 142, 151.

III. A construction of the statute which permits double taxation should be avoided. 2 Cook on Corp. § 567; *Tennessee* v. *Whitworth*, 117 U. S. 129; *People ex rel. Savings Bank* v. *Coleman*, 135 N. Y. 231; *People ex rel. Hoyt* v. *Commissioners* 23 N. Y. 224; *Matter of Dingham*, 66 App. Div. 228; 3 N. Y. Revised Statutes, Birdseye's 3d ed. p. 3526, subd. 5; *People ex rel. Darrow* v. *Coleman*, 119 N. Y. 137; *Matter of*

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Euston, 113 N. Y. 182, dissenting opinion, Haight, J., in *Matter of Romaine*, 127 N. Y. 80, 91; Cooley's Const. Lim., p. 227; *Detroit Citizens' Street Ry. Co.* v. *Common Council*, 125 Michigan, 673.

IV. As succession, inheritance and transfer taxes in the United States are levied upon the power to transmit the title to property, and not upon the property itself, the State of New York was without jurisdiction in this case to tax the exercise of a power which it did not create and could not take away.

1. That the thing taxed is the *right to transmit* has been settled by this court as to the Federal legacy tax. *Knowlton* v. *Moore*, 178 U. S. 41; *Eidman* v. *Martinez*, 184 U. S. 578, 589; *Moore* v. *Ruckgaber*, 184 U. 593. As to the New York transfer tax, *United States* v. *Perkins*, 163 U. S. 625; *Plummer* v. *Coler*, 178 U. S. 115; *Orr* v. *Gilman*, 183 U. S. 278, 289. As to the Illinois inheritance tax, *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283.

2. The New York transfer tax has been repeatedly interpreted in that way by the Court of Appeals. *Matter of Swift*, 137 N. Y. 77, 88; *Matter of Merriam*, 141 N. Y. 479, 484; *Matter of Hoffman*, 143 N. Y. 329; *Matter of Bronson*, 150 N. Y. 1, 6; *Matter of Westwin*, 152 N. Y. 93, 99; *Matter of Sloane*, 154 N. Y. 109, 113; *Matter of Dows*, 167 N. Y. 227, 232; *Matter of Pell*, 171 N. Y. 48, 55; *Matter of Vanderbilt*, 172 N. Y. 69, 72–74.

3. Such is also the view taken in other States. *Finnen's Estate*, 196 Pa. St. 72; *Minot* v. *Winthrop*, 162 Massachusetts, 113; *Kochersperger* v. *Drake*, 167 Illinois, 122; *Schoolfield's Executor* v. *Lynchburg*, 78 Virginia, 366; *State* v. *Dalrymple*, 70 Maryland, 294; *State* v. *Hamlin*, 86 Maine, 495; *State* v. *Ashton*, 94 Tennessee, 674; *In re Wilmerding*, 117 California, 281; *Gilsthorpe* v. *Furnell*, 20 Montana, 299.

As thus limited a tax upon the power of transmission can only be imposed by the sovereignty creating the power, and the transmission in this case was effected solely by the law of Illinois. *Eidman* v. *Martinez*, 184 U. S. 592; *Kintzing* v. *Hutchinson*, 14 Fed. Cas. 649. There are seven examples of different governmental impositions under the head of "death duties"

in Great Britain. Four of these, *Probate Duty*, *Legacy Duty*, *Succession Duty*, *Estate Duty*, were reviewed in *Knowlton* v. *Moore*, 178 U. S. 41, as to the nature of these duties, citing Hanson's Death Duties, 4th ed. 1, 2, 19, 20, 40, 63; Norman's Digest of the Death Duties, 2d ed. 1, 184, 513; Dicey's Conflict of Laws, Moore's American Notes, 1897, 785–789; *Laidlay* v. *The Lord Advocate*, L. R. 15 App. Cas. 468, 483; *Wallace* v. *The Attorney General*, L. R. 1 Ch. App. 1; *Attorney General* v. *Campbell*, L. R. 5 H. L. 524, 529.

V. Where any doubt exists as to liability to a succession tax, the doubt should be resolved in favor of the person sought to be taxed. The Court of Appeals erred in adopting the broader construction of the law. *Eidman* v. *Martinez*, 184 U. S. 578, and cases cited; *United States* v. *Wigglesworth*, 2 Story, 369; cases cited *supra*, and *Matter of Harbeck*, 161 N. Y. 218; *Matter of Vassar*, 127 N. Y. 1, 12; *Matter of Stewart*, 131 N. Y. 274, 282; *Matter of Fayerweather*, 143 N. Y. 114; *United States* v. *Isham*, 7 Wall. 496, 504; 176 Massachusetts, 190; *Matter of Brez*, 172 N. Y. Memo.

VI. The taxation in this proceeding of debts due the decedent from residents of New York is unconstitutional. *Vanhorne's Lessee* v. *Dorrance*, 2 Dallas, 304, 310; *Calder* v. *Bull*, 3 Dallas, 386; *St. Louis* v. *Ferry Co.*, 11 Wall. 423; *Delaware Railroad Tax Cases*, 18 Wall. 206, 229; *Ex parte Yarborough*, 110 U. S. 651, 658; *Scott* v. *McNeal*, 154 U. S. 34, 45, and cases cited; *Adams Express Co.* v. *Ohio*, 165 U. S. 194; *Dewey* v. *Des Moines*, 173 U. S. 193, 204.

1. The proceedings impair the obligation of contracts between the decedent and the New York debtors in violation of section 10, of article I, of the Federal Constitution. *Railroad Company* v. *Pennsylvania*, 15 Wall. 300; *Tappan* v. *Merchants Nat. Bank*, 19 Wall. 490, 499; *Murray* v. *Charleston*, 96 U. S. 432, 448; *Kirtland* v. *Hotchkiss*, 100 U. S. 491, 499; *Erie R. R.* v. *Pennsylvania*, 153 U. S. 628, 646; *Central Trust Co.* v. *Chat. R. & C. R.*, 68 Fed. Rep. 685; *Goldgait* v. *People*, 106 Illinois, 25; *City of Detroit* v. *Lewis*, 109 Michigan, 155, and other cases cited, *supra*.

2. The proceedings deny full faith and credit to the public

acts and judicial proceedings of Illinois in violation of section 1, of article IV. *Hilton* v. *Guyot*, 159 U. S. 113, 181; *Hampton* v. *M'Connel*, 3 Wheat. 234; *Mills* v. *Duryee*, 7 Cranch, 481.

3. The proceedings deny to citizens of Illinois some of the privileges and immunities of citizens of New York in violation of section 2 of article IV. *Ward* v. *Maryland*, 12 Wall. 418; *Scripps* v. *Board of Review*, 183 Illinois, 278.

4. The proceedings violate the Fourteenth Amendment. They abridge privileges and immunities. *Giozza* v. *Tiernan*, 148 U. S. 657; *Duncan* v. *Missouri*, 152 U. S. 377. They deny the equal protection of the law. *Savings Bank* v. *Multnomah County*, 169 U. S. 421; *Lowe* v. *Kansas*, 163 U. S. 81; *Reagan* v. *Farmers L. & T. Co.*, 154 U. S. 362, 399; *Gulf, C. & S. F. Ry. Co.* v. *Ellis*, 165 U. S. 150, 159; *Tinsley* v. *Anderson*, 171 U. S. 101, 106. They deprive the legatees of property without due process of law as there is no jurisdiction to tax. *Scott* v. *McNeal*, 154 U. S. 46; *St. Louis* v. *Ferry Co.*, 11 Wall. 423, 430; *Stuart* v. *Palmer*, 74 N. Y. 183, 190. The proceedings were irregular as the Surrogate adjudged that the property was exempt and the Comptroller of the city of New York was not a person aggrieved by the order within the meaning of the section of the Code of Civil Procedure (§ 2258), permitting an appeal, and the Court of Appeals erred in allowing the proceedings to stand until the Comptroller of the State could be substituted. The failure to deduct from the value of the property the amount of the Illinois inheritance tax and the Federal legacy tax was error.

The sovereign power of the States to tax successions should not be impaired but the power should be exercised fairly and harmoniously under the guidance of Constitutional restraints, and in accord with established principles of law.

Mr. Louis Marshall, with whom *Mr. Julius Offenbach* was on the brief, for the defendants in error.

I. Whether the "deposits" made by the decedent with the Trust Company and Cuyler, Morgan & Co. be regarded as "money" within the State of New York belonging to him at the time of his death, or as a "debt" owing to him at that time by these

"depositaries," the court of last resort of that State has declared it to be the intention of the legislature of that sovereignty to tax the succession to such money or credit although the decedent was at the time of his death a resident of Illinois.

1, 2. The decisions of New York have construed these statutes as imposing a tax upon the right of succession to the property of a decedent, and not upon a decedent's estate as such, and, in effect, to limit the power of testamentary disposition, and that legatees and devisees take their bequests and devises subject to this tax imposed upon the succession to property. In other words, it is a tax upon the right to take property by devise or descent. *Matter of Merriam*, 141 N. Y. 479, 480; *Matter of Hoffman*, 143 N. Y. 329, 331; *United States* v. *Perkins*, 163 U. S. 625, 628, 629; *Scholey* v. *Rew*, 23 Wall. 331, 348; *Magoun* v. *Illinois Trust & Savings Bk.*, 170 U. S. 283, 288; *Knowlton* v. *Moore*, 178 U. S. 41, 57, 59, 60; *Plummer* v. *Coler*, 178 U. S. 115, 121, 122.

The constitutionality of a tax on the succession to property has been uniformly recognized and is no longer open to question, since the elaborate consideration which the subject received in the opinion of Mr. Justice McKenna in *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, 287, 288.

The courts of New York have had occasion to frequently apply this statute to the succession to personal property of non-residents which at the time of the death of the decedent was within the State. *Matter of Romaine*, 127 N. Y. 80; *Matter of Houdayer*, 150 N. Y. 37; writ of error dismissed; *Scudder* v. *Comptroller of New York*, 175 U. S. 32; *Callahan* v. *Woodbridge*, 171 Massachusetts, 595; *Eidman* v. *Martinez*, 184 U. S. 587.

Deposits in banks have been held assessable under this system of legislation in other cases. *Matter of Burr*, 16 Misc. Rep. 89; *Matter of Morejon*, N. Y. Law Journal, July 3, 1891; *Matter of Bondon*, N. Y. Law Journal, March 1, 1892; *Estate of Spier*, 6 Ohio Dec. 898.

The highest court of New York has thus interpreted the statute now under consideration as providing that where a non-resident dies leaving a deposit in a bank or trust company within the State of New York, a transfer by will or intestate law of

such deposit is a transfer of money—"of property within the State," and as such is governed by the provision of section 220 of the tax law.

3. This interpretation by the New York courts will be adopted by the Federal courts. *Leffingwell* v. *Warren*, 2 Black, 599, 603; *Randall* v. *Brigham*, 7 Wall. 523, 541; *Morley* v. *Lake Shore Railway Co.*, 146 U. S. 167; *Burgess* v. *Seligman*, 107 U. S. 33; *Flash* v. *Conn*, 109 U. S. 379; *Bucher* v. *Cheshire R. R. Co.*, 125 U. S. 584; *German Bank* v. *Franklin Co.*, 128 U. S. 538; *Amy* v. *Watertown*, 136 U. S. 318; *Gormley* v. *Clark*, 134 U. S. 348; *Detroit* v. *Osborne*, 135 U. S. 500; *Halstead* v. *Buster*, 140 U. S. 277; *Bauserman* v. *Blunt*, 147 U. S. 647; *Balkam* v. *Woodstock*, 154 U. S. 189; *Hartford Ins. Co.* v. *Chicago Ry. Co.*, 175 U. S. 108; *Wade* v. *Travis County*, 174 U. S. 499, 508; *Williams* v. *Eggleston*, 170 U. S. 311; *New Orleans* v. *Stempel*, 175 U. S. 309, 316; *Board of Liquidation* v. *Louisiana*, 179 U. S. 622, 638; *Yazoo & Mississippi Val. R. R. Co.* v. *Adams*, 181 U. S. 580, 583.

4. The decision in the *Houdayer* case was correct. *Bluefield Banana Co.* v. *Board of Assessors*, 49 La. Ann. 43; *Parker, Tax Collector*, v. *Strauss & Co.*, 49 La. Ann. 1173.

The deposit of money in such institutions exacts from the State the provision of continual safe-guards, civil, police and military, for the benefit of the depositor.

For the protection of those leaving their money with banks and trust companies, the State of New York has devised an elaborate system of investigation, supervision and administration of institutions of this class.

Taxation is the correlative of protection, and is as applicable to a non-resident owner of property as to a resident owner. The deposit with the United States Trust Company did not, however, partake of the nature of a general deposit, but was a special deposit in trust. *Jenkins* v. *Neff*, 163 N. Y. 320, 330, aff'd 186 U. S. 230, 234. *People* v. *Binghamton Trust Co.*, 139 N. Y. 185, distinguished.

But treating the deposit of the proceeds of these shares of stock as an ordinary deposit, it is nevertheless believed that it was property of the decedent within the State of New York.

Downes v. *Phœnix Bank of Charlestown*, 6 Hill, 297; *Payne* v. *Gardiner*, 29 N. Y. 146; *Howell* v. *Adams*, 68 N. Y. 321; *Munger* v. *Albany City National Bank*, 85 N. Y. 587; *Boughton* v. *Flint*, 74 N. Y. 482; *Smiley* v. *Fry*, 100 N. Y. 265; *Dickinson* v. *Bank*, 152 Massachusetts, 49, 55; *Girard Bank* v. *Penn Township Bank*, 39 Pa. St. 92, 98, 99; *United States* v. *Wardwell*, 172 U. S. 48, 54, 55; *Parker, Tax Collector*, v. *Strauss & Co.*, 49 La. Ann. 1173.

Treating this fund as a debt, for all practical purposes it was property within the State of New York. Section 649 of the Code of Civil Procedure; *Dunlop* v. *Paterson Fire Ins. Co.*, 12 Hun, 627, aff'd 74 N. Y. 145; *Douglas* v. *Phœnix Ins. Co.*, 138 N. Y. 209; *Embree* v. *Hanna*, 5 Johns. 100; *Williams* v. *Ingersoll*, 89 N. Y. 508, 529; *Carr* v. *Corcoran*, 44 App. Div. 97; *Simpson* v. *Jersey City Contracting Co.*, 165 N. Y. 193; *Chicago, Rock Island & Pacific Railway Company* v. *Sturm*, 174 U. S. 710, and cases there cited.

Before this fund could be distributed at the place of the decedent's domicil, such distribution could only be made through the aid of the New York courts by means of administration there, of the debt owing to the decedent; and title was, therefore, derivable through such administration.

The rule is established by a uniform line of authorities that an executor or administrator appointed in one State cannot as such sue, or be sued, in his representative capacity in another. *Hopper* v. *Hopper*, 125 N. Y. 402; *Lawrence* v. *Lawrence*, 3 Barb. Ch. 74; *Matter of Webb*, 11 Hun, 124; *Flandrow* v. *Hammond*, 13 App. Div. 325; *Johnson* v. *Wallis*, 112 N. Y. 230; *Petersen* v. *Chemical Bank*, 32 N. Y. 22, 40. Similar rules in other States. *Greves* v. *Shaw*, 173 Massachusetts, 205; *S. C.*, 53 N. E. Rep. 372; *Judy* v. *Kelley*, 11 Illinois, 211; *McGarvey* v. *Darnall*, 134 Illinois, 367; *S. C.*, 25 N. E. Rep. 1005; *Johnson* v. *Powers*, 139 U. S. 156; *Stacy* v. *Thrasher*, 6 How. 44, 58; *Noonan* v. *Bradley*, 9 Wall. 394; *Vaughan* v. *Northrup*, 15 Pet. 1; *Aspden* v. *Nixon*, 4 How. 467; *Reynolds* v. *Stockton*, 140 U. S. 254, 272; *Lawrence* v. *Nelson*, 143 U. S. 222; *Overby* v. *Gordon*, 177 U. S. 222; *Wyman* v. *Halstead*, 109 U. S. 654, 656; *Chicago, Rock Island &c. Ry.* v. *Sturm*,

174 U. S. 714. Succession tax has some of the characteristics of a duty on the administration of the estate of the deceased persons. *Minot* v. *Winthrop*, 162 Massachusetts, 113; *Frothingham* v. *Shaw*, 175 Massachusetts, 59, 61.

Such duties are levied in respect of the control which every government has over property within its jurisdiction, irrespective of the domicil of the decedent. *Laidley* v. *Lord Advocate*, 15 App. Cases, 468, 483; Hanson on Death Duties, 2, 63.

II. If the funds in question are to be regarded as money of the decedent within the State, in accordance with the decision in the *Houdayer* case, then no question as to the validity of the tax can arise, since it must be conceded that it was within the power of the New York legislature to place a succession tax upon the tangible property within the State of a non-resident decedent. *Callahan* v. *Woodbridge*, 171 Massachusetts, 595; *In re Romaine*, 127 N. Y. 80; *Matter of Whiting*, 150 N. Y. 27; *Albany* v. *Powell*, 2 Jones' Eq. 51, and cases cited under point III.

III. As the legislature of New York intended to bring within its taxing power deposits made with residents of New York by non-residents for the purposes of assessing a succession tax upon the estate of the latter, as declared in the *Houdayer* case, it is within the power of such legislature to create a *situs* for such property within the sovereignty of New York for purposes of taxation.

It is doubtless true that under the legal fiction embodied in the maxim *mobilia personam sequuntur* personal estate is deemed to have no *situs* separate from the person or residence of the owner, and it is on the basis of this maxim that it is claimed that debts and choses in action can have no *situs* other than that of the creditor.

This fiction is not, however, superior to the legislative power and has been so frequently disregarded in legislation that it has become practically exploded. This is illustrated by the attachment laws, to which reference has already been made, and is demonstrated by a long line of decisions in various jurisdictions affecting the subject of taxation, citing New York decisions as follows: *People ex rel. Hoyt* v. *Commissioners of Taxes*,

23 N. Y. 224; *People ex rel. Westbrook* v. *Board of Trustees of the Village of Ogdensburgh*, 48 N. Y. 390; *Matter of Romaine*, 127 N. Y. 80, 86; *People ex rel. Jefferson* v. *Smith*, 88 N. Y. 576, 581; *Kirkland* v. *Hotchkiss*, 100 U. S. 491; *Matter of Whiting*, 150 N. Y. 30. Decisions of this court: *Hervey* v. *R. I. Locomotive Works*, 93 U. S. 664, 671; *Green* v. *Van Buskirk*, 5 Wall. 307; 7 Wall. 139, citing *Warner* v. *Jaffray*, 96 N. Y. 254, 255; *Walworth* v. *Harris*, 129 U. S. 365; *Security Trust Co.* v. *Dodd*, 173 U. S. 628; *Pullman's Car Co.* v. *Pennsylvania*, 141 U. S. 18, 22, and cases cited; *Savings Society* v. *Multnomah County*, 169 U. S. 421, and other cases already cited; *Clason* v. *New Orleans*, 46 La. Ann. 1; *Parker, Tax Collector*, v. *Strauss & Co.*, 49 La. Ann. 1173; *Bristol* v. *Washington Co.*, 177 U. S. 133; *Eidman* v. *Martinez*, 184 U. S. 578, and cases cited; *Moore* v. *Ruckgaber*, 184 U. S. 593. Decisions in other jurisdictions: *Greves* v. *Shaw*, 173 Massachusetts, 205; *S. C.*, 53 N. E. Rep. 372; *In re Small's Estate*, 151 Pa. St. 1; *S. C.*, 25 Atl. Rep. 23; *Kingman County Commissioners* v. *Leonard*, 57 Kansas, 531; *S. C.*, 34 L. R. A. 810; *Allen* v. *National State Bank*, 92 Maryland, 509; *S. C.*, 52 L. R. A. 760.

From these decisions the rule is deducible that it is within the power of the State to which resort must be had for the purpose of reducing to possession property of a decedent, whether a resident or a non-resident, by those succeeding to his ownership, to impose such restrictions and conditions on the rights of succession as it may see fit to create, whether the property to be reduced to possession is tangible or intangible, real or personal, and even though it may be a mere credit. *United States* v. *Perkins*, 163 U. S. 625; *State* v. *Dalrymple*, 70 Maryland, 294; *Plummer* v. *Coler*, 178 U. S. 115, 130, 137; *Magoun* v. *Ill. Trust & Sav. Bank*, 170 U. S. 288. *State Tax on Foreign Held Bonds*, 15 Wall. 300, distinguished.

IV. The statute on which the tax is predicated does not impair the obligation of the contract. *Pinney* v. *Nelson*, 183 U. S. 144, 147; *Lehigh Water Co.* v. *Easton*, 121 U. S. 388, 391; *Central Land Co.* v. *Laidley*, 159 U. S. 103, 111; *McCullough* v. *Virginia*, 172 U. S. 102, 116.

V. The tax is not rendered unconstitutional because there is

a possibility that the decedent's estate may be subjected to double taxation.

There is no provision of the Federal Constitution governing state taxation, which forbids unequal or double taxation. *Davidson* v. *New Orleans*, 96 U. S. 97, 106; *Dyer* v. *Osborne*, 11 R. I. 321; *S. C.*, 23 Am. Rep. 460; *Frothingham* v. *Shaw*, 175 Massachusetts, 59, 61; *People* v. *The Home Insurance Co.*, 92 N. Y. 347, affirmed 119 U. S. 129; *Coe* v. *Errol*, 116 U. S. 524.

The war tax on inheritances was sustained in *Knowlton* v. *Moore*, 178 U. S. 53, although the State had likewise imposed a tax on the same inheritance, although it was recognized that the transmission of property by will or intestacy is within the exclusive province of state and not Federal regulation.

VI. The decision sought to be reviewed does not deny full faith and credit to any public acts, records or judicial proceedings in the State of Illinois. *Bonaparte* v. *Tax Court*, 104 U. S. 592; *C. N. Nelson Lumber Co.* v. *Town of Loraine*, 22 Fed. Rep. 60; *Johnson* v. *Powers*, 139 U. S. 156.

VII. The statute does not deprive the plaintiff in error of any of the privileges and immunities of citizens of the State of New York.

The act under consideration seeks to tax the right of succession to all property within the State, whether it belongs to a resident or a non-resident. It certainly creates no exception in favor of a resident of the State. It gives him no privilege or immunity. Non-residents are only taxed on the right of succession to property within the State, while residents of the State are subjected to a tax upon all of their property wherever it may be situated. *Mager* v. *Grima*, 8 How. 490; *Wallace* v. *Meyers*, 38 Fed. Rep. 184, appeal dismissed, 154 U. S. 523; *Brown* v. *Houston*, 114 U. S. 622, 635.

VIII. The act does not violate the Fourteenth Amendment to the Constitution of the United States. It does not abridge the privileges and immunities of the plaintiff in error. It does not deny to her the equal protection of the law. *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283; *Bell's Gap Railroad* v. *Pennsylvania*, 134 U. S. 232; *Giozza* v. *Tiernan*, 148 U. S. 657; *Pacific Express Co.* v. *Seibert*, 142 U. S. 339;

Merchants' Bank v. *Pennsylvania*, 167 U. S. 461; *Davidson* v. *New Orleans*, 96 U. S. 97, 105; *Orr* v. *Gilman*, 183 U. S. 278; *Carpenter* v. *Pennsylvania*, 17 How. 456. It does not deprive the plaintiff in error of her property without due process of law. *Davidson* v. *New Orleans*, 96 U. S. 97, 104; *Hagar* v. *Reclamation District*, 111 U. S. 701, 710; *Spencer* v. *Merchant*, 125 U. S. 345; *Palmer* v. *McMahon*, 133 U. S. 660, 669; *Lent* v. *Tillson*, 140 U. S. 316, 327; *Pittsburg &c. R. R. Co.* v. *Backus*, 154 U. S. 421; *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 168; *Merchants' Bank* v. *Pennsylvania*, 167 U. S. 467.

The criticism on the regularity of the procedure of the Appellate Division in reversing the Surrogate's decision presents no Federal question, nor has it any merit.

IX. The plaintiff in error cannot escape taxation on the pretense that the money deposited by the decedent was only transitorily within the State of New York at the time of his death. Cases cited by plaintiff in error distinguished.

Mr. Justice Holmes delivered the opinion of the court.

This is a writ of error to the Surrogate's Court of the county of New York. It is brought to review a decree of the court, sustained by the Appellate Division of the Supreme Court, 69 App. Div. 127, and by the Court of Appeals, 171 N. Y. 682, levying a tax on the transfer by will of certain property of Timothy B. Blackstone, the testator, who died domiciled in Illinois. The property consisted of a debt of $10,692.24, due to the deceased by a firm, and of the net sum of $4,843,456.72, held on a deposit account by the United States Trust Company of New York. The objection was taken seasonably upon the record that the transfer of this property could not be taxed in New York consistently with the Constitution of the United States.

The deposit in question represented the proceeds of railroad stock sold to a syndicate and handed to the Trust Company, which, by arrangement with the testator, held the proceeds subject to his order, paying interest in the meantime. Five days' notice of withdrawal was required, and if a draft was made upon the company, it gave its check upon one of its banks

of deposit. The fund had been held in this way from March 31, 1899, until the testator's death on May 26, 1900. It is probable, of course, that he did not intend to leave the fund there forever and that he was looking out for investments, but he had not found them when he died. The tax is levied under a statute imposing a tax "upon the transfer of any property, real or personal. . . . 2. When the transfer is by will or intestate law, of property within the State, and the decedent was a non-resident of the State at the time of his death." Laws of 1896, c. 908, § 220, amended, Laws of 1897, c. 284; 3 Birdseye's Stat. 3d ed. 1901, p. 3592. The whole succession has been taxed in Illinois, the New York deposit being included in the appraisal of the estate. It is objected to the New York tax that the property was not within the State, and that the courts of New York had no jurisdiction; that if the property was within the State it was only transitorily there, *Hays* v. *Pacific Mail Steamship Co.*, 17 How. 596, 599, 600, that the tax impairs the obligation of contracts, that it denies full faith and credit to the judgment taxing the inheritance in Illinois, that it deprives the executrix and legatees of privileges and immunities of citizens of the State of New York, and that it is contrary to the Fourteenth Amendment.

In view of the state decisions it must be assumed that the New York statute is intended to reach the transfer of this property if it can be reached. *New Orleans* v. *Stempel*, 175 U. S. 309, 316; *Morley* v. *Lake Shore & Michigan Southern Ry. Co.*, 146 U. S. 162, 166. We also must take it to have been found that the property was not *in transitu* in such a sense as to withdraw it from the power of the State, if otherwise the right to tax the transfer belonged to the State. The property was delayed within the jurisdiction of New York an indefinite time, which had lasted for more than a year, so that this finding at least was justified. *Kelley* v. *Rhoads*, *ante*, p. 1, and *Diamond Match Co.* v. *Village of Ontonagon*, *ante*, p. 84, present term. Both parties agree with the plain words of the law that the tax is a tax upon the transfer, not upon the deposit, and we need spend no time upon that. Therefore the naked question is whether the State has a right to tax the transfer by will of such deposit.

The answer is somewhat obscured by the superficial fact that New York, like most other States, recognizes the law of the domicil as the law determining the right of universal succession. The domicil, naturally, must control a succession of that kind. Universal succession is the artificial continuance of the person of a deceased by an executor, heir, or the like, so far as succession to rights and obligations is concerned. It is a fiction, the historical origin of which is familiar to scholars, and it is this fiction that gives whatever meaning it has to the saying *mobilia sequuntur personam*. But being a fiction it is not allowed to obscure the facts, when the facts become important. To a considerable, although more or less varying, extent the succession determined by the law of the domicil is recognized in other jurisdictions. But it hardly needs illustration to show that the recognition is limited by the policy of the local law. Ancillary administrators pay the local debts before turning over the residue to be distributed, or distributing it themselves, according to the rules of the domicil. The title of the principal administrator, or of a foreign assignee in bankruptcy, another type of universal succession, is admitted in but a limited way or not at all. See *Crapo* v. *Kelly*, 16 Wall. 610; *Chipman* v. *Manufacturers' National Bank*, 156 Massachusetts, 147, 148, 149.

To come closer to the point, no one doubts that succession to a tangible chattel may be taxed wherever the property is found, and none the less that the law of the *situs* accepts its rules of succession from the law of the domicil, or that by the law of the domicil the chattel is part of a *universitas* and is taken into account again in the succession tax there. *Eidman* v. *Martinez*, 184 U. S. 578, 586, 587, 592. See *Mager* v. *Grima*, 8 How. 490, 493; *Coe* v. *Errol*, 116 U. S. 517, 524; *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18, 22; *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283; *New Orleans* v. *Stempel*, 175 U. S. 309; *Bristol* v. *Washington County*, 177 U. S. 133; and for state decisions *Matter of Estate of Romaine*, 127 N. Y. 80; *Callahan* v. *Woodbridge*, 171 Massachusetts, 593; *Greves* v. *Shaw*, 173 Massachusetts, 205; *Allen* v. *National State Bank*, 92 Maryland, 509.

No doubt this power on the part of two States to tax on dif-

ferent and more or less inconsistent principles, leads to some hardship. It may be regretted, also, that one and the same State should be seen taxing on the one hand according to the fact of power, and on the other, at the same time, according to the fiction that, in successions after death, *mobilia sequuntur personam* and domicil governs the whole. But these inconsistencies infringe no rule of constitutional law. *Coe* v. *Errol*, 116 U. S. 517, 524; *Knowlton* v. *Moore*, 178 U. S. 41.

The question then is narrowed to whether a distinction is to be taken between tangible chattels and the deposit in this case. There is no doubt that courts in New York and elsewhere have been loath to recognize a distinction for taxing purposes between what commonly is called money in the bank and actual coin in the pocket. The practical similarity more or less has obliterated the legal difference. *Matter of Houdayer*, 150 N. Y. 37; *New Orleans* v. *Stempel*, 175 U. S. 309, 316; *City National Bank* v. *Charles Baker Co.*, 180 Massachusetts, 40, 42. In view of these cases, and the decision in the present case, which followed them, a not very successful attempt was made to show that by reason of the facts which we have mentioned, and others, the deposit here was unlike an ordinary deposit in a bank. We shall not stop to discuss this aspect of the case, because we prefer to decide it upon a broader view.

If the transfer of the deposit necessarily depends upon and involves the law of New York for its exercise, or, in other words, if the transfer is subject to the power of the State of New York, then New York may subject the transfer to a tax. *United States* v. *Perkins*, 163 U. S. 625, 628, 629; *McCulloch* v. *Maryland*, 4 Wheat. 316, 429. But it is plain that the transfer does depend upon the law of New York, not because of any theoretical speculation concerning the whereabouts of the debt, but because of the practical fact of its power over the person of the debtor. The principle has been recognized by this court with regard to garnishments of a domestic debtor of an absent defendant. *Chicago, Rock Island & Pacific Ry. Co.* v. *Sturm*, 174 U. S. 710. See *Wyman* v. *Halstead*, 109 U. S. 654. What gives the debt validity? Nothing but the fact that the law of the place where the debtor is will make him pay. It does not

matter that the law would not need to be invoked in the particular case. Most of us do not commit crimes, yet we nevertheless are subject to the criminal law, and it affords one of the motives for our conduct. So again, what enables any other than the very creditor in proper person to collect the debt? The law of the same place. To test it, suppose that New York should turn back the current of legislation and extend to debts the rule still applied to slander that *actio personalis moritur cum persona*, and should provide that all debts hereafter contracted in New York and payable there should be extinguished by the death of either party. Leaving constitutional considerations on one side, it is plain that the right of the foreign creditor would be gone.

Power over the person of the debtor confers jurisdiction, we repeat. And this being so we perceive no better reason for denying the right of New York to impose a succession tax on debts owed by its citizens than upon tangible chattels found within the State at the time of the death. The maxim *mobilia sequuntur personam* has no more truth in the one case than in the other. When logic and the policy of a State conflict with a fiction due to historical tradition, the fiction must give way.

There is no conflict between our views and the point decided in the case reported under the name of *State Tax on Foreign Held Bonds*, 15 Wall. 300. The taxation in that case was on the interest on bonds held out of the State. Bonds and negotiable instruments are more than merely evidences of debt. The debt is inseparable from the paper which declares and constitutes it, by a tradition which comes down from more archaic conditions. *Bacon* v. *Hooker*, 177 Massachusetts, 335, 337. Therefore, considering only the place of the property, it was held that bonds held out of the State could not be reached. The decision has been cut down to its precise point by later cases. *Savings & Loan Society* v. *Multnomah County*, 169 U. S. 421, 428; *New Orleans* v. *Stempel*, 175 U. S. 309, 319, 320.

In the case at bar the law imposing the tax was in force before the deposit was made, and did not impair the obligation of the contract, if a tax otherwise lawful ever can be said to have that effect. *Pinney* v. *Nelson*, 183 U. S. 144, 147. The fact

that two States, dealing each with its own law of succession, both of which the plaintiff in error has to invoke for her rights, have taxed the right which they respectively confer, gives no cause for complaint on constitutional grounds. *Coe* v. *Errol*, 116 U. S. 517, 524; *Knowlton* v. *Moore*, 178 U. S. 53. The universal succession is taxed in one State, the singular succession is taxed in another. The plaintiff has to make out her right under both in order to get the money. See *Adams* v. *Batchelder*, 173 Massachusetts, 258. The same considerations answer the argument that due faith and credit are not given to the judgment in Illinois. The tax does not deprive the plaintiff in error of any of the privileges and immunities of the citizens of New York. It is no such deprivation that if she had lived in New York the tax on the transfer of the deposit would have been part of the tax on the inheritance as a whole. See *Mager* v. *Grima*, 8 How. 490; *Brown* v. *Houston*, 114 U. S. 622, 635; *Wallace* v. *Myers*, 38 Fed. Rep. 184. It does not violate the Fourteenth Amendment. See *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283. Matters of state procedure and the correctness of the New York decree or judgment, apart from specific constitutional objections, are not open here. As we have said, the question whether the property was to be regarded as *in transitu*, if material, must be regarded as found against the plaintiff in error.

Decree affirmed.

Mr. Justice White dissents.

CONNECTICUT MUTUAL LIFE INSURANCE COMPANY *v.* HILLMON.

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

No. 94. Argued November 13, 14, 1902.—Decided January 2, 1903.

Where two cases, brought by the same plaintiff, against different defendants, consolidated for trial, each of the defendants is entitled to three peremptory challenges. But the weight of authority is that the right of the plaintiff is not correspondingly multiplied, and that she is entitled to but three. But if the defendants do not exhaust their right to peremptory challenges, they cannot complain that the plaintiff was allowed more than the number to which she was was entitled.

If a witness upon cross-examination is interrogated with regard to an affidavit made by him in direct conflict with his testimony, and the affidavit be subsequently put in evidence by the opposite party without limitation as to its purpose in so doing, it becomes a part of its evidence in the case, and its adversary is entitled to an instruction that such affidavit may be considered as independent evidence to be weighed in connection with the deposition of the witness, and not merely as impeaching his creditability.

Where the defendant in an insurance case relies upon a conspiracy to substitute the dead body of another for that of the insured, and *prima facie* evidence to that effect had been produced, it is error to exclude evidence of declarations made by the alleged conspirators to third parties, tending to show the plans of the conspirators.

THIS was an action begun July 13, 1880, by Sallie E. Hillmon, in the Circuit Court of the United States for the District of Kansas, to recover the amount of a policy of insurance, ($5000,) issued by the company March 4, 1879, upon the life of John W. Hillmon, her husband, in which the plaintiff was named as beneficiary. Plaintiff made the usual allegations of compliance with the terms of the policy, and averred that the assured had died March 17, 1879, thirteen days after the policy was issued, and that due proofs had been forwarded to the company. Other actions were also brought against the New York Life Insurance Company and the Mutual Life Insurance Company of New York, upon policies of insurance issued by them

upon the same life, which actions were subsequently compromised.

Defendant interposed a general denial, and for a special defence set up in substance that on or before November 30, 1878, John W. Hillmon, John H. Brown, Levi Baldwin and diverse other persons to defendant unknown, fraudulently conspiring to cheat and defraud defendant, procured a large amount of insurance on the life of Hillmon, to wit: $10,000 in the New York Life, by policy dated November 30, 1878; $10,000 in the Mutual Life, by policy dated December 10, 1878; and $5000 in the Connecticut Mutual Life, by the policy in suit, dated March 4, 1879; that thereafter, in pursuance of such conspiracy, Hillmon, Brown and Baldwin falsely represented to defendant and others that said Hillmon had died, and that a certain dead body which they had procured was that of Hillmon, whereas in truth Hillmon "was not and is not dead," but has kept himself concealed under assumed names for the purpose of consummating the conspiracy.

As a third defence the company set up a release by plaintiff of all her claims against it under the policies.

Actions having been begun upon all three of these policies, an order was entered July 14, 1882, consolidating them for trial. Two trials of the three consolidated cases resulted in disagreements of the jury. On February 29, 1888, judgments in each were rendered for the plaintiff, which, upon writs of error, were reversed by this court and the cases remanded for a new trial. 145 U. S. 285. The material facts of the case are fully set forth in that report, and will not be here repeated, except so far as they are pertinent to the questions before this court for consideration. After two more trials of the consolidated cases, which resulted in disagreements of the jury, a compromise was effected between the plaintiff and the New York Life, which was followed by dismissal of the action against that company. Thereafter, and on January 9, 1895, an order previously entered consolidating the two remaining actions for trial was continued in force against the objection of each defendant, and the consolidated cases again came on for trial, resulting in separate judgments November 18, 1899, against both companies. To reverse

this defendant sued out a writ of error from the Circuit Court of Appeals, and upon hearing in that court the judgment was affirmed with one dissent. 107 Fed. Rep. 834. The Mutual Life sued out a similar writ of error, but compromised the case before it was heard in the Circuit Court of Appeals.

Mr. William G. Beale for petitioner. *Mr. Buell McKeever*, *Mr. Gilbert E. Porter* and *Mr. James W. Green* were with him on the brief.

Mr. Lysander B. Wheat for respondent. *Mr. C. F. Hutchings* and *Mr. John H. Atwood* were with him on the brief.

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

We shall have occasion to notice but few of the 108 assignments of errors in this case.

1. Several of these relate to an order of consolidation, and to the ruling of the court giving to the plaintiff six peremptory challenges to the jury, while each defendant had but three.

On June 14, 1882, the three original cases were first consolidated for trial, and so remained through all the trials which took place prior to the settlement with the New York Life. The propriety of this consolidation was affirmed by this court upon its first appearance here in 145 U. S. 285. A stipulation appears to have been entered into October 16, 1899, between the attorneys for the plaintiff and the attorneys for the three defendants, to set aside the order of consolidation, and a motion was made for an order to that effect, which was overruled, and the order of consolidation was continued in force as to the two remaining defendants. It would seem that the court refused to be controlled by the stipulation. We see no reason to doubt the propriety of this order, nor does it appear to have been seriously contested. But its effect upon the number of peremptory challenges to which the defendant was entitled is made the subject of dispute. Upon the former hearing of this case it was held that the consolidation of the three cases there con-

sidered did not impair the right of each of the three defendants to three peremptory challenges under Rev. Stat. sec. 819. But the question was left undecided whether the right of the plaintiff was multiplied, so that she became entitled on the last trial to six peremptory challenges, or only to three.

The Circuit Court was of opinion that, as under our ruling, the two defendants were under Rev. Stat. sec. 819, each entitled to three peremptory challenges, or six in the aggregate, the plaintiff was also entitled to six. This is the converse of the proposition established by this court when the case was first here. The argument of the defendant in this connection is that under the ruling of the court each defendant was treated as one party and the plaintiff as two parties; that it gave the plaintiff more challenges than she would have had in one case, treating the causes of action as distinct, and the plaintiff entitled to her three challenges in each case, with the result that each defendant, without its consent, and against its protest, was compelled to try its own cause before a jury to which it was given only one half as many peremptory challenges as were given to the plaintiff. The consequence was that each defendant was prejudiced by the fact that every additional peremptory challenge allowed to the plaintiff beyond three makes arbitrarily a vacancy which may be filled in spite of the defendant by a juror, whom it might and would have challenged if it had an opportunity to do so. The substance of the argument is that, it having been held upon the former hearing here, that each defendant lost no right by the consolidation, and was entitled to as many challenges as if no such consolidation had taken place, the plaintiff was not entitled to any more challenges than she would have been entitled to, in case the consolidation had not taken place. Quite a number of cases are cited in support of this proposition: *Savage* v. *State*, 18 Florida, 909; *Wiggins* v. *State*, 1 Lea, (10 Tennessee) 738; *Mahan* v. *State*, 10 Ohio, 234; *State* v. *Earle*, 24 La. Ann. 38; *Shoeffler* v. *State*, 3 Wisconsin, 823; Thompson on Trials, sec. 45; Proffatt on Jury Trials, sec. 164. The case of *Spies* v. *The People*, 122 Illinois, 1, is to the contrary.

Conceding that the great weight of authority supports the

proposition of the defendant, we are still of opinion that it is not entitled to take advantage of it, inasmuch as it made but two peremptory challenges, waiving its right to a third, and thereby acquiesced in the composition of the jury. The only effect of allowing the plaintiff six peremptory challenges was to put three additional men upon the jury, whom the defendant could not challenge, and if it had exhausted its peremptory challenges it might perhaps claim to have been prejudiced by the fact that three men had been put upon the jury which it was not entitled to challenge; but having failed to exhaust its peremptory challenges, it stands in no position to complain that it was deprived of the right to challenge others. *Stout* v. *Hyatt*, 13 Kansas, 232, 241; *Atchison &c. R. R. Co.* v. *Franklin*, 23 Kansas, 74; *Florence &c. Railroad Company* v. *Ward*, 29 Kansas, 354; *Atlas Mining Co.* v. *Johnston*, 23 Michigan, 36; *Grand Rapids Booming Co.* v. *Jarvis*, 30 Michigan, 308.

2. Error is charged in the refusal to instruct the jury that "the statement signed and sworn to by John H. Brown on the 4th day of September, 1879, having been introduced in evidence by the plaintiff, may be considered in connection with the deposition of John H. Brown as evidence of the facts stated under oath, against the plaintiff, with like effect as the deposition of John H. Brown, and may also be considered as affecting the credibility of said Brown as a witness."

In lieu thereof the court charged the jury that Brown's statement, signed and sworn to by him, was not affirmative evidence of the truth of any matter therein contained or mentioned, and that it should not be considered by the jury except as affecting the credibility of the evidence of Brown in his deposition. To determine the correctness of this construction it is necessary to consider the circumstances under which the evidence was produced. The alleged death of Hillmon was said to have occurred in March, 1879. Upon the trial plaintiff offered and read in evidence the deposition of John H. Brown, taken on December 30, 1881, who swore generally that he was employed by Hillmon driving a team, and afterwards in taking care of and feeding hogs; that he started with him from Lawrence for Wichita for the purpose of locating a cattle ranch, and that

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Hillmon was accidentally killed by the discharge of a gun in the hands of Brown. To contradict this testimony William J. Buchan, a witness put upon the stand by the defendants, swore that in the spring or summer of 1879, but a few months after the alleged death, he met Brown by appointment at Lexington, and was told by him that he was uneasy about the affair; that it was not Hillmon who was killed but another man, but that Hillmon had got away and they were hunting for him; that he wanted to get out of it himself and to turn State's evidence, and that he wanted witness to see the attorney for the insurance company and let up on hunting for him if he would go on the stand and tell the truth about the whole affair. Upon the cross-examination of Buchan the *plaintiff* offered in evidence an affidavit made by Brown on September 4, 1879, in which he repeated the substance of the conversation testified to by Buchan, and stated that instead of Hillmon being killed it was another man whom Hillmon shot. This affidavit had already been produced, though not formally put in evidence by the *defendant* on the cross-examination of Brown. It was under these circumstances that the court ruled that the affidavit was not affirmative evidence of any truth or matter contained in it, and should not be considered, except as affecting the credibility of the evidence of Brown given in his deposition.

It is insisted in behalf of the plaintiff that, as no exception was taken to this part of the charge, its propriety cannot be questioned at this time; but as an exception was properly taken to the refusal of the court to charge that the statement having been introduced in evidence by the plaintiff may be considered in connection with Brown's deposition, as evidence of the facts therein stated under oath with like effect as his deposition, we think there was sufficient to raise the point that the affidavit was not to be treated merely as affecting Brown's credibility, but as substantial evidence in favor of the plaintiff. Having excepted to the refusal to give a certain instruction, it was not necessary to repeat such exception when the contrary of such request was given in the general charge. As defendant had raised the point in one form, it was not necessary to repeat it in another.

As this statement of Brown's had already been produced by the defendant upon the cross-examination of Brown, to impeach his credibility as a witness, and he had been cross-examined as to its contents, it is difficult to see why it was introduced by the plaintiff in connection with the cross-examination of Buchan. It was evidently put in for some purpose, and it is difficult to assign any other than to make it a piece of independent testimony, since, in view of Brown's deposition to the contrary, the plaintiff might still have argued that the statement or affidavit, if ever made, was false. As now claimed, it was introduced for the purpose of explaining why the plaintiff consented to release her claim against the insurance company, though it seems to have been quite unnecessary in this connection, since its statements were already in evidence as part of Brown's cross-examination. Conceding that as a piece of independent testimony, a mere affidavit was not admissible, it was competent for the defendant to waive this objection and to treat it as other testimony in the case offered by the plaintiff. Under such circumstances it is something more than an admission by the witness that he had made statements inconsistent with his testimony upon the subject. For whatever purpose it was introduced, and in view of the fact that it was offered generally and without limitation as to its purpose, it became a piece of plaintiff's evidence to be weighed and considered like any other testimony in the case. We do not undertake to say that the plaintiff was absolutely bound by it and estopped to deny its truth, in view of Brown's deposition to the contrary, but we think it was giving it too little effect to charge the jury that it could only be considered as impeaching the credibility of Brown; and we do not think defendant was asking too much in instruction number 44, that it might be considered in connection with the deposition of Brown as evidence of the facts therein stated under oath, against the plaintiff, with like effect as the deposition. 1 Greenl. Ev. sec. 442. The words "with like effect" were evidently intended to instruct the jury that the deposition and the affidavit were each independent of the other and each affirmative testimony—not, however, that they were of equal weight.

Suppose, for example, the only evidence of the identity of the body found had been the testimony of Brown. It doubtless would have been correct to charge that the utmost effect of his affidavit, if it had been formally introduced upon cross-examination, would be to destroy his testimony as given in the deposition. His credit as a witness being thus destroyed, the fact of Hillmon's death would be regarded as not proven, and the plaintiff would be considered as having failed to establish her case. But upon the other hand, as the affidavit had not been put in upon the cross-examination of Brown, and the plaintiff read it as part of her case, it must necessarily be considered as a piece of independent evidence to be weighed in connection with the deposition, and the jury was necessarily left to consider which of the two, when taken in connection with the other testimony in the case, was to be considered as the more credible. The general rule undoubtedly is that, when a party offers a witness, he thereby generally represents him as worthy of belief, and while under the peculiar circumstances of the case this rule would not apply any more to the affidavit than to the deposition, the plaintiff, by putting both in evidence, without restriction as to the purpose of so doing, places them on the same level, and cannot be heard to say that the affidavit may not be considered as testimony of the facts therein sworn to as well as the deposition.

3. Several assignments are based upon the exclusion of the testimony of the witnesses Phillips, Blythe, Crew and Carr, as to acts performed and declarations made by the alleged co-conspirators John W. Hillmon, John H. Brown and Levi Baldwin, after evidence had been introduced establishing such conspiracy. That considerable evidence of a conspiracy between these three parties had been introduced and at a very considerable length is not denied, and the main objection to the introduction of the acts and declarations of the above witnesses was based upon the ground that the plaintiff, the wife of Hillmon, was not alleged to have been a party to such conspiracy.

The proposed testimony of Phillips, who was a physician, and had been called professionally by Baldwin to his house in the summer or fall of 1878, related to certain inquiries made

by Baldwin as to the effect of death upon bodies. In this connection defendant offered to prove that Baldwin asked the witness if he had any insurance upon his life, and said he had been thinking about taking out some himself, and in the same conversation asked Phillips how long a dead body would decompose after it was buried. He further asked if it "would not be a good scheme to get a good insurance on your life and go down South and get the body of some Greaser and pawn it off as your body and get the money."

The witness Blythe, a lawyer and fire insurance agent, an acquaintance of John W. Hillmon and Levi Baldwin, testified that they had called at his office in the autumn of 1878, asked him concerning life insurance, how to get it, what were good companies, how they should make application, whether a person could travel in different countries without forfeiting the insurance, what proceedings were necessary to collect insurance upon death, what length of time would be required, etc., and that a week or ten days before this conversation he had met Baldwin alone on the street. Defendant thereupon asked what was said by Baldwin at that time, and offered to prove that Baldwin asked the witness if he knew anything about life insurance and about the companies; and that a friend, a relative or connection, wanted to get some insurance, and he wanted to know if witness could recommend some good company to him. Whereupon witness told him how to do it.

By the witness Crew the defendant offered to prove the following testimony, all of which was excluded by the court, namely, that witness resided in the spring of 1879 in Lawrence, Kansas; was acquainted with both Mrs. Hillmon and Baldwin, and that as receiver of a local bank he had several notes of Baldwin's for collection, all of which were overdue. Two of the notes were secured by mortgage on real estate and one by chattel mortgage; that he had talked of foreclosing the mortgages, as he had been unable to collect either principal or interest; that Baldwin told him a part of the money represented by his indebtedness had been furnished to insure the life of John W. Hillmon; that in the latter part of March of that year (the conversation having taken place a few days before the first of

March) he had heard of Hillmon's death; that at this time he had a conversation with Baldwin regarding the latter's indebtedness to the bank, in which Baldwin told him to let his matters rest, as he was then on his way West after the body of Hillmon; that he had arranged for a portion of the insurance on the life of Hillmon, and that as soon as he got it he would be able to straighten up all his affairs; that Baldwin stated that he was to have $10,000 of this insurance; that witness had acquainted himself thoroughly with Baldwin's financial condition and found him in very straitened circumstances, having some property but all mortgaged, and mostly all mortgaged twice, and that his indebtedness was pressing him severely.

The witness Alexander Carr testified that he knew both Baldwin and Hillmon, and that in March, 1879, he and Baldwin were out together buying stock some time after the 10th of March. The witness was then asked what conversation he had with Baldwin in regard to any business transaction between him and Hillmon, and offered to prove that witness was talking one day to Baldwin about himself and Carr going into a sheep ranch together; "and one day he was speaking about that he was under 'brogue' with John W. Hillmon, and he said he and Hillmon had a scheme under 'brogue,' and he said that if that worked out all right he was all right."

All this testimony was ruled out apparently upon the ground that declarations made by Baldwin were not admissible against the other conspirators to prove the existence of the conspiracy if not made in their presence; that these declarations were mere admissions or narrations of what had already taken place and were not made in furtherance of a common design, while it was under way or in process of execution so as to form a part of the *res gestæ;* and for the further reason that the testimony was not admissible against the plaintiff, who was not alleged by the insurance company to have ever become a party to the alleged combination to defraud the insurance company, either by an original participation in the scheme or by subsequently adopting it.

While we are not called upon to express an opinion upon the question whether the mere proof of a conspiracy to defraud the

defendant by the procurement of an insurance upon Hillmon's life with the view of ultimately collecting the amount of the policies by a false pretense of his death would be sufficient to avoid the policies as having been obtained by fraud, without proof that such conspiracy had been consummated by compassing the death of another party and passing off the body of the deceased as that of Hillmon, the fact still remains that there was evidence of a conspiracy to procure a large amount of insurance upon the life of Hillmon and to procure in some way the body of another man to pass off as that of Hillmon, and thereby to obtain the amount of these policies, nominally, at least, for the benefit of Hillmon's wife. It is true the plaintiff is not alleged to have been a party to such conspiracy, although she was named as beneficiary in the policies, but her husband is alleged to have been a party, and any fraud perpetrated by him at the time the policies were taken out was available as a defence by the company in an action by her.

These questions and declarations of Baldwin to the four witnesses above stated were made either just before or just after the policy was taken out. They were not so much narratives of what had taken place as of the purpose Baldwin had in view, and we know of no substantial reason why they do not fall within the general rule stated by Greenleaf, 1 Greenleaf on Ev. sec. 111, that every act and declaration of each member of the conspiracy, in pursuance of the original concerted plan, and with reference to the common object, is, in contemplation of law, the act and declaration of them all, and is therefore original evidence against each of them. The conspiracy then existed and was still pending. *Smith* v. *National Benefit Soc'y*, 123 N. Y. 85.

These declarations taken together tend to show that Baldwin, who seems to have taken the most active part in the transactions connected with this policy, was heavily indebted, and being pressed by his creditors; that he expected in some way to obtain a large part of Hillmon's insurance, and that he was also desirous of going into a sheep ranch with Hillmon, with whom he declared he had a scheme under consideration by which they could raise the necessary funds; that such scheme consisted in

obtaining insurance upon Hillmon's life, and then going South and getting the body of some other person and passing it off as the body of the insured, and thus recovering the amount of the policy. This testimony was certainly corroborative of other testimony in the case, which both courts below agreed as establishing *prima facie* evidence of a conspiracy, and which was to the effect that Baldwin and Hillmon had been intimate acquaintances for eight or ten years prior to 1879; that Baldwin, who appears to have been a man of considerable means, had employed Hillmon in various capacities connected with his farm, and that during his visits at Lawrence Hillmon generally stayed at his house. Hillmon there first met his wife, who was a cousin of Baldwin's and worked at his house. Hillmon was a man of no property, and after his marriage he and his wife occupied a single room in the house of one Mary Judson, and did their cooking upon her stove. Baldwin and Hillmon became interested in life insurance, and consulted various agents as to their companies and about methods of collection in case of loss. In a conversation with one Wiseman in February, 1879, Hillmon stated that he was going West on business and might get killed; asked about proofs of death; what the widow must do to get her insurance money and what evidence she would have to furnish if he were killed. Under these circumstances he took out insurance for $25,000, the annual premium for which amounted to $600. There were various other items of testimony of the same character, which the courts below regarded as sufficient *prima facie* evidence of a conspiracy.

Under the circumstances we think the evidence of the four witnesses in question should have been submitted to the jury, and that such testimony was admissible as against the plaintiff, though she was not alleged to be a party to the conspiracy, upon the theory that any fraudulent conduct on the part of the insured in procuring the policy, or in procuring the dead body of another to impersonate himself, was binding upon her. It is well settled that the fraud of the insurer's agent in the procurement of the policy is binding upon the principal. *Millville &c. Ins. Co.* v. *Collerd*, 38 N. J. Law, 480; *Nat. Life Ins. Co.* v. *Minch*, 53 N. Y. 144; *Oliver* v. *Mut. &c. Ins. Co.*, 2 Curt. 277; *Burruss* v. *Nat. Life Ass'n*, 32 S. E. Rep. 49.

Statement of the Case.

A number of other alleged errors are embraced in the assignments, but we see none to which we find it desirable to call attention. For the error in the instruction regarding Brown's affidavit and in ruling out the declarations of the four witnesses named,

The judgment of the Court of Appeals is reversed and the case remanded to the Circuit Court for the District of Kansas with instructions to grant a new trial.

MR. JUSTICE BREWER and MR. JUSTICE WHITE dissented.

EASTON *v.* IOWA.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

No. 92. Argued January 14, 15, 1903.—Decided February 2, 1903.

Congress having power to create a system of national banks, is the judge as to the extent of the powers which should be conferred upon such banks, and has the sole power to regulate and control the exercise of their operations. Congress having dealt directly with the insolvency of national banks by giving control to the Secretary of the Treasury and the Comptroller of the Currency, who are authorized to suspend the operations of the banks and appoint receivers thereof when they become insolvent, or when they fail to make good any impairment of capital, and full and adequate provision having been made for the protection of creditors of national banks by requiring frequent reports to be made of their condition, and by the power of visitation of Federal officers, it is not competent for state legislatures to interfere, whether with hostile or friendly intentions, with national banks or their officers in the exercise of the powers bestowed upon them by the general government.

While a State has the legitimate power to define and punish crimes by general laws applicable to all persons within its jurisdiction, and it may declare, by special laws, certain acts to be criminal offences when committed by officers and agents of its own banks and institutions, it is without lawful power to make such special laws applicable to banks organized and operated under the laws of the United States.

IN 1899, in the District Court of Wenneshiek County, State of Iowa, James H. Easton, who had been previously indicted,

was tried, found guilty, and sentenced to imprisonment in the penitentiary of Iowa at hard labor for a term of five years, under the provisions of a statute of that State, for the offence of having received, as president of the First National Bank of Decorah, Iowa, a deposit of one hundred dollars in money in said bank, at a time when the bank was insolvent and when such insolvency was known to the defendant.

At the trial it was contended, on behalf of the defendant, that the statute of Iowa, upon which the indictment was found, did not, and was not intended to, apply to national banks, organized and doing business under the national bank acts of the United States, or to the officers and agents of such banks; and that, if the state statute should be construed and held to apply to national banks and their officers, the statute was void in so far as made applicable to national banks and their officers. Both these contentions were overruled by the trial court, and thereupon an appeal was taken to the Supreme Court of the State of Iowa, and by that court, on April 12, 1901, the judgment of the District Court was affirmed. 113 Iowa, 516. The cause was then brought to this court by a writ of error allowed by the Chief Justice of the Supreme Court of Iowa.

Mr. Charles F. Brown and *Mr. H. T. Reed*, with whom *Mr. John J. Crawford* and *Mr. C. W. Reed* were on the brief, for the plaintiff in error.

National banks are agencies of the National Government created by Congress to enable it to exercise and conduct its fiscal powers and operations. They are instruments of the Federal Government created for public purposes and as such necessarily subject to the paramount authority of the United States. *McCulloch* v. *Maryland*, 4 Wheaton, 425; *Osborn* v. *U. S. Bank*, 9 Wheaton, 738; *Legal Tender Cases*, 110 U. S. 421.

The necessity for the incorporation and regulation of such institution theretofore being a matter solely within the jurisdiction of Congress, the whole subject is a matter out of the plane of state control and jurisdiction. The States cannot legislate upon such a matter, and statutes enacted by state legislatures cannot, by judicial interpretation and construction, be

made applicable to such institutions. *Davis* v. *Elmira Savings Bank*, 161 U. S. 275, 283.

The National Banking Act does not prohibit or forbid the receipt of deposits by a bank when insolvent at any time before it is taken out of the control of its officers by the Comptroller of the Currency, acting under the provisions of the National Banking Act. *State* v. *Fields*, 98 Iowa, 74; *McDonald* v. *Chemical Nat. Bank*, 174 U. S. 610; Rev. Stat. sec. 5205.

A State has no power to legislate in reference to national banks, or to alter or supplement any of the provisions of the National Banking Act. *Farmers' National Bank* v. *Dearing*, 91 U. S. 29; *Prigg* v. *Pennsylvania*, 16 Peters, 539; *Hall* v. *DeCuir*, 95 U. S. 499; *Leisy* v. *Hardin*, 135 U. S. 100.

The statute of Iowa violates the fundamental propositions in that it attempts to supplement the National Banking Act and to regulate and control and limit the business of national banks within the State of Iowa, and directly invades the jurisdiction conferred by Congress upon the Secretary of the Treasury and the Comptroller of the Currency. *McClellan* v. *Chipman*, 164 U. S. 356; *Fuzz* v. *Spaunhorst*, 67 Missouri, 256.

This case falls within the principles laid down in *McCulloch* v. *Maryland*, and in *Osborn* v. *United States Bank*, that the States have no power to tax a national bank. It is also within the principle applied in *Prigg* v. *Pennsylvania*, *Ohio* v. *Thomas*, *In re Waite* and *Cunningham* v. *Nagle*. The means and agencies provided and selected by the Federal Government as necessary and convenient to the exercise of its functions cannot be subject to the taxing power of the States, and so also the Federal Government is without power to tax the corresponding means and agencies of the States. Cooley on Taxation, chap. 1, p. 7, chap. 3, pp. 56–58, cases already cited; *Weston* v. *Charleston*, 2 Peters, 499; *Bank of Commerce* v. *New York*, 2 Black, 620; *Palfrey* v. *Boston*, 101 Massachusetts, 329; *Dobbins* v. *Commissioners of Erie Co.*, 16 Peters, 435; *Ward* v. *Maryland*, 12 Wall. 418–427; *Collector* v. *Day*, 11 Wall. 117; *Freedman* v. *Sigel*, 10 Blatch. 327; *Moore* v. *Quirk*, 105 Massachusetts, 49; *Carpenter* v. *Snelling*, 97 Massachusetts, 455; *People* v. *Gates*, 43 N. Y. 40; *Green* v. *Holway*, 101 Massachusetts, 293; *State*

v. *Gaston*, 32 Indiana, 1; Cooley on Constitutional Limitation, pp. 481, 484, and cases cited in notes.

The argument of the learned attorney general does not sustain the proposition for which he contends.

His argument, briefly stated, is as follows: The certificate of the Comptroller of the Currency is issued to a bank because of its solvency and ability to carry on a legitimate banking business. No certificate would be issued to an insolvent bank. Therefore, whenever a bank becomes insolvent, its authority to continue business must necessarily cease. The fact that a bank holds the Comptroller's certificate cannot and does not authorize it to continue business or to receive deposits a single instant after it becomes insolvent. It is contended that these propositions are supported by the well recognized and sound principle of law that the receipt of a deposit of money by an insolvent bank is a fraud, and it is contended that no act of Congress or certificate of Comptroller of the Currency can authorize a fraud.

This argument is sufficiently answered by reference to the sections of the National Banking Act, which authorize a bank to carry on its business after it is insolvent, and do not prohibit the receipt of deposits when insolvent, but refer the subject of the control of such institutions, under all circumstances, to the Comptroller of the Currency and Secretary of the Treasury.

Admitting all that the attorney general says, we submit it has no relevancy to the question of the power of the State of Iowa to enact the statute in question. Everything that is said on pages fifteen and sixteen of the brief of the learned attorney general might well be addressed to Congress, but it has no force in determining the scope of the constitutional power of a State upon the subject under consideration. The argument of the learned attorney general all leads up to the conclusion stated upon page sixteen of his brief as follows:

"The effect of the statute is to require of the officers of all banks within the State, a higher degree of diligence in the discharge of their duties. It gives to the general public greater confidence in the stability and solvency of national banks, and

in the honesty and integrity of their managing officers. It enables them, better to accomplish the purposes and designs of the General Government, and is an aid, rather than an impediment, to their utility and efficiency as agents and instrumentalities of the United States."

Assuming this to be true, is not Congress the sole judge of the policy to be adopted and enforced in cases of the insolvency of national banks?

Can a state legislature say: The scheme adopted and put in force by Congress in respect to national banks does not command public confidence; or that does not give to such institutions sufficient stability. The States can exercise no concurrent or independent power in reference to the management of such institutions, as from their nature institution or where the purpose to be served is one which must be necessarily exercised by the National Government exclusively. *Gilman* v. *Philadelphia*, 3 Wallace, 730.

Mr. Charles W. Mullan, attorney general of the State of Iowa, for defendant in error.

I. The legislature of Iowa intended that the statute should apply to national banks transacting business in Iowa. *State* v. *Fields*, 98 Iowa, 748; *State* v. *Easton*, 85 N. W. Rep. 795; distinguishing *State* v. *Menche*, 56 Kansas, 77; *Commonwealth* v. *Ketner*, 92 Pa. St. 372; *Allen* v. *Carter*, 119 Pa. St. 192. It is a familiar rule of law that the construction of a statute by the highest court of the enacting State will be followed by the Federal courts. *Bucher* v. *Cheshire R. R. Co.*, 125 U. S. 582; *Bacon* v. *Northwestern Life Ins. Co.*, 131 U. S. 264; *Ankeny* v. *Clark*, 148 U. S. 354; *Adams Express Co.* v. *Ohio*, 165 U. S. 219.

II. The statute is not invalid as to national banks conducting business in Iowa. It is based on the well recognized and sound principle of law which is that the receipt of a deposit of money by an insolvent bank is a fraud. No act of Congress or certificate of the Comptroller of the Currency, can authorize or legalize the commission of a fraud. *Meadowcraft* v. *The People*, 163 Illinois, 65; *St. Louis &c. Ry. Co.* v. *Johnson*, 133 U. S. 566;

Argument for Defendant in Error.

Craigie v. *Hadley*, 99 N. Y. 131; *The N. Y. Breweries Co.* v. *Higgins*, 79 Hun, 250; *Wasson* v. *Hawkins*, 59 Fed. Rep. 233; *Trust & Savings Bank* v. *Mfg. Co.*, 150 Illinois, 340; *First National Bank* v. *Strauss*, 66 Mississippi, 479; 14 Am. St. Rep. 581; *Plumley* v. *Massachusetts*, 155 U. S. 461; *Bank* v. *Commonwealth*, 9 Wall. 361, cited as distinguishing and limiting, *McCulloch* v. *Maryland*, 4 Wheat. 316 and *Farmers' &c. Nat. Bank* v. *Dearing*, 91 U. S. 29; *McClellan* v. *Chipman*, 164 U. S. 356. The statute does not and, therefore, cannot be held invalid on the ground that it in anywise, does interfere, impair, impede or destroy the efficiency of national banks in attaining the objects for which they were created, or impair their efficiency and utility as instrumentalities of the government. *Davis* v. *Elmira Savings Bank*, 161 U. S. 275, 283; *Waite* v. *Dowley*, 94 U. S. 533; citing and distinguishing *Cook County Nat. Bank* v. *United States*, 107 U. S. 445; *Ohio* v. *Thomas*, 173 U. S. 276; *In re Neagle*, 135 U. S. 1; *In re Waite*, 81 Fed. Rep. 363. The States are original sovereign powers and as such retain every sovereign right not delegated to the General Government. They are the foundation upon which the Federal government rests. *Lane County* v. *Oregon*, 7 Wall. 76; *Railroad Co.* v. *Peniston*, 18 Wall. 31; *Texas* v. *White*, 7 Wall. 725.

III. The Federal government has not, as yet, intervened and occupied this field of legislation, to the exclusion of the power of the State to legislate upon the subject. See *Gilman* v. *Philadelphia*, 3 Wall. 730, as to when States may exercise concurrent or independent power. *Prigg* v. *Pennsylvania*, 16 Peters, 539, and *People* v. *Fonda*, 62 Michigan, 401, cited and distinguished, the latter as being in direct conflict with decisions of this court. *Cross* v. *North Carolina*, 132 U. S. 139; *Teal* v. *Felton*, 12 How. 284; *Moore* v. *People*, 14 How. 13; *Commonwealth* v. *Tenny*, 97 Massachusetts, 50; *Hoke* v. *The People*, 122 Illinois, 511; *Commonwealth* v. *Luberg*, 94 Pa. St. 85, cited as overruling *State* v. *Ketner*, 92 Pa. St. 372.

IV. The enactment of the statute was a proper exercise of the police power of the State. Cooley on Const. Lim. 6th ed., 704, 706; *United States* v. *De Witt*, 9 Wall. 41; *License Cases*,

5 How. 504; *Passenger Cases*, 7 How. 283; *Slaughter House Cases*, 16 Wall. 36; *Patterson* v. *Kentucky*, 97 U. S. 503. The police power of a State cannot be alienated even by an express grant; it is a power and responsibility which legislatures cannot divest themselves of if they would. *Thorp* v. *R. & B. R. R. Co.*, 27 Vermont, 149; *Beer Co.* v. *Massachusetts*, 97 U. S. 33; *Stone* v. *Mississippi*, 101 U. S. 814. The Fourteenth Amendment does not take from the States the police powers reserved at the time of the adoption of the Constitution. *Slaughter House Cases*, 16 Wall. 36; *Barbier* v. *Connolly*, 113 U. S. 27; *Mugler* v. *Kansas*, 123 U. S. 623; *United States* v. *Cruikshank*, 92 U. S. 555; *State* v. *Noyes*, 47 Maine, 189; *Lake View* v. *Rose Hill Cemetery*, 70 Illinois, 191. Fraud is trespass upon the rights of others and may therefore always be punished. Tiedeman's Limitations of Police Powers, 291. An insolvent bank has no right to continue business or to receive deposits; it is the duty of its officers to at once close its doors, decline deposits and discontinue business. *Anonymous Case*, 67 N. Y. 598; *Craigie* v. *Hadley*, 99 N. Y. 133; 52 Am. Rep. 9; *St. Louis &c. Ry. Co.* v. *Johnson*, 133 U. S. 566; *Am. Trust &c. Bank* v. *Gueder &c. Mfg. Co.*, 150 Illinois, 336; *Meridan First Nat. Bank* v. *Straw*, 56 Mississippi, 479; 14 Am. St. Rep. 579. The Supreme Court of Mississippi, in a case precisely like the one at bar, sustained the validity of a similar statute. *State* v. *Bardwell*, 72 Mississippi, 535.

V. The statute does not unjustly discriminate against banks and their officers and agents or deny them equal protection under the laws of the State, and is not repugnant to, or void under, the Fourteenth Amendment. The law bears equally upon all persons falling within its classification. Cooley's Constitutional Limitations, 6th ed. 479–481. Legislation limited as to business or territory does not infringe upon the constitutional right of equal protection and right of contract where all persons subject to it are treated alike under like circumstances and conditions. *Munn* v. *Illinois*, 94 U. S. 113; *Walston* v. *Neven*, 123 U. S. 578; *Barbier* v. *Connolly*, 113 U. S. 32; *Hayes* v. *Missouri*, 120 U. S. 68; *Mo. Pac. Ry. Co.* v. *Mackey*, 127 U. S. 205; *Minneapolis &c. Ry. Co.* v. *Herrick*, 127

U. S. 210; *State* v. *Schemmer*, 10 L. R. A. 135; *Vt. Loan & Trust Co.* v. *Whitehead*, 49 N. W. R. 318; *State* v. *Moore*, 104 N. C. 714; *Ex parte Swan*, 96 Missouri, 44.

The statute does not go so far as to attempt to regulate the business of banks, but simply makes fraudulent acts of persons within the State an offence punishable under the law.

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

Those portions of the Iowa statute whose validity is the question in this case consist of sections 1884 and 1885 of the code of that State, and are in the following terms:

"Sec. 1884. No bank, banking house, exchange broker, deposit office, firm, company, corporation, or person engaged in the banking, brokerage, exchange or deposit business, shall, when insolvent, accept or receive on deposit, with or without interest, any money, bank bills or notes, United States Treasury notes or currency, or other notes, bills, checks or drafts, or renew any certificate of deposit.

"Sec. 1885. If any such bank, banking house, exchange broker, deposit office, firm, company, corporation or person shall receive or accept on deposit any such deposits, as aforesaid, when insolvent, any owner, officer, director, cashier, manager, member or person knowing of such insolvency, who shall knowingly receive or accept, be accessory, or permit, or connive at receiving or accepting on deposit therein, or thereby, any such deposits, or renew any certificate of deposit, as aforesaid, shall be guilty of a felony, and, upon conviction, shall be punished by a fine not exceeding ten thousand dollars, or by imprisonment in the penitentiary for a term of not more than ten years, or by imprisonment in the county jail not more than one year, or by both fine and imprisonment."

At the trial evidence was adduced tending to show, and the jury found, that the defendant, being engaged in the banking business, as an officer, to wit, president of the First National Bank of Decorah, on the 21st day of August, A. D. 1896, did, as president of said bank, receive and accept on deposit in said

bank the sum of one hundred dollars in lawful paper money and of the value of one hundred dollars, from one John French, the bank being then and there insolvent, and the defendant then and there well knowing that the said bank was insolvent.

It will be observed that national banks or banking associations are not specifically named in the statute; and it was hence argued on behalf of the defendant, that such institutions are not within the enactment. As, however, the state courts, following a previous decision of the Supreme Court of Iowa, in the case of *State* v. *Fields*, 98 Iowa, 748, held that the statute was applicable to all banks, whether organized under the laws of the State or the acts of Congress, we must accept that construction as correct, and confine our consideration to the question whether, as so construed, the act is within the jurisdiction of the State.

It is obvious that the two sections of the statute, above quoted, must be read together as one enactment. If section 1884, regarded as applicable to national banks, is a valid exercise of power by the State, then the penalties declared in section 1885 can be properly enforced; but if section 1884 must be held invalid as an attempt to control and regulate the business operations of national banks, then the penal provisions of section 1885 cannot be enforced against their officers. In other words, the validity of the mandatory and of the penal parts of the statute must stand or fall together.

What, then, is the character of a state law which forbids national banks, when insolvent, from accepting or receiving on deposit, with or without interest, any money, bank bills or notes, United States Treasury notes or currency, or other notes, bills, checks or drafts, or renewing any certificate of deposit?

The answer given by the Supreme Court of Iowa to this question is as follows:

"The acts of Congress provide no penalty for the fraudulent receiving of deposits, and the statute under consideration operates upon the person who commits the crime. And it is not a material question to determine whether it will be necessary to investigate the financial condition of the bank, to prove that the bank was insolvent when the deposit was received. This

statute is in the nature of a police regulation, having for its object the protection of the public from the fraudulent acts of bank officers. The mere fact that in violating the law of the State the defendant performed an act pertaining to his duty as an officer of the bank, does not in any manner interfere with the proper discharge of any duty he owes to any power, state or Federal. Surely, it was not intended by any act of Congress that officers of a national bank should be clothed with the power to cheat and defraud its patrons. National banks are organized and their business prosecuted for private gain, and we can conceive of no reason why the officers of such banks should be exempt from the penalties prescribed for fraudulent banking."

We think that this view of the subject is not based on a correct conception of the Federal legislation creating and regulating national banks. That legislation has in view the erection of a system extending throughout the country, and independent, so far as powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the States. Having due regard to the national character and purposes of that system, we cannot concur in the suggestions that national banks, in respect to the powers conferred upon them, are to be viewed as solely organized and operated for private gain. The principles enunciated in *McCulloch* v. *Maryland*, 4 Wheat. 316, 425, and in *Osborn* v. *United States Bank*, 9 Wheat. 738, though expressed in respect to banks incorporated directly by acts of Congress, are yet applicable to the later and present system of national banks.

In the latter case it was said by Chief Justice Marshall:

"The bank is not considered as a private corporation, whose principal object is individual trade and individual profit; but as a public corporation, created for public and national purposes. That the mere business of banking is, in its own nature, a private business, and may be carried on by individuals or companies having no political connection with the government, is admitted; but the bank is not such an individual or company. It was not created for its own sake or for private purposes. It has never been supposed that Congress could create such a cor-

poration. The whole opinion of the court, in *McCulloch* v. *Maryland*, is founded on, and sustained by, the idea that the bank is an instrument which is 'necessary and proper for carrying into effect the powers vested in the government of the United States.'"

A similar view of the nature of banks organized under the national bank laws has been frequently expressed by this court. Thus, in *Farmers' National Bank* v. *Dearing*, 91 U. S. 29, it was said:

"National banks organized under the act are instruments designed to be used to aid the government in the administration of an important branch of the public service. They are means appropriate to that end."

Such being the nature of these national institutions, it must be obvious that their operations cannot be limited or controlled by state legislation, and the Supreme Court of Iowa was in error when it held that national banks are organized and their business prosecuted for private gain, and that there is no reason why the officers of such banks should be exempt from the penalties prescribed for fraudulent banking. Nor is it altogether true, as asserted by that court, that there is no act of Congress prohibiting the receipt of deposits by national banks or their officers, when a bank is insolvent. It is true that there is no express prohibition contained in the Federal statutes, but there are apt provisions, sanctioned by severe penalties, which are intended to protect the depositors and other creditors of national banks from fraudulent banking. It is not necessary to quote at length those provisions, but it will be sufficient to say that a bank organized under the national bank act is authorized to make contracts; to prescribe, by its board of directors, by-laws regulating the manner in which its general business shall be conducted, and the privileges granted by law exercised and enjoyed; to exercise by its board of directors, or duly authorized officers, all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes and drafts, bills of exchange; by receiving deposits; by buying and selling exchange; by loaning money on personal security. Such banks are required to deposit

with the Treasurer of the United States, as security for their circulating notes, United States bonds in an amount not less than one fourth of their capital; to report to the Treasurer of the United States twice each year the average amount of their deposits, and to pay to said Treasurer each half year a tax upon such deposits; and to make to the Comptroller of the Currency not less than five reports during each year, (and special reports as often as he may require,) according to such form as he may require, verified by the oath or affirmation of the president or cashier, which reports shall exhibit in detail the resources and liabilities of the association. The Comptroller is directed to appoint suitable persons to make examination of the affairs of every banking association, who shall have power to make a thorough examination into all the affairs of the association, and in doing so to examine any of the officers or agents thereof, and to make a full and detailed report of the condition to the Comptroller. Whenever the Comptroller becomes satisfied of the insolvency of such bank he may, after due examination of its affairs, appoint a receiver, who shall take possession of the assets of the association, wind up its affairs, and make ratable distribution of its assets. And severe penalties are imposed upon any officer or agent of such association who violates any of the provisions of the national bank act.

It thus appears that Congress has provided a symmetrical and complete scheme for the banks to be organized under the provisions of the statute.

It is argued by the learned Attorney General on behalf of the State of Iowa that "the effect of the statute of Iowa is to require of the officers of all banks within the State a higher degree of diligence in the discharge of their duties. It gives to the general public greater confidence in the stability and solvency of national banks, and in the honesty and integrity of their managing officers. It enables them better to accomplish the purposes and designs of the general government, and is an aid, rather than impediment, to their utility and efficiency as agents and instrumentalities of the United States."

But we are unable to perceive that Congress intended to leave the field open for the States to attempt to promote the wel-

fare and stability of national banks by direct legislation. If they had such power it would have to be exercised and limited by their own discretion, and confusion would necessarily result from control possessed and exercised by two independent authorities.

Nor can we concede that by such legislation of a State, as was attempted in this instance, the affairs of a national bank, or the security of its creditors, would be advantageously affected. The provision of the state statute is express that it is the duty of the officers of the bank, when they know it is insolvent, to at once suspend its active operations; for it is obvious, that to refuse to accept deposits would be equivalent to a cessation of business. Whether a bank is or is not actually insolvent may be, often, a question hard to answer. There may be good reason to believe that, though temporarily embarrassed, the bank's affairs may take a fortunate turn. Some of the assets that cannot at once be converted into money may be of a character to justify the expectation that, if actual and open insolvency be avoided, they may be ultimately collectible, and thus the ruin of the bank and its creditors be prevented. *McDonald* v. *Chemical Nat. Bank*, 174 U. S. 610. But under the state statute, no such conservative action can be followed by the officers of the bank except at the risk of the penalties of fine and imprisonment. In such a case the provisions of the Federal statute would permit the Comptroller to withhold closing the bank and to give an opportunity to escape final insolvency. It would seem that such an exercise of discretion on the part of the Comptroller would, in many cases, be better for all concerned than the unyielding course of action prescribed by the state law. However, it is not our province to vindicate the policy of the Federal statute, but to declare that it cannot be overridden by the policy of the State.

Similar legislation to that of the State of Iowa has been considered and disapproved by the Supreme Courts of several of the other States.

Thus in *Commonwealth* v. *Ketner*, 92 Penn. St. 372, one Torrey was indicted and found guilty under a charge that, as the cashier of the First National Bank of Ashland, organized under

the laws of the United States, he had embezzled the moneys of the said bank contrary to the form of the act of assembly of the State of Pennsylvania, prescribing a penalty of fine and imprisonment. A writ of *habeas corpus* was allowed by the Supreme Court of the State, and the accused was discharged. That court, having quoted the acts of assembly relied on, said:

"We are spared further comment upon these acts for the reason that they have no application to national banks. Neither of them refers to national banks in terms, and we must presume, that when the legislature used the words 'any bank,' that it referred to banks created under and by virtue of the laws of Pennsylvania. The national banks are the creatures of another sovereignty. They were created and are now regulated by the acts of Congress. When our acts of 1860 and 1861 were passed, there were no national banks, nor even a law to authorize their creation. When the act of 1878 was passed, Congress had already defined and punished the offence of embezzlement by the officers of such banks. There was therefore no reason why the State, even if it had the power, should legislate upon the subject. Such legislation could only produce uncertainty and confusion, as well as a conflict of jurisdiction. In addition, there would be the possible danger of subjecting an offender to double punishment, an enormity which no court would permit, if it had the power to prevent it. An act of assembly prescribing the manner in which the business of *all* banks shall be conducted, or limiting the number of the directors thereof, could not by implication be extended to national banks, for the reason, that the affairs of such banks are exclusively under the control of Congress. Much less can we, by mere implication, extend penal statutes . . . to such institutions. The offence for which the relator is held, is not indictable, either at common law or under the statutes of Pennsylvania. We therefore order him to be discharged."

In *Allen's Appeal*, 119 Pa. St. 192, the question was whether a state law, which forbade "any cashier of any bank from engaging, directly or indirectly, in the purchase or sale of stock, or in any other profession, occupation or calling other than his duty as cashier," and which declared the same to be a misde-

meanor, was applicable to the cashier of a national bank, and it was held that it was not so applicable, the court saying, among other things:

"The national banking act and its supplements create a complete system for the government of those institutions. Conceding the power of Congress to create this system, we are unable to see how it can be regulated or interfered with by state legislation. The act of 1860, if applied to national banks, imposes a disqualification upon cashiers of such institutions where none has been imposed by act of Congress. If the State may impose one qualification upon the cashiers, why not another? If upon the cashier, why not upon the president or other officer? Nay, further, suppose the legislature should declare that no person should be a bank director unless he has arrived at fifty years of age, or should be the owner of one hundred shares of stock, could we apply such an act to national banks? If so, such institutions would have a precarious existence. They would be liable to be interfered with at every step, and it might not be long before the whole national banking system would have to be thrown aside as so much worthless lumber."

People v. *Fonda*, 62 Michigan, 401, was a case wherein a clerk of a national bank was prosecuted in a state court and found guilty of larceny and embezzlement of the funds of the bank under the statute of the State. But it was held by the Supreme Court of the State that the offence was within the laws of the United States, and that, accordingly, the state court was without jurisdiction. It was said by the court, in view of section 711 of chapter 12 of the Revised Statutes of the United States, in the following terms: "The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several States: First, of all crimes and offences cognizable under the authority of the United States;" that, Congress, by law, created the national banking system, and provided for its internal workings, and prescribed a punishment for the offence charged against the defendant. It seems clearly the case is one falling within section 711 above quoted, and that by the Federal law

itself the jurisdiction of the State is expressly excluded. Chancellor Kent, in his commentaries, 1 Com. 400, says: "In judicial matters the concurrent jurisdiction of the state tribunals depends altogether upon the pleasure of Congress, and may be revoked and extinguished whenever they think proper, in every case in which the subject matter can constitutionally be made cognizable in the Federal courts; and, without an express provision to the contrary, the state courts will retain a concurrent jurisdiction in all cases where they had jurisdiction originally over the subject matter;" and accordingly the judgment of the trial court was reversed and the prisoner discharged.

In *Commonwealth* v. *Felton*, 101 Massachusetts, 204, the defendant was charged with being an accessory to an embezzlement by an officer of a national bank, and it was said by the court:

"The difficulty in the way of holding the defendant upon the present indictment is, that the act of Congress has taken the crime of the principal out of our jurisdiction. Our courts cannot deal with him upon that charge."

A law of the State of Kansas provided that no bank should receive deposits when it was insolvent, and prescribed a punishment for a violation of that provision by any officer or agent of such bank; but it was held by the Supreme Court of that State that the provisions of the state law had no application to national banks, and that the penalties prescribed were not operative as against officers of national banks. *State* v. *Menke*, 56 Kansas, 77.

The same view has prevailed in the lower Federal courts. In *Sutton Manufacturing Company* v. *Hutchinson*, 63 Fed. Rep. 496, 501, it was said by the Circuit Court of Appeals, through Mr. Justice Harlan:

"A corporation is not required by any duty it owes to creditors to suspend operations the moment it becomes financially embarrassed, or because it may be doubtful whether the objects of its creation can be attained by further effort upon its part. It is in the line of right and of duty when attempting, in good faith, by the exercise of its lawful powers and by the use of all

legitimate means, to preserve its active existence, and thereby accomplish the objects for which it was created."

In *In re Waite*, 81 Fed. Rep. 359, it was held by the Circuit Court of the United States for the District of Iowa that a pension examiner of the United States was not liable to a criminal prosecution in the courts of a State for acts done by him in his official capacity. In the opinion it was said:

"The question which marks the limit of the state jurisdiction is whether the person sought to be called to account was acting under the authority of the United States when the acts complained of were done, in and about a subject matter within Federal jurisdiction . . . for the criminal statutes of the State are not applicable to acts done within the plane of Federal jurisdiction, and under the authority of the United States. Whenever it is made to appear in a criminal case pending in the state court that the acts charged in the indictment were done by defendant as an officer or agent of the United States in and about a matter within Federal control, . . . then it is made to appear that the state court is asked to assume a jurisdiction which it cannot rightfully exercise; and if that court entertains the case, and proceeds to adjudicate on the question of the extent of the authority possessed by the officers of the United States, . . . testing the same by the provisions of state statutes, . . . it proceeds at the peril of having its jurisdiction questioned and denied."

So, in *In re Thomas*, 82 Fed. Rep. 304, it was held by the Circuit Court of the United States for the Southern District of Ohio that, the governor of the soldiers' home at Dayton, Ohio, in serving to the inmates, as food, oleomargarine furnished by the government, is not subject to the law of the State prescribing the manner in which oleomargarine shall be used in eating houses, because his act is that of the government of the United States within its constitutional powers, and wholly beyond the control or regulation of the legislature of the State.

This judgment was affirmed by this court in *Ohio* v. *Thomas*, 173 U. S. 276.

A leading case in which this court had occasion to consider the limitation of legislation by a State affecting a subject within

the scope of action by Congress is that of *Prigg* v. *Pennsylvania*, 16 Pet. 539, from which we quote the following observations:

"If Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that state legislatures have a right to interfere, and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any farther legislation to act upon the subject matter. Its silence as to what it does not do, is as expressive of what its intention is as the direct provisions made by it."

On the immediate subject of control over national banks it was said, in *Farmers' National Bank* v. *Dearing*, 91 U. S. 29:

"The States can exercise no control over national banks, nor in anywise affect their operation, except so far as Congress may see proper to permit. Everything beyond this is 'an abuse, because it is the usurpation of power which a single State cannot give.' Against the national will 'the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government.'"

This subject has received recent and careful consideration in the case of *Davis* v. *Elmira Savings Bank*, 161 U. S. 275, twice argued in this court. The legislature of the State of New York had provided by law that savings banks, organized under the laws of that State, should have a preference as depositors in banks in case of the insolvency of such banks, and it was sought to apply this provision to the case of a deposit by a savings bank in a national bank which had subsequently become insolvent. But this court held that such a provision could not be extended by a State to national banks, because it was repugnant to that provision of the national banking act which requires the assets of an insolvent national bank

to be ratably distributed among its creditors. In the opinion of the court, by Mr. Justice White, it was said:

"National banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt, by a State, to define their duties or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impairs the efficiency of those agencies of the Federal government to discharge the duties, for the performance of which they were enacted. These principles are axiomatic, and are sanctioned by the repeated adjudications of this court."

Our conclusions, upon principle and authority, are that Congress, having power to create a system of national banks, is the judge as to the extent of the powers which should be conferred upon such banks, and has the sole power to regulate and control the exercise of their operations; that Congress has directly dealt with the subject of insolvency of such banks by giving control to the Secretary of the Treasury and the Comptroller of the Currency, who are authorized to suspend the operations of the banks and appoint receivers thereof when they become insolvent, or when they fail to make good any impairment of capital; that full and adequate provisions have been made for the protection of creditors of such institutions by requiring frequent reports to be made of their condition, and by the power of visitation by Federal officers; that it is not competent for state legislatures to interfere, whether with hostile or friendly intentions, with national banks or their officers in the exercise of the powers bestowed upon them by the general government.

Cross v. *North Carolina*, 132 U. S. 131, was a case wherein this court pointed out the distinction between crimes defined and punishable at common law or by the general statutes of a State and crimes and offences cognizable under the authority of the United States; and accordingly it was held that the crime of forging promissory notes, purporting to be made by indi-

viduals, and made payable to or at a national bank, was a distinct and separate offence, indictable under the laws of the State.

Undoubtedly a State has the legitimate power to define and punish crimes by general laws applicable to all persons within its jurisdiction. So, likewise, it may declare, by special laws, certain acts to be criminal offences when committed by officers or agents of its own banks and institutions. But it is without lawful power to make such special laws applicable to banks organized and operating under the laws of the United States.

It was by failing to observe the distinction between the two classes of cases that, we think, the courts below fell into error.

The judgment of the Supreme Court of Iowa is reversed, and the cause is remanded to that court to take further action not inconsistent with the opinion of this court.

BLEISTEIN *v.* DONALDSON LITHOGRAPHING COMPANY.

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

No. 117. Argued —Decided February 2, 1903.

Chromolithographs representing actual groups of persons and things, which have been designed from hints or descriptions of the scenes represented, and which are to be used as advertisements for a circus are "pictorial illustrations" within the meaning of Rev. Stat. § 4952, allowing a copyright to the "author, designer, or proprietor . . . of any engraving, cut, print, . . . or chromo" as affected by the act of 1874, chap. 301, § 3, 18 Stat. 78, 79. And on complying with all the statutory requirements the proprietors are entitled to the protection of the copyright laws.

THE case is stated in the opinion of the court.

Mr. Ansley Wilcox and *Mr. Arthur von Briesen* for plaintiffs in error:

This action comes here upon writ of error to the Circuit Court

of Appeals for the Sixth Circuit, which court heard it on writ of error directed to the United States Circuit Court for the District of Kentucky. The Circuit Court, at the close of plaintiffs' case, instructed the jury to find a verdict for defendant, which was done and judgment entered thereon. The Circuit Court of Appeals affirmed said judgment.

There were three causes of action which were all based upon sec. 4965 of the Revised Statutes, quoted on page 60. By order of the Circuit Court, dated June 10, 1899, the marshal seized 10,590 eight-page prints and 13,205 four-page prints, described in the writ, and also five metal electrotype plates, all of which he found in the defendant's possession (page 13).

The action was tried at Covington, Kentucky, on December 12 and 13, 1899, before Hon. Walter Evans, sitting as Circuit Judge, and a jury.

At the outset of the trial, during the direct examination of the first witness, the court anticipated the question upon which it afterwards took the case away from the jury and decided it, by the following remark: "*The real controversy will be whether this is a subject of copyright, whether it comes within the copyright law.*"

At the close of the plaintiffs' case, defendant moved for "peremptory instructions for the defendant." The court said, "State why, in a word," to which defendant's counsel answered: "In the first place I want to say with reference to the Statuary Exhibit. . . . It is alleged in the petition, and is in fact copyrighted on the 18th of April, and the publication plainly shows it was prior to that. That is a specific objection to that one upon that ground specifically—that is the Statuary.

"The Court: Now as to the other two.

"Counsel: The specific objection to this one, the Ballet, is that it is an immoral picture.

"And the general objection that I make to them all is that they are none of them subject matter of copyright. They are all mere matter of advertising."

The next day the court delivered a written opinion which concludes as follows:

"The case must turn upon the others (other questions), and

especially upon the general proposition that the things copyrighted in this case were by no means such as either the Constitution or the legislation of Congress intended to protect by the privilege of copyright. The court cannot bring its mind to yield to the conclusion that such tawdry pictures as these were ever meant to be given the enormous protection of not only the exclusive right to print them, but the additional protection of a penalty of a dollar each for reprints from them.

"As previously stated, they are neither 'pictorial illustrations' nor 'works connected with the fine arts' within the meaning of section 4952. Not being so, there was no authority to grant the copyrights, whether the Constitution authorizes Congress to promote the fine arts or not.

"The judgment of the court is, that the plaintiffs, on their own showing, are not entitled to recover, and for that reason the motion of defendant will be granted, and I will instruct the jury to find a verdict for it."

The jury, in accordance with said instruction, returned a verdict for the defendant.

There is no question as to the fact of infringement.

The sheets in evidence, made by defendant, contain reproductions by means of cheap electrotype plates of each of the plaintiffs' designs. These reproductions are not in colors.

The principal questions are:

First. Whether on the question of artistic merit or value of these lithographic prints or chromos, the Circuit Court was justified in taking the case from the jury, and condemning them entirely as not being fit subjects for copyright.

Second. Whether the copyrights were obtained for these prints in accordance with the Constitution and laws of the United States, and are valid copyrights.

The second question involves the inquiries: Whether the copyrights were properly taken out by the plaintiffs, in their trade names of "The Courier Co." and "The Courier Lithographing Co.," and, incidentally, whether plaintiffs have the right to sue in their individual names for infringement of these copyrights; and whether the Statuary Act Design was copyrighted before it was published.

Argument for Plaintiffs in Error.

The three pictures in question are show-bills or circus bills, also called posters and, more definitely, picture-posters. They are colored lithographs or chromolithographs, commonly called "chromos." They were designed primarily to be sold to the proprietors of circuses and other shows, and by them to be used for advertising; but they could be sold to any one, or used for any purpose for which they were adapted.

They were made in the plaintiffs' lithographing establishment under a special contract with the proprietor of a circus, by which the plaintiffs agreed to design and get up certain representations of scenes supposed to be exhibited at the show, the plaintiffs reserving rights of design and of copyright, and with the usual understanding that so long as the proprietor of the circus used these designs he had the right to them, but if he ceased to use any of them, the plaintiffs could sell the design or the pictures which embodied it, to any one.

The fundamental question of the right to copyright such show-bills or posters, is a question of great importance, involving the protection of an immense industry. The foundation of the copyright law is in the provision of the Constitution (art. 1, sec. 8), which authorizes Congress—

"To promote the progress of science and *useful arts*, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries."

It is settled that the words "authors" and "writings," in this section, are not confined to literary writers and their works, but include, among others, designers, engravers and lithographers, as well as photographers. *Burrow-Giles Litho. Co.* v. *Sarony*, 111 U. S. 53; *Trade Mark Cases*, 100 U. S. 82. Picture-posters or show bills, such as these chromolithographs were, are not designed for close inspection or long-continued study, like an oil painting, a steel or wood engraving, or an etching, and they are not to be judged by the same standards. They are intended to catch the eye of the passer on the street, or any one who merely glances at them, and to challenge his attention,—if possible to compel him to look again, so that he will observe what is the subject of the poster and have this forced upon his mind, and will be attracted by it. Their func-

tion is to illustrate something, and to advertise it by appealing quickly to the imagination, and conveying instantly a strong and favorable impression. Thus, to be successful, they require artistic ability, and above all things creativeness or originality of a high order, but peculiar. They must be designed boldly, and executed on broad lines, with not much attention to detail, so that the spirit of the picture will stand out at once, and almost leap at you, and will not be lost in a mass of details and minor features.

Such is the ideal picture-poster, a special and peculiar branch of pictorial art, and one into which many gifted artists, highly successful in other fields, have ventured with greater or less success. Charles Hiatt's work entitled "Picture Posters," published in 1895 by George Bell & Sons, London; "The Modern Poster," by Alexandre and others, published in 1895 by Charles Scribner's Sons.

Certainly it does not lie in the mouth of the pirate, who has stolen and copied them at some expense and considerable risk, to deny that they have merit and value.

I. The designs were proper subjects of copyright and each of these picture-posters was a proper subject of copyright, within the language and the spirit of the copyright law. There was abundant evidence of originality of design, of artistic merit, and of practical value and usefulness, as to each of the pictures.

If any of these qualities was seriously questioned by the defence, it became the duty of the court to send the case to the jury.

All of the pictures are new and original designs and involve new and original conceptions and creations. There was enough evidence on this subject to require the case to be submitted to the jury if any question was raised about it, citing, and in some instances distinguishing, as to definition of author, writings, etc., *The Trade Mark Cases*, 100 U. S. 82; *Lithograph Co.* v. *Sarony*, 111 U. S. 53; *Nottage* v. *Jackson*, 11 Q. B. Div. 627; *Brightly* v. *Littleton*, 37 Fed. Rep. 103; *Carlisle* v. *Colusa County*, 57 Fed. Rep. 979; *Drury* v. *Ewing*, Fed. Cases, No. 4095.

If any one of the pictures was sufficiently proved to be new

and original, this was enough to carry the case to the jury upon this question; they were all proved to be new and original.

II. As to artistic merit and value. The pictures being original designs, we maintain that they are of sufficient artistic merit and of sufficient value and usefulness to be entitled to copyright. At least there was enough evidence of this to require the case to be submitted to the jury, if any question was raised about it,—and furthermore no such question was raised by the defence.

"If a copyrighted article has merit and value enough to be the object of piracy, it should also be of sufficient importance to be entitled to protection." Drone on Copyright, p. 212, cited with approval in *Henderson* v. *Tomkins*, 60 Fed. Rep. 758, 765; *Church* v. *Linton*, 25 Ont. Rep. 121; *Hegeman* v. *Springer*, 110 Fed. Rep. 374; *Bolles* v. *Outing Co.*, 77 Fed. Rep. 966; 175 U. S. 262; *Richardson* v. *Miller*, Fed. Cases, No. 11,791.

We have nothing to do with cases involving attempts to copyright *mere catalogues or price lists*, or labels, sometimes containing pictures, reproduced by photographic or other mechanical processes, of articles intended for sale, but which obviously have no artistic merit or originality. These decisions, whether condemning or upholding such copyrights, do not touch the questions involved in the case at bar. Distinguishing *Mott Iron Works* v. *Clow*, 82 Fed. Rep. 216; also citing *Yuengling* v. *Schile*, 12 Fed. Rep. 97, 101; *Schumaker* v. *Schwencke*, 25 Fed. Rep. 466; *Lamb* v. *Grand Rapids School Furniture Co.*, 39 Fed. Rep. 474; Drone on Copyright, 164, 165; *Grace* v. *Newman*, L. R. 19 Eq. Cases, 623; *Maple* v. *Junior Army & Navy Stores*, L. R. 21 Ch. Div. 369; *Church* v. *Linton*, 25 Ont. Rep. 131; *Carlisle* v. *Colusa County*, 57 Fed Rep. 979.

"The degree of merit of the copyrighted matter the law is not concerned with. Any is legally enough. To use it or not use it, is voluntary on the part of the public."

III. The copyrights were properly taken out by the plaintiffs in their trade names of "The Courier Co." and "The Courier Litho. Co.," and the plaintiffs have the right to sue in their individual names for infringement of these copyrights.

That copartners in business, who are the proprietors of a

copyrighted article, may take out a copyright in either of their copartnership or trade names, is well settled. *Scribner* v. *Clark*, 50 Fed. Rep. 473; affirmed as *Belford* v. *Scribner*, 144 U. S. 488; *Callaghan* v. *Myers*, 128 U. S. 617; *Scribner* v. *Allen Co.*, 49 Fed. Rep. 854; *Werckmeister* v. *Springer Lith. Co.*, 63 Fed. Rep. 808; *Rock* v. *Lazarus*, Law Rep. 15 Eq. Cases, 104; *Weldon* v. *Dicks*, Law Rep. 10 Ch. Div. 247; *Fruit-Cleaning Co.* v. *Fresno Home Packing Co.*, 94 Fed. Rep. 845.

Finally, the plaintiffs were the "*proprietors*" of each of the copyrighted prints, and as such were authorized to take out the copyrights by the express language of the copyright law, Rev. Stat., sec. 4952, which includes "proprietors" with "authors, inventors (and) designers." *Colliery Eng. Co.* v. *United etc., Co.*, 94 Fed. Rep. 152.

No formal assignment of the right to a copyright is necessary. *Consent* is sufficient to constitute one the proprietor. *Carte* v. *Evans*, 27 Fed. Rep. 861. See also *Schumacher* v. *Schwencke*, 25 Fed. Rep. 466; *Little* v. *Gould*, Fed. Cases, No. 8395; *Lawrence* v. *Dana*, Fed. Cases, No. 8136; *Sweet* v. *Benning*, 81 Eng. Com. Law Rep. 459; 16 Com. Bench Rep. 459; *Gill* v. *United States*, 160 U. S. 426, 435.

All of the pictures, and particularly the Statuary Act Design, were copyrighted before publication.

The law is well settled that there was no publication of these prints when they were shipped from Buffalo on April 11, or when they were received by Mr. Wallace at Peru, Indiana, on or about April 15. There was no publication until they were exposed to the general public, so that the public, without discrimination as to persons, might enjoy them. This must have been some time after April 15, when the last copyright was surely completed.

Publication is a legal conclusion which follows from certain acts. Drone on Copyright, p. 291; *Jewelers Merc. Agency* v. *Jewelers Pub. Co.*, 84 Hun (N. Y. Sup. Ct.), 12, 16; *Callaghan* v. *Myers*, 128 U. S. 617; *Black* v. *Henry G. Allen Co.*, 56 Fed. Rep. 764; *Belford* v. *Scribner*, 144 U. S. 488; *Garland* v. *Gemmill*, 14 Canada Sup. Ct. Rep. 321; *Prince Albert* v. *Strange*, 2 De Gex & Smale, 652; 1 MacNaghten & Gorden; 47 Eng. Ch.

Rep. 25. The representation of a play upon the stage regularly at a theatre, does not constitute a publication. *Tompkins* v. *Halleck*, 133 Massachusetts, 32; *Palmer* v. *De Witt*, 47 N. Y. 532; *Boucicault* v. *Hart*, Fed. Cases, No. 1692.

The use by a teacher of his manuscript and allowing pupils to make copies for the purpose of obtaining his instruction, does not amount to a publication. *Bartlett* v. *Crittenden*, Fed. Cases, Nos. 1076 and 1082. The printing of copies of an operetta and distributing them to artists, for private use only in learning their parts, and the representing of the operetta on the stage, is not a publication. *French* v. *Kreling*, 63 Fed. Rep. 621; *Reed* v. *Carusi*, Fed. Cases, No. 11,642; *Blume* v. *Spear*, 30 Fed. Rep. 629; *Exch. Tel. Co.* v. *Cent. News*, Law Rep. 2 Ch. Div. 48.

Mr. Edmund W. Kittredge, with whom *Mr. Joseph Wilby* was on the brief, for defendant in error, contended that the plaintiff in error was not entitled to copyright. The evidence established that these three prints were ordered by B. E. Wallace, proprietor of the circus known as the "Wallace Shows," under contract with him as an advertisement for his show, and they have never been made for anybody else. All of these pictures purported to be representations of acts to be done in the Wallace Shows, and all were made under a representation by Wallace, expressed on the face of the pictures, that his show was going to do these things. All these posters contain reading matter indicating that these were pictures of acts to be done in the Wallace Shows, and they all included pictures of Mr. Wallace himself.

They were prints and the copyright inscription was insufficient. But for the provision in the first clause of this act the inscription, "Copyright, 1898, Courier Litho. Co., Buffalo, N. Y.," would have been fatal to the plaintiffs' right of action. *Thompson* v. *Hubbard*, 131 U. S. 123. The inscription prescribed by section 4962 of the Revised Statutes was otherwise indispensable to the maintenance of an action for the infringement of a copyright. The notice given on each one of these pictures was that authorized by the act of June 18, 1874. Having thus availed themselves of the provisions of this act,

clearly the plaintiffs are not in position to claim that the pictures are not covered by its provisions. Again, if these pictures were chromos, and not prints, cuts or engravings, then under the allegations of the petition they were not admissible in evidence because they were not in support of the allegations of the petition. As to what a chromo is and how statute should be construed, *Yuengling* v. *Schile*, 12 Fed. Rep. 107; *Bolles* v. *Outing Company*, 175 U. S. 262; *Thornton* v. *Schreiber*, 124 U. S. 612; *Rosenbach* v. *Dreyfuss*, 2 Fed. Rep. 217; *Ehret* v. *Pierce*, 10 Fed. Rep. 554; *S. C.*, 18 Blatch. 302; *Schumacher* v. *Wogram*, 35 Fed. Rep. 210; *Higgins* v. *Kueffel*, 140 U. S. 428. As to advertisements and copyrights, citing *Cobbett* v. *Woodward*, L. R. 14 Eq. 407, cited with approval by this court in *Baker* v. *Selden*, 101 U. S. 106; *Clayton* v. *Stone & Hall*, 2 Paine, 392; *Mott Iron Works* v. *Clow*, 82 Fed. Rep. 216.

There was no evidence tending to show that the plaintiffs themselves, or either of them, were the authors of these prints. It was claimed that they were the proprietors because, as they also claimed, the design or conception was that of their employés, working for them, under salaries, and that their designs were the property of the employer. If they were not themselves the authors, then it was incumbent upon them to allege how they acquired title as proprietors from the author, inventor or designer. *Lithographic Co.* v. *Sarony*, 111 U. S. 53; *Nottage* v. *Jackson*, 11 Q. B. D. 627; *Atwell* v. *Ferret*, 2 Blatch. 46; *Bimms* v. *Woodworth*, 4 Wash. C. C. Rep. 48; *Black* v. *Allen Co.*, 42 Fed. Rep. 618; *S. C.*, 56 Fed. Rep. 764; *Press Pub. Co.* v. *Falk*, 59 Fed. Rep. 524; *Pollard* v. *Photograph Co.*, 40 Ch. Div. 345; *Moore* v. *Rugg*, 46 N. W. 141; *Dielman* v. *White*, 102 Fed. Rep. 892; *Parton* v. *Prang*, 3 Clifford, 537; *Little* v. *Good*, 2 Blatch. 166.

It is incumbent upon the plaintiffs, in a case like this, for the recovery of penalties, to allege and to prove as alleged, every fact essential to the validity of their copyright. *Jones* v. *Van Zandt*, 5 How. 372.

The copyright law does not protect what is immoral in its tendency. A print representing unchaste acts or scenes calculated to excite lustful or sensual desires in those whose minds

are open to such influences, and to attract them to witness the performance of such scenes, is manifestly of that character. It is the young and immature and those who are sensually inclined who are liable to be influenced by such scenes and representations, and it is their influence upon such persons that should be considered in determining their character. *Broder* v. *Zeno Mauvais Music Co.*, 88 Fed. Rep. 74; *Dunlop* v. *United States*, 165 U. S. 501; *Martinetti* v. *Maguire*, Fed. Cases, No. 9173, *The Black Crook* case.

Mr. Justice Holmes delivered the opinion of the court.

This case comes here from the United States Circuit Court of Appeals for the Sixth Circuit by writ of error. Act of March 3, 1891, c. 517, § 6, 26 Stat. 828. It is an action brought by the plaintiffs in error to recover the penalties prescribed for infringements of copyrights. Rev. Stat. §§ 4952, 4956, 4965, amended by act of March 3, 1891, c. 565, 26 Stat. 1109, and act of March 2, 1895, c. 194, 28 Stat. 965. The alleged infringements consisted in the copying in reduced form of three chromolithographs prepared by employés of the plaintiffs for advertisements of a circus owned by one Wallace. Each of the three contained a portrait of Wallace in the corner and lettering bearing some slight relation to the scheme of decoration, indicating the subject of the design and the fact that the reality was to be seen at the circus. One of the designs was of an ordinary ballet, one of a number of men and women, described as the Stirk family, performing on bicycles, and one of groups of men and women whitened to represent statues. The Circuit Court directed a verdict for the defendant on the ground that the chromolithographs were not within the protection of the copyright law, and this ruling was sustained by the Circuit Court of Appeals. *Courier Lithographing Co.* v. *Donaldson Lithographing Co.*, 104 Fed. Rep. 993.

There was evidence warranting the inference that the designs belonged to the plaintiffs, they having been produced by persons employed and paid by the plaintiffs in their establishment to make those very things. *Gill* v. *United States*, 160 U. S. 426,

435; *Colliery Engineer Company* v. *United Correspondence Schools Company*, 94 Fed. Rep. 152; *Carte* v. *Evans*, 27 Fed. Rep. 861. It fairly might be found also that the copyrights were taken out in the proper names. One of them was taken out in the name of the Courier Company and the other two in the names of the Courier Lithographing Company. The former was the name of an unincorporated joint stock association formed under the laws of New York, Laws of 1894, c. 235, and made up of the plaintiffs, the other a trade variant on that name. *Scribner* v. *Clark*, 50 Fed. Rep. 473, 474, 475; *S. C.*, *sub nom.* *Belford* v. *Scribner*, 144 U. S. 488.

Finally, there was evidence that the pictures were copyrighted before publication. There may be a question whether the use by the defendant for Wallace was not lawful within the terms of the contract with Wallace, or a more general one as to what rights the plaintiffs reserved. But we cannot pass upon these questions as matter of law; they will be for the jury when the case is tried again, and therefore we come at once to the ground of decision in the courts below. That ground was not found in any variance between pleading and proof, such as was put forward in argument, but in the nature and purpose of the designs.

We shall do no more than mention the suggestion that painting and engraving unless for a mechanical end are not among the useful arts, the progress of which Congress is empowered by the Constitution to promote. The Constitution does not limit the useful to that which satisfies immediate bodily needs. *Burrow-Giles Lithographic Co.* v. *Sarony*, 111 U. S. 53. It is obvious also that the plaintiffs' case is not affected by the fact, if it be one, that the pictures represent actual groups—visible things. They seem from the testimony to have been composed from hints or description, not from sight of a performance. But even if they had been drawn from the life, that fact would not deprive them of protection. The opposite proposition would mean that a portrait by Velasquez or Whistler was common property because others might try their hand on the same face. Others are free to copy the original. They are not free to copy the copy. *Blunt* v. *Patten*, 2 Paine, 397, 400. See *Kelly* v.

Morris, L. R. 1 Eq. 697; *Morris* v. *Wright*, L. R. 5 Ch. 279. The copy is the personal reaction of an individual upon nature. Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone. That something he may copyright unless there is a restriction in the words of the act.

If there is a restriction it is not to be found in the limited pretensions of these particular works. The least pretentious picture has more originality in it than directories and the like, which may be copyrighted. Drone, Copyright, 153. See *Henderson* v. *Tomkins*, 60 Fed. Rep. 758, 765. The amount of training required for humbler efforts than those before us is well indicated by Ruskin. "If any young person, after being taught what is, in polite circles, called 'drawing,' will try to copy the commonest piece of real *work*,—suppose a lithograph on the title page of a new opera air, or a woodcut in the cheapest illustrated newspaper of the day—they will find themselves entirely beaten." Elements of Drawing, 1st ed. 3. There is no reason to doubt that these prints in their *ensemble* and in all their details, in their design and particular combinations of figures, lines and colors, are the original work of the plaintiffs' designer. If it be necessary, there is express testimony to that effect. It would be pressing the defendant's right to the verge, if not beyond, to leave the question of originality to the jury upon the evidence in this case, as was done in *Hegeman* v. *Springer*, 110 Fed. Rep. 374.

We assume that the construction of Rev. Stat. § 4952, allowing a copyright to the "author, inventor, designer, or proprietor . . . of any engraving, cut, print . . . [or] chromo" is affected by the act of 1874, c. 301, § 3, 18 Stat. 78, 79. That section provides that "in the construction of this act the words 'engraving,' 'cut' and 'print' shall be applied only to pictorial illustrations or works connected with the fine arts." We see no reason for taking the words "connected with the fine arts" as qualifying anything except the word "works," but it would not change our decision if we should assume further that they also qualified "pictorial illustrations," as the defendant contends.

Opinion of the Court.

These chromolithographs are "pictorial illustrations." The word "illustrations" does not mean that they must illustrate the text of a book, and that the etchings of Rembrandt or Steinla's engraving of the Madonna di San Sisto could not be protected to-day if any man were able to produce them. Again, the act however construed, does not mean that ordinary posters are not good enough to be considered within its scope. The antithesis to "illustrations or works connected with the fine arts" is not works of little merit or of humble degree, or illustrations addressed to the less educated classes; it is "prints or labels designed to be used for any other articles of manufacture." Certainly works are not the less connected with the fine arts because their pictorial quality attracts the crowd and therefore gives them a real use—if use means to increase trade and to help to make money. A picture is none the less a picture and none the less a subject of copyright that it is used for an advertisement. And if pictures may be used to advertise soap, or the theatre, or monthly magazines, as they are, they may be used to advertise a circus. Of course, the ballet is as legitimate a subject for illustration as any other. A rule cannot be laid down that would excommunicate the paintings of Degas.

Finally, the special adaptation of these pictures to the advertisement of the Wallace shows does not prevent a copyright. That may be a circumstance for the jury to consider in determining the extent of Mr. Wallace's rights, but it is not a bar. Moreover, on the evidence, such prints are used by less pretentious exhibitions when those for whom they were prepared have given them up.

It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to

pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value—it would be bold to say that they have not an aesthetic and educational value—and the taste of any public is not to be treated with contempt. It is an ultimate fact for the moment, whatever may be our hopes for a change. That these pictures had their worth and their success is sufficiently shown by the desire to reproduce them without regard to the plaintiffs' rights. See *Henderson* v. *Tomkins*, 60 Fed. Rep. 758, 765. We are of opinion that there was evidence that the plaintiffs have rights entitled to the protection of the law.

The judgment of the Circuit Court of Appeals is reversed; the judgment of the Circuit Court is also reversed and the cause remanded to that court with directions to set aside the verdict and grant a new trial.

MR. JUSTICE HARLAN, with whom concurred MR. JUSTICE MCKENNA, dissenting.

Judges Lurton, Day and Severens, of the Circuit Court of Appeals, concurred in affirming the judgment of the District Court. Their views were thus expressed in an opinion delivered by Judge Lurton: "What we hold is this: That if a chromo, lithograph, or other print, engraving, or picture has no other use than that of a mere advertisement, and no value aside from this function, it would not be promotive of the useful arts, within the meaning of the constitutional provision, to protect the 'author' in the exclusive use thereof, and the copyright statute should not be construed as including such a publication, if any other construction is admissible. If a mere label simply designating or describing an article to which it is attached, and which has no value separated from the article, does not come within the constitutional clause upon the subject of copyright, it must follow that a pictorial illustration designed and useful only as an advertisement, and having no intrinsic value other than its function as an advertisement, must be equally without the obvious meaning of the Constitution.

JUSTICES HARLAN and MCKENNA, dissenting.

It must have some connection with the fine arts to give it intrinsic value, and that it shall have is the meaning which we attach to the act of June 18, 1874, amending the provisions of the copyright law. We are unable to discover anything useful or meritorious in the design copyrighted by the plaintiffs in error other than as an advertisement of acts to be done or exhibited to the public in Wallace's show. No evidence, aside from the deductions which are to be drawn from the prints themselves, was offered to show that these designs had any original artistic qualities. The jury could not reasonably have found merit or value aside from the purely business object of advertising a show, and the instruction to find for the defendant was not error. Many other points have been urged as justifying the result reached in the court below. We find it unnecessary to express any opinion upon them, in view of the conclusion already announced. The judgment must be affirmed." *Courier Lithographing Co.* v. *Donaldson Lithographing Co.*, 104 Fed. Rep. 993, 996.

I entirely concur in these views, and therefore dissent from the opinion and judgment of this court. The clause of the Constitution giving Congress power to promote the progress of science and useful arts, by securing for limited terms to authors and inventors the exclusive right to their respective works and discoveries, does not, as I think, embrace a mere advertisement of a circus.

MR. JUSTICE MCKENNA authorizes me to say that he also dissents.

Syllabus.

THE MANILA PRIZE CASES.[1]

APPEALS FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Nos. 309, 310, 311. Argued October 28, 29, 1902—Decided January 23, 1903.

While the right of the citizen to demand condemnation of vessels or property as prize for his benefit must be derived from acts of Congress, and their scope is not to be enlarged in his favor by construction, where there is no controversy in respect to the existence of the grant, a more liberal construction may be applied in carrying the intention of Congress into effect.

1. Vessels lying on the bottom in shallow water in such condition, as the result of a naval engagement, that they cannot be floated by any of the means possessed by the naval force overcoming them, but which are afterwards, by the independent means of the Government, raised and repaired and appropriated to its own use are not to be regarded as sunk or destroyed within the meaning of sec. 4635, Rev. Stat., but they may be regarded as within the provisions of secs. 4624 and 4625, and their money value may stand in place of prize and be so adjudicated.
2. The legal status of property taken from vessels in such condition must be regarded as the same as the vessel to which it belongs.
3. Naval stores—public enemy property—designed for hostile uses, stored on the sea shore in an establishment for facilitating naval warfare, when taken by a naval force, as a result of a naval engagement, can be adjudged as prize for the benefit of the captors.

As the right of the government of the capturing naval force is supreme, it may when in its judgment the public interest demands it, restore a prize; and the courts cannot proceed to condemnation as to captured property restored under a treaty of peace before decree.

The strength of the capturing naval force under Admiral Dewey's command at Manila was superior to that of the Spanish fleet on May 1, 1898.

4. Cascoes, or native boats, and certain floating derricks, property of private persons in the Philippine Islands, were rightly held by the District Court not to be subject to condemnation as prize.
5. Vessels performing the functions of colliers and not in a condition to render effective aid, if required, during a naval engagement and the masters and crews thereof who have been shipped, but who are not commissioned or enlisted men in the United States Navy, are not entitled to participate in prize money or bounty resulting from the capture and destruction of the enemy's vessels.

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[1] Docket titles—*United States* v. *Dewey*, No. 309. *Dewey* v. *United States*, No. 310. *Stovell* v. *Dewey*, No. 311.

Statement of the Case.

THESE are appeals taken from a decree of the Supreme Court of the District of Columbia, sitting as a District Court of the United States in admiralty, in a suit in prize brought by Admiral Dewey in behalf of himself and the officers and crew of the naval forces on the Asiatic station, taking part in the battle of Manila Bay.

May 1, 1898, Admiral Dewey, being then a Commodore in the United States Navy, with a fleet under his command, engaged a Spanish fleet consisting of the Reina Cristina, Castilla, Don Juan de Austria, Don Antonio de Ulloa, General Lezo, Marques del Duero, Argos, Velasco, Isla de Cuba, Isla de Luzon, Isla de Mindanao, Manila and two torpedo boats, supported by shore batteries, submarine mines and torpedoes. At the close of the battle all these vessels were confessedly destroyed except the Manila, which was captured, and the Don Juan de Austria, Isla de Cuba and Isla de Luzon, in respect of which the facts were these: Under the severe fire of the American fleet they steamed to a position of greater safety, and, after the battle, backed ashore, and when in shallow water their sea valves were opened and they settled on the bottom. They, and other armed vessels, were afterwards set on fire by a detachment from the United States fleet, in obedience to a signal from the flagship when the firing ceased. All captured vessels, not destroyed, were appraised and appropriated to the use of the United States, except one or more private vessels, which were restored to their owners, and not including the Don Juan de Austria, the Isla de Cuba and the Isla de Luzon.

May 3, 1898, Commodore Dewey took possession of the Cavite arsenal, containing a large quantity of naval stores and supplies, and some boats, and he also took possession of certain land batteries. Some of the property taken at the arsenal, besides that taken from the sunken vessels, was included in the appraisement.

The protocol between the United States and Spain, signed August 12, 1898, provided as follows: "The United States will occupy and hold the city, bay and harbor of Manila, pending the conclusion of a treaty of peace, which shall determine the control, disposition and government of the Philippines.

. . . Upon the conclusion and signing of this protocol, hostilities between the two countries shall be suspended."

About the first of September, 1898, an examination was made of the Don Juan de Austria, the Isla de Cuba and the Isla de Luzon, and the commander-in-chief advertised for bids for raising, repairing and fitting them out. In October he contracted, on behalf of the United States, with a dock company to effect this purpose. The work of raising the vessels was begun on October 29 and finished on November 24. They were then overhauled sufficiently to enable them to proceed to Hong Kong, where they were reconstructed and refitted for use in the United States Navy, of which they became a part.

Full report was made to the Navy Department in July, 1899, of the condition of each of these vessels, upon being raised, and of the progress of reconstruction, including estimates of the value of the vessels when completed, exclusive of armament, and of the cost of raising, fitting out and repairing them. And an appraisement was made in that department of the three vessels when completed, giving the value, and the cost of repairs, from which it also appears that they were first commissioned in the United States Navy in 1900.

Some of the other sunken vessels might probably have been raised to advantage, but no attempt was made to do so, though a small amount of property was taken from them for government use. They were all advertised for sale in September, 1898, but no bids were received.

Shortly after the battle, the commander-in-chief took possession for government use of some cascoes or cargo boats, and two floating derricks belonging to private parties.

The treaty of peace between the United States and Spain provided: "Stands of colors, uncaptured war vessels, small arms, guns of all calibres, with their carriages and accessories, powder, ammunition, live stock, and materials and supplies of all kinds, belonging to the land and naval forces of Spain in the Philippines and Guam, remain the property of Spain."

By virtue of this provision, so much of the public property captured at the Cavite arsenal, and elsewhere on land, remaining unused at the date of the exchange of ratifications, was subsequently restored to Spain.

Statement of the Case.

Actions were instituted for bounty under section 4635 of the Revised Statutes, on account of all the vessels other than the Don Juan de Austria, the Isla de Cuba, the Isla de Luzon and those enumerated in the appraisement, and bounty has been granted under that section for the destruction of those vessels. *Dewey* v. *United States*, 35 C. Cl. 172; *S. C.*, 178 U. S. 510.

July 20, 1899, this libel was filed against the Don Juan de Austria, the Isla de Cuba, the Isla de Luzon; all the property taken from them and from the sunken vessels; all the vessels and other property taken afloat, and all the property captured ashore.

The United States filed an answer denying that the Don Juan de Austria, the Isla de Cuba and the Isla de Luzon, the property captured on board of them, the property captured on land, and the cargo boats were subject to condemnation as prize. March 26, 1901, an intervening libel was filed by Edwin F. Stovell, on behalf of himself and the officers and crew of the Nanshan, to which an answer was filed by libellant. The case having been heard, a decree of condemnation and distribution was made November 5, 1901, which adjudged the Isla de Cuba, the Isla de Luzon and the Don Juan de Austria, and the Manila and all other captured vessels named in the appraisement, except such as might have been returned to private owners, and all property captured upon or belonging to any of these vessels, or any vessels sunk or destroyed on May 1, 1898, to be lawful prize of war. All property captured ashore and all non-seagoing craft belonging to the arsenal, as well as all cascoes and the floating derricks not belonging to the King of Spain, were held not to be prize, and as to such property the libel was dismissed. The Nanshan, and the Zafiro, a vessel in the same situation, were held not entitled to share in any of the prize property; and the hostile fleet was held to have been of inferior force to the vessels making the capture. An appeal was taken by the United States, a cross appeal by libellant, and an appeal by the intervenor.

Errors were assigned:

By the United States, that the District Court erred in holding (1) that the vessels of war raised and reconstructed for the

navy, with guns, munitions, equipment, stores and other articles found upon them, were lawful prize of war for the benefit of the captors; (2) as also guns, munitions, equipment, stores and other articles on board the Spanish vessels of war sunk or otherwise destroyed, and not restored.

By libellant, that the District Court erred in holding (1) that the property captured at the naval station at Cavite was not lawful prize; (2) that the cascoes were not lawful prize.

By the intervenor, in holding that the Nanshan (and with her the Zafiro) was not entitled to share in the prize property.

Mr. Assistant Attorney General Hoyt and *Mr. Special Attorney Charles C. Binney* for the United States.

Mr. Benjamin Micou for Admiral Dewey and other officers. *Mr. Hilary A. Herbert* was with him on the brief.

Mr. William B. King for Rear Admiral Coghlan and others. *Mr. George A. King* was with him on the brief.

Mr. Charles W. Claggett and *Mr. Conrad H. Syme* for appellant Stovell.

Mr. Chief Justice Fuller, after making the foregoing statement, delivered the opinion of the court.

Captures in war enure to the Government and can become private property only by its grant. The right of the citizen to demand condemnation of vessels or property as prize for his benefit must be derived from acts of Congress, and their scope is not to be enlarged in his favor by construction. *The Siren*, 13 Wall. 389. Although in matters of detail, where there is no controversy in respect of the existence of the grant, a more liberal construction may be applied in carrying the intention of Congress into effect.

The correctness of the decree so far as it related to Spanish seagoing vessels with their equipment and the property found

on board of them, captured at the battle or soon afterward, and not restored to their owners, is conceded.

1. The first question to be determined is whether the Don Juan de Austria, the Isla de Cuba, and the Isla de Luzon were properly adjudicated as prize for the benefit of captors in view of their condition immediately after the engagement, and their being subsequently raised, reconstructed, and commissioned in the Navy.

In the consideration of that question we assume that "capture" and "prize" are not convertible terms, and that for the subject of capture to be made prize for the benefit of the captors the taking must meet the conditions imposed by the statutes.

The statutory provisions bearing on the case are to be found in chapter LIV of the Revised Statutes, entitled "Prize," embracing sections 4613 to 4652 inclusive, some of which are given below, together with certain of the "Instructions to Blockading Vessels and Cruisers," issued by General Order, June 20, 1898.[1]

[1] "SEC. 4613. The provisions of this title shall apply to all captures made as prize by authority of the United States, or adopted and ratified by the President of the United States."

"SEC. 4615. The commanding officer of any vessel making a capture shall secure the documents of the ship and cargo, including the log book, with all other documents, letters, and other papers found on board, and make an inventory of the same, and seal them up, and send them, with the inventory, to the court in which proceedings are to be had, with a written statement that they are all the papers found, and are in the condition in which they were found; or explaining the absence of any documents or papers, or any change in their condition. He shall also send to such court, as witnesses, the master, one or more of the other officers, the supercargo, purser, or agent of the prize, and any person found on board whom he may suppose to be interested in, or to have knowledge respecting, the title, national character, or destination of the prize. He shall send the prize, with the documents, papers, and witnesses, under charge of a competent prize master and prize crew, into port for adjudication, explaining the absence of any usual witnesses; and in the absence of instructions from superior authority as to the port to which it shall be sent, he shall select such port as he shall deem most convenient, in view of the interest of probable claimants, as well as of the captors. If the captured vessel, or any part of the captured property, is not in condition to be sent in for adjudication, a survey shall be had thereon and an appraisement made by persons as competent and impartial as can be obtained, and their reports shall be sent to the court in which proceedings are to be had; and such property, unless appro-

Ordinarily the property must be brought in for adjudication, as the question is one of title, which does not vest until condemnation, but it will be seen that by section 4615, if the captured vessel, or any part of the captured property, is not in condition to be sent in for adjudication, a survey and appraisement shall be had, the property sold, and the proceeds deposited subject to the order of the court; and by sections 4624 and 4625, captured vessels and property may be appropriated to the use of the United States, and the money value stand in place of the prize. And proceedings may be had where property which might have been brought in has been entirely lost or destroyed. Adjudication is contemplated in all cases.

By section 4635, a bounty is given for each person on board a vessel of the enemy which is "sunk or otherwise destroyed" in an engagement, of $100 if the hostile fleet is of inferior, and of $200 if of equal or superior, force; and $50 for every person on board at the time of such capture, where the vessels

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priated for the use of the Government, shall be sold by the authority of the commanding officer present, and the proceeds deposited with the Assistant Treasurer of the United States most accessible to such court, and subject to its order in the cause."

"SEC. 4624. Whenever any captured vessel, arms, munitions, or other material are taken for the use of the United States before it comes into the custody of the prize court, it shall be surveyed, appraised, and inventoried, by persons as competent and impartial as can be obtained, and the survey, appraisement, and inventory shall be sent to the court in which proceedings are to be had; and if taken afterward, sufficient notice shall first be given to enable the court to have the property appraised for the protection of the rights of the claimants and captors. In all cases of prize property taken for or appropriated to the use of the Government, the department for whose use it is taken or appropriated shall deposit the value thereof with the Assistant Treasurer of the United States nearest to the place of the session of the court, subject to the order of the court in the cause.

"SEC. 4625. If by reason of the condition of the captured property, or if because the whole has been appropriated to the use of the United States, no part of it has been or can be sent in for adjudication, or if the property has been entirely lost or destroyed, proceedings for adjudication may be commenced in any district the Secretary of the Navy may designate; and in any such case the proceeds of anything sold, or the value of anything taken or appropriated for the use of the United States, shall be deposited with the Assistant Treasurer in or nearest to that district, subject to the order of the court in the cause. If, when no property can be sent in for

taken are immediately destroyed in the public interest but not in consequence of injuries received in action.

This bounty is to be divided in the same manner as prize money, and the prize money in the one case and the bounty in the other cover the entire results of success.

We agree with counsel for libellant that the words "sunk or otherwise destroyed" are equivalent to "destroyed by sinking or otherwise." There are two general classes then under the statute, vessels destroyed, and vessels captured and condemned, or appropriated.

The facts before us are somewhat peculiar and serve to illustrate the variant circumstances that may occur in naval engagements, and create modifications of the general classification. These vessels were run ashore and sunk by their own commanders, with the result that they were only temporarily disabled, and the commanding officer of our fleet, in the public interest, as the engagement closed, directed their destruction to be com-

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adjudication, the Secretary of the Navy shall not, within three months after any capture, designate a district for the institution of proceedings, the captors may institute proceedings for adjudication in any district. And if in any case of capture no proceedings for adjudication are commenced within a reasonable time, any parties claiming the captured property may, in any District Court as a court of prize, move for a monition to show cause why such proceedings shall not be commenced, or institute an original suit in such court for restitution, and the monition issued in either case shall be served on the attorney of the United States for the district, and on the Secretary of the Navy, as well as on such other persons as the court shall order to be notified."

"SEC. 4630. The net proceeds of all property condemned as prize, shall, when the prize was of superior or equal force to the vessel or vessels making the capture, be decreed to the captors; and when of inferior force, one half shall be decreed to the United States and the other half to the captors, except that in case of privateers and letters of marque, the whole shall be decreed to the captors, unless it shall be otherwise provided in the commissions issued to such vessels."

"SEC. 4634. Whenever a decree of condemnation is rendered, the court shall consider the claims of all vessels to participate in the proceeds, and for that purpose shall, at as early a stage of the cause as possible, order testimony to be taken tending to show what part should be awarded to the captors, and what vessels are entitled to share; and such testimony may be sworn to before any judge or commissioner of the courts of the United States, consul or commercial agent of the United States, or notary public,

pleted by burning. In the report of the action, dated May 4, 1898, they were included among the vessels reported as burnt, but they were not included in the appraisement made by the board of appraisal and survey ordered in accordance with section 4624, and following, of the Revised Statutes, to survey, appraise and take a careful inventory of "enemy's property captured and appropriated for the uses of the United States Government." After hostilities were suspended an examination of the wrecks of the Don Juan de Austria, the Isla de Cuba and the Isla de Luzon was made, and subsequently the vessels were raised, under a contract entered into by the commander-in-chief for the Government, and reconstructed. If the vessels had not been raised and saved, they would have remained abandoned as destroyed, but as they were saved and appropriated by the Government, they cannot be said in fact to fall within that category. We attach no importance to the official reports referring to the vessels as destroyed, which was true in the

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or any officer of the Navy highest in rank, reasonably accessible to the deponent. The court shall make a decree of distribution, determining what vessels are entitled to share in the prize, and whether the prize was of superior, equal, or inferior force to the vessel or vessels making the capture. The decree shall recite the amount of the gross proceeds of the prize subject to the order of the court, and the amount deducted therefrom for costs and expenses, and the amount remaining for distribution; and whether the whole of such residue is to go to the captors, or one half to the captors and one half to the United States.

"SEC. 4635. A bounty shall be paid by the United States for each person on board any ship or vessel of war belonging to an enemy at the commencement of an engagement, which is sunk or otherwise destroyed in such engagement by any ship or vessel belonging to the United States or which it may be necessary to destroy in consequence of injuries sustained in action, of one hundred dollars, if the enemy's vessel was of inferior force, and of two hundred dollars, if of equal or superior force, to be divided among the officers and crew in the same manner as prize money; and when the actual number of men on board any such vessel cannot be satisfactorily ascertained, it shall be estimated according to the complement allowed to vessels of its class in the Navy of the United States; and there shall be paid as bounty to the captors of any vessel of war captured from an enemy, which they may be instructed to destroy, or which is immediately destroyed for the public interest, but not in consequence of injuries received in action, fifty dollars for every person who shall be on board at the time of such capture."

sense in which the word was then used, for the question really is whether, when salvage had been effected, the Government can maintain that the captors did not take them, but that they were destroyed so that they could not be treated as prize.

The position of the Government is that as these vessels were sunk, and destroyed to such an extent that libellant's naval force was powerless to salve them by its own resources, their subsequent reconstruction and appropriation by the Government had no effect on their legal status, which had been determined immediately after the battle.

It is insisted that if not prize then they could not be prize afterwards, and yet it is not denied that when the question of title is settled by decree it takes effect by relation as of the date of the capture. And because this is so the fact that hostilities had ceased before the vessels were raised becomes immaterial.

The contention is that if a vessel lies on the bottom in shallow water, but in such a condition that she cannot be floated

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Instructions:

"20. Prizes should be sent in for adjudication, unless otherwise directed, to the nearest home port, in which a prize court may be sitting.

"21. The prize should be delivered to the court as nearly as possible in the condition in which she was at the time of seizure; and to this end her papers should be sealed at the time of seizure and kept in the custody of the prize master. Attention is called to articles Nos. 16 and 17 for the government of the United States Navy. (Exhibit A.)

"22. All witnesses, whose testimony is necessary to the adjudication of the prize, should be detained and sent in with her, and, if circumstances permit, it is preferable that the officer making the search should act as prize master.

"23. As to the delivery of the prize to the judicial authority, consult sections 4615, 4616, and 4617, Revised Statutes of 1878. (Exhibit B.) The papers, including the log book of the prize, are delivered to the prize commissioners; the witnesses, to the custody of the United States marshal; and the prize itself remains in the custody of the prize master until the court issues process directing one of its own officers to take charge.

"24. The title to property seized as prize changes only by the decision rendered by the prize court. But, if the vessel itself, or its cargo, is needed for immediate public use, it may be converted to such use, a careful inventory and appraisal being made by impartial persons and certified to the prize court."

by any of the means ordinarily possessed by a naval force, such vessel must be regarded as "sunk" within the meaning of the statute, even though she has received no structural injury; or if a vessel, though not sunk, be so structurally injured as to destroy her power of floating and she cannot be repaired by any means possessed by the naval forces in the place where she lies, such vessel must be regarded as structurally "destroyed" within the meaning of the statute.

And it is said that a close analogy is furnished by the cases of constructive total loss of a vessel, such as justifies an abandonment to the underwriters. Nevertheless counsel argues that there are differences between those cases and cases under section 4635. Thus, while it is admitted that in the former the owner need not abandon unless he see fit to do so, the right of election on the part of captors as to whether the vessel should be treated as destroyed or as a prize is denied in the latter; and another difference suggested is that the owner of a submerged or stranded vessel could contract with a third party to

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"28. If there are controlling reasons why vessels may not be sent in for adjudication, as unseaworthiness, the existence of infectious disease, or the lack of a prize crew, they may be appraised and sold; and if this cannot be done they may be destroyed. The imminent danger of recapture would justify destruction, if there was no doubt that the vessel was good prize. But, in all such cases, all the papers and other testimony should be sent to the prize court, in order that a decree may be duly entered."

"*Exhibit A.*

"ART. 16. No person in the Navy shall take out of a prize, or vessel seized as a prize, any money, plate, goods, or any part of her equipment, unless it be for the better preservation thereof, or unless such articles are absolutely needed for the use of any of the vessels or armed forces of the United States, before the same are adjudged lawful prize by a competent court; but the whole, without fraud, concealment, or embezzlement, shall be brought in, in order that judgment may be passed thereon; and every person who offends against this article shall be punished as a court martial may direct.

"ART. 17. If any person in the Navy strips off the clothes of, or pillages, or in manner maltreats, any person taken on board a prize, he shall suffer such punishment as a court martial may adjudge.

"*Exhibit B.*"

[Sections 4615, 4616 and 4617 Rev. Stat.]

raise it, while captors cannot. We think, however, that the alleged differences destroy the analogy altogether, or rather that its application when correctly stated leads to the opposite result. Abandonment rests on the election of the parties, and there was here neither a right of abandonment nor any acts from which abandonment on the one side and acceptance on the other could be fairly inferred.

The public interest required the United States and the captors to preserve the property, if that were possible; and it would be an anomalous conclusion to hold *in invitum* that the United States could pay bounty for these vessels as destroyed and at the same time retain and use them.

The vessels were not derelict, abandoned without hope of recovery, and on the contrary their preservation was recommended, and, in the circumstances, Commodore Dewey having duly taken the steps prescribed by the statute in respect of vessels confessedly captured, was not obliged to determine at once at his peril into which class these particular vessels fell and to literally comply with section 4615 in regard to captured property "not in condition to be sent in for adjudication."

War is not waged for predatory purposes, but Congress chose to grant reward for success, and in doing so cannot be assumed to have intended that such reward should be subjected to the restrictions of close bargains. The intention was that either prize money or bounty should be paid. Of course, by capture without destruction the Government might obtain distinct acquisitions, and the captors would be recompensed at the expense of the enemy.

Circumstances have frequently occurred in which the public interest has required the destruction of vessels capable in themselves of being brought in, as, for example, at the battle of the Nile, when Nelson was obliged to burn prizes in order to avoid the delay in refitting them, and the loss of the service of other ships to convoy them to Gibraltar; but there his government could not assist him, or take the captured vessels off his hands.

Section 4635 provided that bounty should be paid in all cases where an enemy vessel of war was sunk or otherwise destroyed, either in an engagment, or in consequence of injuries received

in action, or after capture when the destruction was for the public interest; but the statute does not demand the construction that every vessel must be considered as destroyed, which, though susceptible of salvage and saved, could not have been, and was not saved, by the unaided resources of the capturing force.

It is true that when the Government succeeded in raising and restoring the vessels it saved them for itself, but it may reasonably be held that this was subject by relation to the right of the captors to an adjudication giving them, after the costs and expenses were deducted, a share in the residue of value.

If the effort at salvage had failed, or if the cost had equaled or exceeded the value, the captors would still be entitled to bounty, for it was not intended that the grant should be defeated by laying them under a rigid rule of election. And on the other hand these vessels were not "appropriated to the use of the United States" by the mere effort of the Government to raise them.

The act of raising was not the use contemplated by the statute. Such use was dependent on the success of the effort at salvage. The loss which might have been total, became on success partial, that is, confined to the extent of the expenditure, and the taking possession to accomplish that result, became by success appropriation to use.

The case of the Albemarle is in point, although apparently no opinion ruled the question in terms.

The Albemarle was sunk by Lieutenant Cushing on the night of October 27, 1864; was raised in March, 1865; reached Norfolk, April 27, 1865, and was appropriated to the use of the United States. She was appraised by a duly appointed board of naval officers and the value found was deposited by the Secretary of the Navy with the Assistant Treasurer of the United States at Washington. Proceedings to condemn the Albemarle as prize were instituted in the District Court of the United States for the District of Columbia and went to a decree of condemnation. The case was not reported, but the proceedings will be found in *Swan* v. *United States*, 19 C. Cl. 51, in the course of subsequent litigation; as also in *United States* v. *Steever*, 113 U. S. 747. No appeal was taken, and the conclusion that a

vessel thus situated could be decreed to be prize was accepted by all the Departments. We perceive no adequate reason to depart from that precedent.

2. As to the property taken from the vessels raised and reconstructed, and that taken from the vessels destroyed, we think its legal status must be regarded as the same as that of the vessel to which it belonged.

By section 4613 it is declared that the provisions of Title LIV shall apply to "all captures made as prize by authority of the United States, or adopted and ratified by the President of the United States."

The taking must be under such conditions as make the subject of the capture prize, and the sections preceding section 4635 recognize that property other than vessels may be prize, using the words "ship and cargo," "vessel, arms, munitions or other material," "captured property," "prize property." But section 4635 refers to the destruction of a "ship or vessel of war," which could not be "sunk or otherwise destroyed" under that section, and be "prize" under the preceding sections, and as we have already said the grant of bounty to be divided "in the same manner as prize money," appears obviously to have been "intended as a substitute for the prize itself," as ruled by Lowell, J., in *The Selma*, 1 Lowell, 30, or as given in lieu of prize money, as observed by Mr. Justice Field, in *Porter* v. *United States*, 106 U. S. 607.

No question of cargo is involved. Cargo is the lading of a ship or vessel, and may be prize when the vessel is not, or the vessel may be, when the cargo is not. The inquiry here relates to things belonging to the outfit of vessels of war, for whose capture prize money is paid, and for whose destruction bounty is paid. The injury to the enemy is the same in either case, but the reward cannot be the same, as it is arbitrary in the one case, and not in the other, and arrived at in accordance with the general rules prescribed as required by the circumstances. The statute did not contemplate a division of the grant and an award of prize money and bounty in respect of the same transaction, unless, indeed, the capture embraced distinct and separate properties.

What is included then by the term a "ship or vessel of war" under section 4635? Whatever the toleration extended in courts of admiralty to the use, in practice, of words apparently superfluous, the word "ship" embraces her boats, tackle, apparel and appurtenances because part of the ship as a going concern, and, for the same reason, "ship or vessel of war" includes her armament, search lights, stores, everything, in short, attached to or on board the ship in aid of her operations.

The first Congressional legislation regulating prize was the act of March 2, 1799, 1 Stat. 715, c. 24, providing:

"SEC. 5. *And be it further enacted*, That all captured national ships or vessels of war shall be the property of the United States—all other ships or vessels, being of superior force to the vessel making the capture, in men or in guns, shall be the sole property of the captors—and all ships or vessels of inferior force shall be divided equally between the United States and the officers and men of the vessel making the capture.

"SEC. 6. *And be it further enacted*, That the produce of prizes taken by the ships of the United States, and bounty for taking the ships of the enemy, be proportioned and distributed in the manner following, to wit:

[Then followed twelve subdivisions in respect of the distribution of prize money.]

"13. The bounty given by the United States on any national ship of war, taken from the enemy and brought into port, shall be for every cannon mounted, carrying a ball of twenty-four pounds, or upwards, two hundred dollars; for every cannon carrying a ball of eighteen pounds, one hundred and fifty dollars; for every cannon carrying a ball of twelve pounds, one hundred dollars; and for every cannon carrying a ball of nine pounds, seventy-five dollars; for every smaller cannon, fifty dollars; and for every officer and man taken on board, forty dollars; which sums are to be divided agreeably to the foregoing articles."

These sections admit of no other meaning than that the tackle, sails, apparel, stores, guns, ammunition and other appurtenances of captured national vessels of war should be the property of the United States, as well as the ships themselves, and so of ships or vessels going to the captors.

And the acts of April 23, 1800; July 17, 1862; June 30, 1864, and the Revised Statutes, contain nothing inconsistent with that view.

Parsons, in his work on Marine Insurance, says that "insurance on the ship covers all that belongs to it, as hull, sails, rigging, tackle, apparel, or furniture;" and he quotes from Emerigon, c. 10, § 2, p. 234: "The expression, 'on the body,' embraces in its generality, as I have just said, all that regards the ship. Such are the hull of the vessel, its rigging and apparel, munitions of war, stores and victualling, advances to the crew, and all that has been expended in the fitting it out." 1 Marine Ins. 524.

And in his work on Shipping and Admiralty, vol. 1, p. 78, the same author says: "How much passes by the word 'ship,' or the phrase 'ship and her appurtenances,—or apparel,—or furniture,'—or the like, cannot be positively determined by any definition. Stowell and Abbott agree, that whatever is on board a ship for the objects of the voyage and adventure in which she is engaged, belonging to the owners, constitutes a part of the ship and her appurtenances, within the meaning of the English statute of 53 Geo. 3, c. 159."

That was an act "to limit the responsibility of shipowners," and provided that owners should not be liable "further than the value of his or their ship or vessel, and the freight due or to grow due," and in several clauses of the act the responsibility was referred to as limited "to the value of the ship with all her appurtenances and freight."

In *The Dundee*, 1 Hagg. 109, the question arose whether the value of certain fishing stores should be included. Lord Stowell held that it should, and that the word "appurtenances," distinguished between cargo, which was intended to be disposed of at the foreign port, and having a merely transitory connection with the ship, and those accompaniments that were indispensable instruments without which the ship could not perform its functions. The owners declared in prohibition in the King's Bench, *Gale* v. *Laurie*, 5 B. & C. 156, and Abbott, C. J., afterwards Lord Tenterden, announced the same conclusion, and, among other things, said: "The fishing stores were not

carried on board the ship as merchandise, but for the accomplishment of the objects of the voyage; and we think, that whatever is on board a ship for the object of the voyage and adventure on which she is engaged, belonging to the owners, constitutes a part of the ship and her appurtenances within the meaning of this act, whether the object be warfare, the conveyance of passengers, or goods, or the fishery. This construction furnishes a plain and intelligible general rule; whereas if it should be held that nothing is to be considered as part of the ship that is not necessary for her navigation or motion on the water, a door would be opened to many nice questions, and much discussion and cavil."

In *The Witch Queen*, 3 Sawy. 201, Judge Hoffman held that, where a vessel was supplied with a diving bell, air pump, and other apparatus for the accomplishment of the enterprise in which she was about to engage, the lien of the materialmen extended to all articles belonging to the owner, which, not being cargo, had been placed on board for the objects and purposes of the voyage. The decision proceeded on our eighth rule in admiralty, referring to "suits *in rem* against a ship, her tackle, sails, apparel, furniture, boats, or other appurtenances"; and *The Dundee*, decided twenty years before the adoption of the rule, was cited as showing the sense in which the term "appurtenances" had been used.

To be sure, the words tackle, sails, apparel, boats, appurtenances, are not used in Title LIV, but we think that such minuteness was unnecessary, and that the words "ship or vessel of war belonging to the enemy" are sufficiently comprehensive to embrace not only everything essential to the ship's navigation, but to the purposes of her existence.

Necessarily there is nothing in the distinction attempted to be drawn between the ship and her "appliances and outfit," nor can we concur in the view that the latter may be regarded as cargo in any aspect.

It is said that the destroyed hostile vessel of war should be held the subject of bounty, and property taken from her the subject of prize money because bounty alone would be an inadequate reward.

This, even if true, would not justify us in attributing to the statute a scope not permitted by its terms.

Section 4635 is couched in the same language as when enacted July 17, 1862, after the battle between the Monitor and the Merrimac had admonished us of the impending change in the construction of vessels of war, yet the bounty provision was reënacted in 1864, and incorporated into the Revised Statutes, and while in these days the amount of bounty may seem inconsiderable in comparison with the value of the vessel destroyed, we must take the statute as we find it.

3. The battle of Manila was fought on the first day of May, and on the third, the enemy's forces evacuated the Cavite arsenal, which was taken possession of by a landing party. This naval station contained a considerable amount of arms, munitions and material, for the repairing, equipment and fitting out of ships, and some non-seagoing boats were in use there. The property was appraised in due course; some of it was used in the Navy prior to the exchange of ratifications of the treaty of peace; and the remainder restored to Spain thereafter. The District Court declined to adjudicate this property to be prize because captured on land.

These were naval stores taken at a naval station, by a naval force, as the result of a naval engagement, and the question is whether the fact that they were taken from a navy yard instead of from a vessel rendered the statute inapplicable.

Generally speaking, forts, cities, lands taken from the enemy, are called conquests; movables taken on land, booty; on the high seas, prize. And the high seas include coast waters without the boundaries of low water mark, though within bays or roadsteads—waters on which a court of admiralty has jurisdiction. *United States* v. *Ross*, 1 Gall. 624.

Mr. Justice Story and Mr. Wheaton thought that the jurisdiction in prize extended "as well to goods taken on land by a naval force, or in consequence of the operations of a naval force, as to property captured on the water." Wheaton on Captures, 278; Pratt's Story's Notes on Prize Courts, 28; 2 Wheat. Appx. 1. Both these learned authors cite English authorities, and among them the leading case of *Lindo* v. *Rodney*, 2 Douglas, 613, note.

In that case the property was captured on the island of St. Eustatius, and a writ of prohibition to restrain the prize court was applied for. It was stated that the only question was "whether the goods being taken on land, though in consequence of a surrender to ships at sea, excludes the only prize jurisdiction known in this kingdom." The question was answered in the negative in an elaborate opinion and the rule discharged. Lord Mansfield, among other things, said: "In short, every reason which created a prize court as to things taken upon the high seas, holds equally when they are *thus* taken at land. The original cause of taking is here at sea. The force which terrified the place into a surrender was at sea. If they had resisted, the force to subdue would have been from the sea. Mr. Piggott candidly said, it would be spinning very nicely, to contend, if the enemy left their ship, and got ashore with money, were followed upon land, and stripped of their money, that this would not be a sea capture. I agree with him, but I cannot distinguish that case from this. Both takings are literally upon land. In both, the prey is, as it were, killed at sea, and taken upon land. Here the capture of the goods on land is the immediate consequence of the surrender at discretion to a sea force. Would a sum paid by capitulation upon land have made it a sea or a land prize? *Cui bono* should all this subtilty be spun, when the reason for a jurisdiction to judge a capture at sea and such a capture at land is exactly the same?"

This reasoning shows that even though the general proposition may have been stated somewhat broadly by Story and Wheaton, circumstances may bring particular cases within it, and that mere contact with land does not *ipso facto* exclude jurisdiction in prize.

In *The Siren*, 13 Wall. 389, 392, Mr. Justice Swayne, speaking for the court, said: "While the American Colonies were a part of the British Empire, the English maritime law, including the law of prize, was the maritime law of this country. From the close of the Revolution down to this time it has continued to be our law, so far as it is adapted to the altered circumstances and condition of the country, and has not been modified by the proper national authorities."

It was there decided that a seagoing vessel captured by the Army and Navy jointly was not subject of condemnation as prize, and that only captures made by naval force alone were so subject. "Whenever a claim is set up," said the court, "its sanction by an act of Congress must be shown. If no such act can be produced the alleged right does not exist."

Hence captures are made as prize for the benefit of captors when they come within the scope of our prize statutes, and not otherwise.

In *The Emulous*, 1 Gall. 563, 575, Mr. Justice Story said: "The admiralty, therefore, not only takes cognizance of all captures made at sea, in creeks, havens, and rivers, but also of all captures made on land where the same have been made by a naval force, or by coöperation with a naval force. This exercise of jurisdiction is settled by the most solemn adjudications."

The decree in *The Emulous* was reversed in *Brown* v. *United States*, 8 Cranch, 110, but that was on the ground of the unlawfulness of the taking, and so referred to by Mr. Justice Gray, in *The Paquete Habana*, 175 U. S. 667, 711.

In *United States* v. *269½ Bales of Cotton*, Woolworth, 236, an officer of the Army embarked a battalion of cavalry on vessels of the United States, and in the service of the Government, but not part of the naval force, and proceeding by river and by land penetrated into a certain district of Mississippi then held by the enemy, and by force of arms overpowered a body of hostile troops and took from their possession 269½ bales of cotton, which were subsequently libelled. And Mr. Justice Miller, on circuit, held that the cotton was captured by the Army and not by the Navy, and dismissed the libel. While Mr. Justice Miller there remarked that the result of *Brown* v. *United States*, was "that property on land is not, without the aid of the statute, liable to capture and condemnation as prize of war," yet after considering many English cases at some length, and referring to *The Emulous*, and the case of *Six Hundred and Eighty Pieces Merchandise*, 2 Sprague, 233, he said: "In every one of the cases where the court has sustained its jurisdiction in prize, it appears that the force making the capture, or coöperating in the act, was the naval arm, or, by its presence and active assistance, it

contributed immediately in effecting the capture; that it operated from the sea; that the place captured was an island, town, or fortress, itself established to resist naval attack, and to support and succor naval expeditions, and accessible from the sea, so that the attacking squadron could directly bring to bear upon it the stress of its armament." And, referring to property captured on land by land forces, he added: "However desirable it may be that, in a war between nations, there should exist a tribunal similar to the prize court, to administer the law of nations with reference to property captured on land, we find no warrant for asserting that any such authority exists in the admiralty courts of the United States, unless the circumstances of the capture show some element of a force operating from, or on, the water, which would bring it within the recognized rules on that subject."

In the case of *Mrs. Alexander's Cotton*, 2 Wall. 404, a joint expedition of gunboats under Rear Admiral Porter and a body of troops under Major General Banks proceeded up the Red River, and, during its advance, seventy-two bales of cotton, the private property of Mrs. Alexander, were taken from her plantation, where they were stored in a cotton-gin house about a mile from the river, by a party from one of the gunboats. The cotton was hauled by teams to the river bank, sent to Cairo, libelled as prize of war in the District Court for the Southern District of Illinois, May 18, 1864; claimed by Mrs. Alexander; sold *pendente lite*, and the proceeds decreed to her. The United States appealed and asked the reversal of the decree and the condemnation of the cotton as maritime prize. This court held that the capture was justified by legislation and by public policy, but that the property was not maritime prize; that there was no authority to condemn any property as prize for the benefit of the captors except under the act of July 17, 1862, 12 Stat. 600, c. 204; and that as the second section of that act provided that "the proceeds of all ships and vessels, and the goods taken on board of them, which shall be adjudged good prize," should be the property of the captors, in whole or in part, property on land was excluded from the category of prize for the benefit of captors, and that this was decisive of the case

so far as claims of captors were concerned. The decree was reversed and the cause remanded with directions to dismiss the libel.

In that case the capture was the result of a joint expedition; the property was private property; unprotected and stored at a distance from the river; valuable for domestic use, and so valuable as to be of peculiar assistance to the enemy, but not in any sense war material.

In the present case the capture was made by naval force alone; the property was public property, consisting of arms, munitions and naval material; in a naval station taken through the operations of the fleet from the sea.

For the reasons indicated by Mr. Justice Miller, in harmony with the observations of Lord Mansfield, the rulings in that case and in *The Siren* are not controlling in this, and, moreover, the terms of the applicable statute are not the same.

The sections constituting Title LIV of the Revised Statutes were brought forward from the act of June 30, 1864, 13 Stat. 306, c. 174.

Section 2 of the act of July 17, 1862, referred to by Mr. Chief Justice Chase in the case of *Mrs. Alexander's Cotton*, reads as follows: "That the proceeds of all ships and vessels, and the goods taken on board of them, which shall be adjudged good prize, shall, when of equal or superior force to the vessel or vessels making the capture, be the sole property of the captors; and when of inferior force, shall be divided equally between the United States and the officers and men making the capture."

This section was identical with section 5 of the act of April 23, 1800, and was expressly repealed by section 35 of the act of June 30, 1864, while section 10 of the latter act, afterwards section 4630 of the Revised Statutes, provided: "That the net proceeds of all property condemned as prize shall, when the prize was of superior or equal force to the vessel or vessels making the capture, be decreed to the captors; and when of inferior force, one half shall be decreed to the United States and the other half to the captors;" and section 33: "That the provisions of this act shall be applied to all captures made as prize by authority of the United States, or adopted and ratified

by the President of the United States;" which was reënacted as section 4613 of the Revised Statutes.

The effect of this legislation was not to revive section 5 of the act of 1800 as contended, nor to give jurisdiction in admiralty in respect of property captured on land by land forces, but if the language of the act of 1862 confined the rights of captors to the proceeds of ships and cargoes, it seems clear that the language of the act of 1864, that the captors should be entitled to "the net proceeds of all property condemned as prize," operated to so far remove the restriction as to permit the statute to extend to other property fairly coming within accepted rules of prize.

The District Court thought the words inadequate to produce this result, and carefully examined other sections of the act of 1864, which referred to vessels and cargoes as the usual subjects of prize. But we should remember that that statute, and Title LIV, into which it was carried, embraced prize in general, and that vessels and their cargoes most frequently constituted prize property brought in for adjudication. So that in making provision in that regard, Congress was obliged to use such terms as even to give color to the argument that enemy's vessels of war could not be condemned at all for the benefit of captors, and that bounty was their only reward, as was the case under the act of 1799. But it is conceded that this is not so, and we think that these sections ought not to be given the restrictive force attributed to them.

We are also unable to see that the significance of the change in phraseology is lessened when considered with the other legislation referred to.

The act of March 12, 1863, 12 Stat. 820, c. 120, provided for the collection of all abandoned or captured property in insurrectionary districts, and "that such property shall not include any kind or description which has been used, or which was intended to be used, for waging or carrying on war against the United States, such as arms, ordnance, ships, steamboats, or other water craft, and the furniture, forage, military supplies, or munitions of war." Section 7 read: "That none of the provisions of this act shall apply to any lawful maritime prize by

the naval forces of the United States." The property excepted had been declared "lawful subject of prize and capture wherever found;" and it was made the duty of the President "to cause the same to be seized, confiscated, and condemned," by the confiscation act of August 6, 1861, 12 Stat. 319, c. 60. This act referred to property taken when used, or intended to be used, in waging war against the United States, while the act of 1863 referred to property not so used or intended to be.

By the second section of the act of March 3, 1863, "further to regulate proceedings in prize cases," 12 Stat. 759, c. 86, it was provided that "any captured vessel, any arms or munitions of war, or other material," might be taken "for the use of the Government," and the value deposited in the Treasury of the United States, and for prize proceedings. This act was expressly repealed by section 35 of the act of June 30, 1864, section 10 of which act, as already seen, provided that the captors might share in the net proceeds of all property condemned as prize.

Section 7 of the act of July 2, 1864, 13 Stat. 377, c. 225, reads: "That no property seized or taken upon any of the inland waters of the United States by the naval forces thereof, shall be regarded as maritime prize; but all property so seized or taken shall be promptly delivered to the proper officers of the courts, or as provided in this act and in the said act approved March twelve, eighteen hundred and sixty-three." These various acts growing out of the civil war cannot be regarded as having any important bearing on the act of June 30, 1864, and Title LIV, in so far as the particular modification of the act of 1862 is concerned.

And neither these acts, nor sections 5308 to 5311, in respect of insurrection, and par. 9 of section 563, and par. 6 of section 629, Revised Statutes, affect the result we have reached.

In our opinion it would be spinning altogether too nicely to hold that because enemy property on land cannot be taken in prize by land operations, public property designed for hostile uses, and stored on the sea shore in an establishment for facilitating naval warfare, might not be made prize, under the statute, when captured by naval forces operating directly from the sea.

But while the property in question was in general susceptible of condemnation in prize, it was nevertheless taken subject to the exercise of the power of restitution. The right of the Government is supreme, and when in its judgment the public interest demands it, prizes may be restored, and the courts cannot proceed to condemnation.

In *The Elsebe*, 5 Rob. 155, Lord Stowell, then Sir William Scott, decided that up to the period of final condemnation, the Crown can, by virtue of its prerogative, restore a prize to the enemy from whom it has been captured, and may take this step without consulting the captors.

The principle is fully discussed and sustained by unanswerable reasoning, and is not shaken by his subsequent observations in *The St. Ivan*, Edw. 376, that "captors bring in their prizes subject to such interposition on the part of the Crown; but it is of very rare occurrence, and speaking with all due reverence ought to be of rare occurrence, and only under very special circumstances; as, for instance, where the detention of the vessel may be detrimental to the general interests of the country."

Until condemnation captors acquire no absolute right of property in a prize, though then the right attaches as of the time of the capture, and it is for the Government to determine when the public interests require a different destination. In respect of whatever was restored under the treaty with Spain the Government must be regarded as absolved from liability.

It further follows from the views we entertain as justifying condemnation of a portion of this property, that the capturing naval force must be held to have been superior within the contemplation of the statute, according to previous decision.

4. The libel was amended some months after it was filed so as to cover certain cascoes or small native boats, and also two floating derricks or wrecking boats, the property of private citizens residing in the Philippine Islands. These cascoes appear to have been large barges, propelled by sweeps and by poling, of from thirty to sixty tons capacity, of the value of from $1500 to $1800, Mexican, each, and used in discharging cargoes. The wrecking boats were flat boats, the largest being forty feet long and fifteen feet broad. They had no means of propulsion, were

not seagoing boats in any sense, and could only be used in comparatively smooth water. All these boats may have been the private property of Filipinos, but that is not clear.

It may well be doubted if these craft came within the words ship or vessel as used in Title LIV. Whether in the circumstances they could justly be treated as technically enemy property, is a question not so presented as to require discussion. They were put to public use by the commanding officer, but what ultimately became of them does not appear from the record. If restitution was made, they have ceased to be within the jurisdiction. And in any view, we are of opinion that they came within the considerations set forth in *The Paquete Habana*, 175 U. S. 677; and that the District Court rightly held that they were not subject to condemnation.

We are of opinion that the District Court committed no error in its decree in respect of the Don Juan de Austria, the Isla de Cuba and the Isla de Luzon, and the property taken from them, as well as the vessels captured and their appurtenances; or in respect of the lighters and wrecking boats; but that a share in a portion of the naval stores and material captured in the Cavite arsenal, and the boats pertaining thereto, should have been awarded; and that the decree should not have included property taken from vessels sunk and destroyed.

And this brings us to consider:

5. The decree dismissing the intervention of Stovell.

This was an intervening libel filed by Edward F. Stovell as captain of the Nanshan, on behalf of its officers and crew, as well as himself, seeking to participate in the prize money that might be awarded on the main libel. Stovell had previously made an application in the Court of Claims to participate in the bounty awarded for vessels destroyed under section 4635 of the Revised Statutes, which was dismissed by that court. 36 C. Cl. 392.

The record in the Court of Claims was made the record in the District Court on the intervention of Stovell, and forms part of the record on this appeal. The facts are correctly summarized by Weldon, J., in the opinion of the Court of Claims, as follows:

"The facts found by the court show that the claimant was captain or master of the original crew of the Nanshan, which was a British merchant vessel, purchased by Admiral Dewey at Hong Kong, under authority of the Secretary of the Navy, in April, 1898. The vessel was not commissioned, but was registered as an American steamer, and the original crew was shipped in the American merchant service. The crew were employed to handle the ship, and the officers and men were promised and received double the wages they had theretofore been paid in the British merchant service. They were not rated in the United States Navy, and the double wages were not the rates of pay fixed by the President under authority of Revised Statutes, section 1564. The arrangement as to the employment and payment of the crew was the result of an agreement made by Admiral Dewey with the original officers of the Nanshan. A monthly list of the names and wages of the crew, in Mexican money, was made by the original captain or master, the aggregate amount of which was received by him from the pay inspector of the fleet in a lump sum, reduced to the value of American gold, which money the captain distributed to his original crew.

"Admiral Dewey placed on board a naval officer, Lieut. Benj. W. Hodges, and four enlisted men, and two mounted 1-pounder guns. The master of the Nanshan, Capt. Edwin F. Stovell, remained on board, and under him were shipped the seamen, as aforesaid. The naval officer exercised control over the vessel and gave all orders concerning her. The merchant captain was merely his executive officer, being familiar with the crew. The Nanshan did not approach the Spanish fleet during the battle of Manila near enough to enable her to be of any service. The guns were mounted on her as a protection from boat attacks, but not for offensive operations. At the time and during the battle of Manila, Lieut. Benj. W. Hodges had been detailed as aforesaid with four men of the Navy for duty on said vessel, and was so engaged on said vessel as above stated at and during the time of the battle. The Nanshan was loaded with 3000 tons of coal. The Raleigh was detailed as a special guard in case the reserve division was attacked separately by the enemy.

The duty of the naval captain on said ship was to take general charge of the vessel, execute all orders from the flagship controlling the movements of the Nanshan, the handling of the guns, and the signaling, but not to interfere with the internal management and discipline of the ship and such things as loading and discharging cargo.

"After the vessel was bought by Admiral Dewey, the Nanshan crossed the China Sea with the fleet and was a part thereof. She kept her position in the fleet. After the fleet stopped at Subig Bay the Admiral ordered her commander to come on board the flagship for his final orders, afterwards returning to the Nanshan. The fleet started in single column, the Olympia leading, followed by the Baltimore, the Raleigh, the Petrel, the Concord, the Boston, the McCullough, the Nanshan, and Zafiro, passing the forts in that order. The forts on the south side of the channel fired upon the fleet as they were entering Manila Bay, and the Nanshan passed through that fire. The Nanshan was in reserve during the action, within signaling distance. She had on board two 1-pounders, taken from the Olympia, with 360 rounds of ammunition for those guns; also 11 rifles from the Raleigh and 11 revolvers, with a suitable amount of ammunition, and two boats rigged ready to lower to pick up men if it was found necessary to do so. The Nanshan was a heavy ship, being loaded to the underwriters' mark with coal.

"At the time and during the battle of Manila the Nanshan was between 4 and 5 miles of the Spanish fleet engaged in that action. She was within signaling distance of the fleet that effected the destruction of the Spanish vessels, but was not in such condition as to afford effective aid, her guns not being able to produce any effect upon the Spanish vessels; she was ordered to lay off in the bay, clear of the fleet; she could not have been brought within effective range, because her guns were too light."

Section 4614 provides: "The term 'vessels of the Navy,' as used in this Title, shall include all armed vessels officered and manned by the United States, and under the control of the Department of the Navy."

Section 4632: "All vessels of the Navy within signal dis-

tance of the vessel or vessels making the capture, under such circumstances and in such condition as to be able to render effective aid, if required, shall share in the prize; and in case of vessels not in the Navy, none shall be entitled to share except the vessel or vessels making the capture; in which term shall be included vessels present at and rendering actual assistance in the capture."

The Court of Claims held on the facts that the Nanshan was not at the time of the battle of Manila in such a condition as to enable her to render effective aid, if required; that she was performing the functions of a collier, to be protected instead of to act aggressively; that her crew had never been enlisted in the Navy, but had been employed simply to perform manual labor; that the two 1-pounders and the small arms she had on board were for purposes of defence rather than attack; that "she was not kept in the relation which she sustained to the engagement for strategic purposes, but for the purpose of protection to herself and the incident protection of the rest of the fleet as the source of their coal supply;" and that she could not participate in prize money awarded under section 4632.

By the fifth clause of section 4631, which treats of the distribution of prize money, after certain deductions, the remainder is to be distributed "among all others doing duty on board, including the fleet captain, and borne upon the books of the ship, in proportion to their respective rates of pay in the service;" and under section 1569 the pay to petty officers, seamen and others must be fixed by the President. The Court of Claims further decided that as intervenors were shipped and not enlisted, and their pay had not been fixed by the President, but was a matter of agreement with the officer who shipped them, this furnished an additional reason for holding that they were not entitled to share in the prize money.

It is agreed that the decision as to the Nanshan determines the case of the Zafiro.

The District Court adjudged "that the Nanshan and Zafiro, not participating in any of said captures and not being armed vessels of the United States within signal distance of the vessel or vessels making the capture, under such circumstances and in

such conditions as to be able to render effective aid, if required, are not entitled to share in any of the prize property."

Notwithstanding the ingenious argument on behalf of the intervenors, we are not able to arrive at any different conclusion, and to hold that the Nanshan and Zafiro were part of the fighting force of the Navy in the battle, or present under such circumstances and in such condition as to be able to render effective aid in that engagement, as prescribed by the statute. They participated neither actually nor constructively in the captures.

The rights to share of the commissioned officers and enlisted men of the United States Navy on board these two vessels depend on other considerations.

The decree of the Supreme Court of the District of Columbia on the intervening libel is affirmed. The decree on the libel is reversed and the cause remanded with directions to enter a decree in accordance with this opinion.

THE INFANTA MARIA TERESA.[1]

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 273. Argued October 27, 28, 1902.—Decided February 23, 1903.

The Spanish war vessel Infanta Maria Teresa at the engagement at Santiago on July 3, 1898, was so far sunk and destroyed that she could not be sent in for adjudication, and no survey was had nor was any sale directed by the commanding officer, nor was she taken by and appropriated for the use of the United States and the value deposited under sec. 4625, Rev. Stat. Subsequently she was raised by a wrecking company under a contract with the Government and taken as far as Guantanamo, whence, after certain temporary repairs were made, it being impossible to completely repair her at that port, she proceeded in tow and partially under her own steam to Norfolk, the nearest government navy yard and the nearest point where permanent repairs could be made. On the way she was lost at Cat

[1] Docket title—*United States* v. *Taylor*, originally *United States* v. *Sampson*. See 187 U. S. 436.

Statement of the Case.

Island as a result of inability to withstand the storm on account of injuries received in the action at Santiago, became a total wreck, and was abandoned. The commanding officer concurred with the Government in the effort at salvage.

Held, that as the salvage was not actually accomplished, there was no appropriation to its use by the Government in the meaning of the statute and the captors were entitled to bounty only and not to prize money.

Held, that the disposition of the property taken from the vessel must follow the rule laid down in *The Manila Prize Cases*, *ante*, p. 254.

THIS is an appeal from a decree of the Supreme Court of the District of Columbia, sitting as a District Court of the United States in admiralty, on a libel in prize filed by William T. Sampson, Rear Admiral, United States Navy, in behalf of himself and the officers and men of the naval force on the North Atlantic Station, who took part in the naval engagement off Santiago. During the pendency of the appeal in this court Admiral Sampson died, and his death being suggested, Admiral Henry C. Taylor was substituted by direction of the court. 187 U. S. 436.

The engagement took place July 3, 1898, when the Spanish fleet, consisting of the Infanta Maria Teresa, Cristobal Colon, Viscaya, Almirante Oquendo, and the torpedo boats Furor and Pluton, which had been lying in the harbor of Santiago, made a sortie and attempted to force its way past the American fleet then blockading the port. None of the Spanish vessels were afloat at the close of the action. The least injured was the Cristobal Colon, which was sunk by her commander, and lay nearly on her beam ends. The vessel in the next best condition was the Infanta Maria Teresa, whose bottom had been pierced by a point of rock, while she was completely burned out above the protective deck. She lay nearly upright, being submerged to about her normal water line aft, and a little less than this forward.

On July 6, 1898, a board of eight officers was designated by Admiral Sampson, the commander-in-chief, to make "a thorough examination of the condition of the wrecked Spanish vessels," and to consider and report on the possibility of saving any of them. July 13, 1898, the board reported that it was "possible and desirable to float the Infanta Maria Teresa,"

and as to the Cristobal Colon, "that if the weather continues favorable the probabilities are good for saving the vessel."

July 6, 1898, a contract was entered into between the Merritt-Chapman Derrick Wrecking Company and the United States, stating in its preamble that the United States was "desirous of raising and saving as many as possible of the Spanish vessels composing the fleet of Admiral Cervera," and providing that the contractors should, upon "arriving at the scene of the wreck of the Cristobal Colon, at once begin the work of raising that vessel," with so much of her armament, stores, etc., as it might be possible to recover, the vessel and appurtenances, if so required by the United States, to be transported to the navy yard at Norfolk, Virginia. The contract further stated: "Inasmuch as it is believed that the Cristobal Colon is the least damaged of all the Spanish vessels above referred to, the party of the first part will endeavor to float her, and in case of success in that undertaking, or if it should in the judgment of the senior United States naval officer present, be impossible to save that vessel, or if in his judgment, during the work on the Cristobal Colon, it should be practicable to devote any time, attention, or labor to the saving of any of the other of the said vessels, then the party of the first part shall do all in its power towards the accomplishment of that end," etc. And further: "An officer of the Navy, to be designated by the commander-in-chief, and at all times subject to his orders, under the direction of the Secretary, shall be present at the scene of the work as the Department's representative, to supervise and inspect the operations under this contract, and the party of the first part shall subsist such officer on board its vessel during the performance of such work and until the return to the navy yard at Norfolk, if so required."

Soon after the report of the board convened by Admiral Sampson, the contractors began work on the Colon, and on July 29, 1898, a supplemental contract was made in regard to the work on that vessel. The operations were carried on for some time for the purpose of raising and floating both the Colon and the Teresa, but work on the Colon was stopped on or about August 31, 1898, and the efforts were concentrated

on the Teresa, which was finally floated September 23, and reached Guantanamo, September 24. She there received certain temporary repairs, and on October 29, 1898, started for Norfolk, Virginia, convoyed by the U. S. S. Leonidas, and in tow of the United States repair ship Vulcan, and the wrecking tug Merritt, also using her own steam as far as the condition of her engines permitted. She was in charge of the wrecking company, but an officer of the Navy had charge of the government men and employés on board, at the request of the wreck master, to assist the company in taking the ship to Norfolk. On November 1 she encountered a severe storm, and, after some hours, being apparently in a sinking condition, she was cast off, and ultimately drifted on to Cat Island, where she struck on the rocks and became a hopeless wreck. The evidence showed that her inability to withstand the storm was because of injuries sustained in action. There was no contention as to negligence, and a naval court of inquiry made findings and a report to the effect that the ship was not prematurely abandoned, and that the abandonment was in nowise due to the fault or negligence of any officer of the Navy.

July 17, 1899, libellants filed a petition in the Court of Claims for bounty under section 4635, Revised Statutes, for the destruction of the Viscaya, Oquendo, Colon, Furor and Pluton, which went to decree in their favor. 35 C. Cl. 578.

July 31, 1899, the libel in the present case was filed, setting forth that the Teresa, and all property taken from her, as well as that taken from the Colon and other sunken vessels, were prize of war, and had been appropriated to the use of the United States. The libel averred that the Teresa, "after being taken for and appropriated to the use of the United States, and while in the possession of the United States, under the control of the Secretary of the Navy, being in charge of contractors employed by him," was abandoned at sea, driven ashore, and finally abandoned, "and for that reason cannot be sent in for adjudication."

The District Court entered a decree of condemnation, July 30, 1901, to the effect that the Infanta Maria Teresa and all the property taken from her and from the other vessels were law-

ful prize of war, and directing upon the ascertainment of their value the amount should be deposited subject to the further order of the court, and that libellants were entitled to receive a moiety thereof. This appeal was then taken.

Mr. Assistant Attorney General Hoyt and *Mr. Special Attorney Charles C. Binney* for appellant.

Mr. William B. King for appellees. *Mr. William E. Harvey* and *Mr. George A. King* were with him on the brief.

Mr. James H. Hayden for appellees. *Mr. Joseph K. McCammon* was with him on the brief.

Mr. Chief Justice Fuller, after making the foregoing statement, delivered the opinion of the court.

After the engagement, the Teresa, as she lay shattered on the shore, was not in condition to be sent in for adjudication, and no survey and appraisement were thereupon had, nor was any sale directed by the commanding officer, as provided in section 4615, Revised Statutes; nor was the Teresa taken for and appropriated to the use of the United States and the value deposited under section 4624; nor were proceedings for adjudication commenced under section 4625, until by this libel. But the attention of the Government and of the commanding officer was directed from the first to the question of salvage. The commanding officer was of opinion that the Colon and the Teresa could both be raised and reconstructed, and the Government was desirous that this should be done if possible. The proceedings to that end were conducted in perfect good faith, and there was no suggestion that by the attempt to save these ships the Government was appropriating them or either of them to its use within the intent and meaning of the statute. The Government argues, and with great force, that the Teresa having been sunk and destroyed to such an extent that the naval force was powerless to save her by its own resources, her legal status as sunk or destroyed became fixed immediately after the engagement, and that nothing but bounty could be

recovered. In *The Manila Prize Cases*, *ante*, p. 254, we ruled that this was applying too rigid a construction to the statute, and that if an enemy's vessel of war sunk in battle was subsequently raised and reconstructed by the Government, she might properly be adjudicated as prize, the result being to let in the captors for prize money after the expense and cost of reconstruction and refitting had been deducted.

But the facts in this case are wholly different. The Teresa was raised and floated, but she was lost before she reached the Norfolk Navy Yard, which was the nearest practicable point at which she could be reconstructed.

We cannot concur in the view that the United States appropriated the Teresa to its own use within the meaning of the statute by attempting, with the advice and concurrence of the captors, to save her, or by the mere act of raising, and as soon as she floated, for that was only a step in the effort at salvage, and until salvage was accomplished, she was not appropriated to use. And this is true of the Colon, though the effort to salve her was given up before she floated.

Libellants' counsel agree with counsel for the Government that the question of prize or no prize must be determined as of the close of the engagement on July 3, 1898, but they contend that the Teresa was not sunk or destroyed as she lay stranded on the beach, and in her then condition could have been condemned as prize; that the Secretary of the Navy, in arranging to salve her, acted voluntarily, and "without the knowledge of the captors;" and that the latter, at least, yielded to his superior authority.

The statute makes no provision for adjudicating wrecks as prize. By section 4625 proceedings may be had in respect of proceeds of property appraised and sold; in respect of the value of property appropriated to use; and in respect of property entirely lost or destroyed.

In this case there was no appraisal and sale; there was no appropriation to the use of the Government in the meaning of the statute; the vessel had not been in condition to be sent in and then been "entirely lost or destroyed."

And it must be remembered that the Teresa could never

have been raised and saved by the captors alone. Yet her salvability seems to have been generally conceded. The commanding officer took no measures to have the wreck appraised and sold, but concurred with the Government in the effort at salvage. In doing so he represented all who would have been interested if the ship had been saved, and while the chance of obtaining considerable prize money was quite good, no risk was run of losing bounty by taking that chance.

The Government acted with due prudence in employing persons, whose business it was to do such work, to raise and deliver the vessel at the Norfolk Navy Yard. If no attempt had been made, the vessel would finally have gone to pieces where she lay.

Salvors are not held responsible for a loss when attempting salvage in good faith, and with reasonable judgment and skill, *The Laura*, 14 Wall. 336, and we know of no reason why the Government should be held to a more rigorous accountability even if it could in any case be regarded from the standpoint of a mere salvor of the property of another.

Where a hostile vessel of war has been so far destroyed that she cannot be brought in by the naval force, which reduced her to that condition, but she is raised, reconstructed and appropriated to use by the Government, the statute may be so construed as to permit the application of the doctrine of relation, but this case does not come within that view, and the claim for prize money in respect of the wreck itself is not sanctioned by the act of Congress. But libellants did not waive their right to bounty by seeking to recover prize money, and to bounty they are still entitled.

As to the property taken from the Teresa and the other wrecks, its disposition must follow the rule laid down in *The Manila Prize Cases*, *ante*, p. 254.

In our opinion the words "ship or vessel of war belonging to an enemy," as employed in § 4635, covered armament, outfit, and appurtenances, including provisions, money to pay the crew or for necessary expenditures, everything necessary to be used for the purposes of the vessel, and as a vessel of war.

The grant of prize money and the grant of bounty were dis-

tinct grants, and the applicable general rule ought not to be deprived of its force by particular exceptions.

The decree is reversed, without costs in this court, and the cause remanded with a direction to dismiss the libel.

MR. JUSTICE BROWN, with whom was MR. JUSTICE BREWER, dissenting.

I am unable to distinguish this case in principle from that of the *The Manila Prize Cases*, *ante*, p. 254, just decided. There the vessels were sunk and partially destroyed, but were subsequently raised, hauled into the slip, sufficiently cleaned up and overhauled to put to sea for Hong Kong under their own steam. The repairs were completed at Hong Kong, and the vessels commissioned as a part of the Navy.

In the present case, the Infanta Maria Teresa was also sunk and partially destroyed, but was raised, taken to Guantanamo, temporarily repaired, a crew put on board, was started for a port in the United States under her own steam, and was subsequently lost in a gale of wind. All the operations connected with her raising and repair were conducted by contractors engaged by the Navy Department, and supervised by a board of that department.

I submit that the fact that the vessels in Manila Bay were actually repaired and commissioned as vessels of the Navy and the Infanta Maria Teresa does not constitute a distinction in principle between the two cases; but the fact that in both cases the government elected to take possession of the vessels, and undertook to repair them for purposes of its own, is the turning point in the case. Had the vessels in Manila Bay been abandoned after being raised, and before they were repaired temporarily, had the Infanta Maria Teresa been either abandoned or lost before reaching Guantanamo Bay, or had she been there abandoned, I should have had no doubt that they could not either of them be considered as prizes of war. But the fact that, after being examined, the Maria Teresa was temporarily repaired at Guantanamo and sent to Norfolk, with a crew on board and under her own steam, indicates clearly to my

mind that the government had elected to make the vessel its own property, and her subsequent loss was the loss of the government and not of the captors. In fact, it is the election, and not the result of the election, which determines the ownership of the property.

MUTUAL LIFE INSURANCE COMPANY *v.* McGREW.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 109. Argued January 15, 16, 1902.—Decided February 23, 1903.

To maintain a writ of error asserted under the third of the classes of cases enumerated in section 709, Rev. Stat., the right, title, privilege or immunity relied on must not only be specially set up or claimed, but (1) at the proper time, which is in the trial court whenever that is required by the state practice, as it is in California, and (2) in the proper way, by pleading, motion, exception, or other action, part or being made part, of the record, showing that the claim was presented to the court.

Where it is claimed that the decision of a state court was against a right, title or immunity claimed under a treaty between the United States and a foreign country and no claim under the treaty was made in the trial court and it is a rule of practice of the highest court of the State that it will not pass on questions raised for the first time in that court and which might and should have been raised in the trial court, the writ of error will be dismissed.

The mere pleading of a decree in a foreign country or of a statute of such country and the construction of the same by the courts thereof do not amount to specifically asserting rights under a treaty with that country.

Judicial knowledge cannot be resorted to to raise controversies not presented by the record.

The raising of a point in this court as to the faith and credit which should be given judicial proceedings of a foreign country, which ceased to be foreign before judgment was rendered in a state supreme court, but was not brought to the attention of that court, comes too late.

THIS is a writ of error to revise the judgment of the Supreme Court of the State of California, affirming a judgment of the Superior Court of the city and county of San Francisco in favor of Alphonsine McGrew and against the Mutual Life Insurance Company of New York. 132 California, 85.

Statement of the Case.

The action was brought on a policy of insurance payable to Alphonsine C. McGrew, and in the amended answer to the complaint the recovery of a decree of divorce was averred, and it was alleged: "That under and by virtue of the Hawaiian law in force at the time said decree of divorce was granted and now in force, it is provided: 'When a divorce is decreed for the adultery or other offence amounting thereto, of the wife, the husband shall hold her personal estate forever, and he shall hold her real estate so long as they shall live; and if he shall survive her, and there shall be issue of the marriage born alive, he shall hold her real estate for the term of his own life, as a tenant by the curtesy; provided that the court may make such reasonable provision for the divorced wife out of any real estate that may have belonged to her, as it may deem proper.' That under and by virtue of the foregoing provision of law, and decree of divorce, all rights of the said Alphonsine C. McGrew in and to said policy of insurance did pass to the said Henri Golden McGrew and become his absolute property free and clear of any claims of the said Alphonsine C. McGrew, plaintiff herein, whatsoever."

The amended answer also averred that after McGrew's death, one Carter was duly appointed in Hawaii administrator of his estate; that as such administrator he commenced suit against the insurance company in a Circuit Court of Hawaii on the policy of insurance; recovered judgment October 15, 1895, for the full amount; that the Supreme Court of Hawaii affirmed the judgment, and subsequently denied an application for rehearing, and that the judgment was thereafter paid.

The trial court made findings of fact as follows:

"1. On the 14th day of September, 1892, this defendant made, executed, and delivered to Henri G. McGrew, a certain policy of insurance, being the same policy mentioned in the complaint herein, wherein and whereby the said defendant promised and agreed to pay unto the plaintiff, Alphonsine McGrew, the sum of five thousand dollars ($5000.00), upon the death of the said Henri G. McGrew, during the continuance of said policy of insurance, provided said Alphonsine McGrew were living at the time of the death of said Henri G. McGrew, and upon

acceptance of satisfactory proof of the death of said Henri G. McGrew, during the continuance of said policy.

"2. Henri G. McGrew died on the 22d day of October, 1894, in Honolulu, Hawaiian Islands, and said plaintiff survived him.

"3. Said Henri G. McGrew, upon said 14th day of September, 1892, and continuously and up to the time of his death, was a resident of, and domiciled in, the Hawaiian Islands.

"4. On the 9th day of February, 1895, plaintiff presented to said defendant satisfactory proof of the death of said Henri G. McGrew, and demanded of said defendant the payment of the sum of five thousand ($5000.00) dollars, under and in accordance with the terms of said policy of insurance, but defendant has never paid the same, or any part thereof.

"5. Subsequent to the said 14th day of September, 1892, and prior to the 8th day of February, 1894, the said Henri G. McGrew became of unsound mind, and thereafter, upon due proceedings had, Charles L. Carter, residing in the city of Honolulu, was duly appointed the guardian of the person and estate of said Henri G. McGrew, an incompetent person, and continued to hold such office of guardian at the time of the filing of the libel of divorce, and the proceedings thereunder hereinafter mentioned.

"6. On the 8th day of February, in the year 1894, Charles L. Carter, as guardian and on behalf of Henri G. McGrew, an incompetent person, filed in the Circuit Court of the first judicial circuit of the Republic of Hawaii, which said court has jurisdiction over said parties and over libels for divorce, a libel praying for a divorce from said plaintiff on the ground of her adultery; and thereafter, and on the 11th day of April, 1894, this plaintiff being then a resident of, and domiciled in, said Hawaiian Islands, appeared in said action and contested the same.

"7. On the 23d day of August, 1894, a decision was rendered, and on the 24th day of August, 1894, a decree was signed in said cause by the said Circuit Court, dissolving the bonds of matrimony theretofore existing between said Henri G. McGrew and this plaintiff, upon the ground of the adultery of this plaintiff.

"8. On the 5th day of April, 1894, this plaintiff left the Ha-

waiian Islands with the intention of not returning to said islands, but of coming to the State of California and of making her home in, and permanently residing in, said State. And thereafter, and in due course of her voyage from the Hawaiian Islands and in said month of April, this plaintiff arrived in the State of California, and with said intention above mentioned, thereupon took up her residence in, and made her home in, said State, and with said intention has ever since continuously remained in, and resided in, and made her home in, said State of California; and on the 23d and 24th days of August, 1894, was actually in, and residing in, said State, with the intention above mentioned of permanently residing and making her home in said State of California.

"9. Prior to said 5th day of April, 1894, this plaintiff had been excluded by said Charles L. Carter, as such guardian, from the home of said Henri G. McGrew, and was by him thereafter prevented from returning, and has ever since and until the death of said Henri G. McGrew been by him prevented from returning to the same, and was, on said 5th day of April, excluded from said home by said guardian.

"10. On said 5th day of April, 1894, this plaintiff had no home, and has never since had a home in the Hawaiian Islands."

[Findings 11, 12, 13, 14, 16 and 17 referred to the filing of a bill of exceptions by Mrs. McGrew in the divorce suit, and the statute and rule of court of Hawaii in respect of the practice in relation thereto.]

"15. The following Hawaiian law was in force in the Hawaiian Islands at the time said decree of divorce was granted, to wit: When a divorce is decreed for the adultery or other offence amounting thereto of the wife, the husband shall hold her personal estate forever."

And the court concluded as matter of law that the rights of Mrs. McGrew in and to the policy and the moneys due thereunder never passed to her husband, nor did the policy or money due thereunder ever become his property; and that the insurance company was indebted to Mrs. McGrew on said policy in the sum of $5000 and interest. Judgment was rendered ac-

cordingly October 11, 1897, and the case was carried to the Supreme Court of the State, and the record filed therein December 13, 1897. The judgment was affirmed February 28, 1901, and a petition for rehearing denied. 132 California, 85. This writ of error was allowed by the Chief Justice of that court.

The Supreme Court of California held that the construction given by the courts of the Republic of Hawaii to the statute of that republic that permitted an action for a divorce to be maintained by the guardian of an incompetent person should be accepted, although such was not the law of California, and that the judgment of divorce rendered in that republic, in pursuance of the statute so construed, should, by comity, be given effect by the courts of California as a decree of divorce; that the statute of Hawaii declaring that, where a divorce is decreed for the adultery of the wife, the husband shall take her personal estate, could have no operation pending the suit for divorce, and not until after the entry of judgment; that Mrs. McGrew was bound by the decree of divorce in Hawaii, so far as the dissolution of the bond of matrimony was concerned, she having appeared to the action; that when a husband commences a suit for divorce, the wife may acquire a separate actual domicil by change of residence from one country to another pending the suit; that Mrs. McGrew became domiciled in California prior to the entry of the decree, and that the statute of Hawaii declaring the forfeiture of her personal property to the husband could not operate in California to affect her, or to give to the husband a policy of insurance, which, by its terms, was payable to her, and which, at the time of the decree, was governed by the law of her domicil in California. No allusion whatever was made by the Supreme Court to the treaty between Hawaii and the United States.

The decisions of the Supreme Court of Hawaii are reported, *McGrew, a person non compos, by his Guardian, Charles L. Carter*, v. *Alphonsine McGrew*, 9 Hawaii, 475; *McGrew &c.*, v. *McGrew*, 10 Hawaii, 600; *Carter* v. *Mutual Life Insurance Company*, 10 Hawaii, 117; *S. C.*, 10 Hawaii, 559; *S. C.*, 10 Hawaii, 562.

In the opinion on the last hearing, December 16, 1896, the

court observed: "The company, not having brought the widow into court by interpleader, is in the unfortunate position of being subjected to two suits—one by the administrator here, the other by the widow in California. It must now rely on the assumption that the two courts will take the same view of the law." The court also considered the point that the statute in question, section 1331 of the Civil Code, was repealed by implication by the Married Women's act of 1888. But it held that the section was not inconsistent with that act, and that it might "be regarded as a special provision for a penalty or forfeiture in case of a divorce for the offence of adultery." And the court said that it was glad to know that the section had been repealed. Section 1331 was repealed May 12, 1896, Laws Hawaii, 1896, p. 70, act 24.

Article VIII of the treaty between the United States and the Kingdom of Hawaii was as follows:

"The contracting parties engage, in regard to the personal privileges, that the citizens of the United States of America shall enjoy in the dominions of his Majesty, the King of the Hawaiian Islands, and the subjects of his said Majesty in the United States of America, that they shall have free and undoubted right to travel and to reside in the states of the two high contracting parties, subject to the same precautions of police which are practiced towards the subjects or citizens of the most favored nations. They shall be entitled to occupy dwellings and warehouses, and to dispose of their personal property of every kind and description, . . . and their heirs or representatives, being subjects or citizens of the other contracting party, shall succeed to their personal goods, whether by testament or *ab intestato;* and may take possession thereof, either by themselves or by others acting for them, and dispose of the same at will, paying to the profit of the respective governments, such dues only as the inhabitants of the country wherein the said goods are, shall be subject to pay in like cases. And in case of the absence of the heir and representative, such care shall be taken of the said goods as would be taken of the goods of a native of the same country in like case, until the lawful owner may take measures for receiving them. And if a

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question should arise among several claimants as to which of them said goods belong, the same shall be decided finally by the laws and judges of the land wherein the said goods are. Where, on the decease of any person holding real estate within the territories of one party, such real estate would, by the laws of the land, descend on a citizen or subject of the other, were he not disqualified by alienage, such citizen or subject," etc. 9 Stat. 977.

Mr. Julien T. Davies and *Mr. Frederic D. McKenney* for plaintiff in error. *Mr. Edward Lyman Short*, *Mr. William H. Chickering* and *Mr. Warren Gregory* were on the brief.

I. The Federal questions were sufficiently claimed in the California courts by the pleadings, proof and assignments of error in the trial court. The mind of the state court was directed to the fact that a right protected by treaty was relied upon. *French* v. *Hopkins*, 124 U. S. 524; *Butler* v. *Gage*, 138 U. S. 61; *Sayward* v. *Denny*, 158 U. S. 184; *Powell* v. *Brunswick Co.*, 150 U. S. 400, 433; *Oxley Stave Co.* v. *Butler Co.*, 166 U. S. 653.

Submitting this case to these tests, it will be manifest that it can be readily inferred from the California opinion that that court was informed by contention of the plaintiff in error that a Federal right was intended to be asserted and denied the right so asserted. It would be preposterous in this case to claim that the California court proceeded in its determination without any thought that it was expected to decide a Federal question.

The question is, did the party bringing the case here intend to assert below a Federal right? *Michigan Sugar Co.* v. *Michigan*, 185 U. S. 113.

The Supreme Court of California itself construed the record as raising a Federal question. They say: "The defence is rather a remarkable one; it rests upon a decree of divorce rendered by a court of the Republic of Hawaii, a decree which could not have been obtained here; and upon an Hawaiian statute which has no force except by comity." As to definition of comity see *Barnett's Trusts*, 1902, 1 Ch. 858; *Fergusson's Will*, 1902, 1 Ch. 486.

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This court has frequently taken jurisdiction where the judgment of a sister State is pleaded as *res adjudicata* in the state court, although no specification in so many words was made in the pleading that such judgment violates the faith and credit clause of the Constitution, Art. IV.

That is, the pleading was a sufficient compliance with the clause in § 709, "specially set up or claimed." *Bell* v. *Bell*, 181 U. S. 175; *Sweringen* v. *St. Louis*, 185 U. S. 45.

The answer shows that the courts of Hawaii subsequently determined in the action of *Carter* v. *Mutual Life Insurance Co.*, 10 Hawaii, 117, 570, that the decree referred to did operate upon the interest of Mrs. McGrew in this very policy of insurance, and that the administrator of her former husband's estate was entitled to recover upon it.

The California court refused to follow the Hawaiian laws and judges, and decided that Mrs. McGrew did not lose her beneficial interest by the divorce proceedings.

Thus the company would be compelled to pay the same policy twice, though paid for but once, notwithstanding the treaty, and Constitution properly prevent it. This treaty was "as much a part of the law of every State as its own local laws and constitution." *Hauenstein* v. *Lynham*, 100 U. S. 483, 490; *Hickie* v. *Starke*, 1 Pet. 98; *Murray* v. *Charleston*, 96 U. S. 442; *Capital City Dairy Company* v. *Ohio*, 183 U. S. 238; *Green Bay &c. Canal Co.* v. *Patten Paper Company*, 172 U. S. 58, 68; *Roby* v. *Colehour*, 146 U. S. 153, 159; *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116. The decision of the alleged Federal question was necessary to the judgment rendered, and hence gives jurisdiction. *Brooks* v. *Missouri*, 124 U. S. 394, 400; *Armstrong* v. *Treasurer of Athens County*, 16 Peters, 281, 285; *Eureka Lake Company* v. *Yuba County*, 116 U. S. 410, 415; *Arrowsmith* v. *Harmoning*, 118 U. S. 194; *Furman* v. *Nichol*, 8 Wall. 44, 56; *Hickie* v. *Starke*, 1 Peters, 94; *Martin* v. *Hunter's Lessee*, 1 Wheat. 305, 355; *Craig* v. *State of Missouri*, 4 Peters, 410. The record shows a "complete" right under a treaty, and that the judgment of the court is in violation of that treaty. *Mayor &c.* v. *De Armas*, 9 Peters, 224; *Crowell* v. *Randell*, 10 Peters, 368.

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The findings of the trial court and the admitted statement of facts upon which the case was tried, deal wholly with these Hawaiian judgments and Hawaiian law.

The following cases do not sustain contention of defendant in error: *Parmelee* v. *Lawrence*, 78 U. S. 38; *Brooks* v. *Missouri*, 124 U. S. 394; *Baldwin* v. *Kansas*, 129 U. S. 57; *Brown* v. *Massachusetts*, 144 U. S. 579; *Oxley Stave Co.* v. *Butler Co.*, 166 U. S. 653; *Water Co.* v. *Electric Co.*, 172 U. S. 488; *Chapin* v. *Fye*, 179 U. S. 129.

II. The Federal questions were, therefore, necessarily involved in the Supreme Court of California on appeal, and were fully presented there by counsel.

The rights of the insurance company under the treaty, and the errors of the trial court in its rulings thereon, were fully called to the attention of the appellate court in California, and specially set up and claimed there, and were there argued by counsel for both parties and were considered by the court. *New York Central Railroad Co.* v. *New York*, 186 U. S. 269, 273.

The record shows not only that the state appellate court could not escape deciding this treaty question, but it also shows that the treaty question was presented to the trial court and passed on by it when it decided such evidence to be immaterial and excluded it.

III. The treaty and constitutional point in question were involved in the decision of the Supreme Court of California and apply to this case. *Tullock* v. *Mulvane*, 184 U. S. 497. Raising the question on appeal is sufficient. *Sweringen* v. *St. Louis*, 185 U. S. 45; *Mutual Life* v. *Cohen*, 179 U. S. 262.

This court further has jurisdiction to determine whether the Supreme Court of California should not have applied section 1, article IV of the United States Constitution in regard to full faith and credit. *Keokuk &c. Bridge Co.* v. *Illinois*, 175 U. S. 633; *Dewey* v. *Des Moines*, 173 U. S. 193.

When the company claimed the protection of the treaty it claimed the protection of the Constitution. When the Constitution was extended to Hawaii while the California court had the case under advisement, the constitutional points were added to the treaty points, by operation of law, for the California

court was bound to take judicial notice of the Constitution as the supreme law. Pleading was a sufficient compliance with the clause in § 709, "specially set up or claimed." *Bell* v. *Bell*, 181 U. S. 175; *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116, 142. The record shows that the public acts of Hawaii had an effect there not given them by the California court. *Lloyd* v. *Matthews*, 155 U. S. 227.

IV. The opinion of the Supreme Court of California impliedly referred to the Federal question. This point, taken in connection with the others showing that the Federal question was sufficiently claimed and set up is conclusive against the motion to dismiss.

A treaty and constitutional right may be denied as well by evading a direct decision thereon as by positive action. *Chapman* v. *Goodnow*, 123 U. S. 540, 548; *Des Moines Nav. Co.* v. *Iowa Homestead Co.*, 123 U. S. 552, 555.

Raising the Federal question for the first time in the appellate state court, if it be there considered, or necessarily involved in the decision, gives the right of review in this court. *Missouri, Kansas, etc. Ry. Co.* v. *Elliott*, 184 U. S. 530; *Mallett* v. *North Carolina*, 181 U. S. 589, 592; *Erie R. R. Company* v. *Purdy*, 185 U. S. 148; *Maxwell* v. *Newbold*, 18 How. 511, 516.

If the mind of the state court is directed to the fact that a right protected by the treaty is relied upon, it is sufficient. *Eastern Building Assn.* v. *Welling*, 181 U. S. 47.

V. The Federal question was presented a second time to the Supreme Court in the petition for rehearing which was denied, and such decision necessarily involved a second consideration of the Federal question by the state court.

This brief determination "motion denied" is not equivalent to "motion dismissed" without consideration but it involves judicial action on the merits of the matter presented. *Chapman* v. *Goodnow*, 123 U. S. 548; *Michigan Sugar Co.* v. *Michigan*, 185 U. S. 113; *Rothschild* v. *Knight*, 184 U. S. 339, 341; *King* v. *Cross*, 175 U. S. 396; *Chicago, Rock Island & Pacific* v. *Sturm*, 174 U. S. 710.

VI. Questions arose among several claimants, namely, Henri G. McGrew by his guardian, Charles L. Carter, Alphonsine Mc-

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Grew, J. O. Carter, administrator of the estate of Henri G. McGrew, deceased, as to which of them said policy belonged to, and the same were decided finally by the laws and judges of Hawaii, wherein the said policy was.

The decisions were that the policy belonged to Henri McGrew and his estate and the California court was bound under the treaty by the law as laid down by the Hawaiian judges and their decisions, and under the Constitution of the United States was bound to give full faith and credit to the divorce decree, the public act of Hawaii in regard to the effect of such decree, and the judgment in the administrator's action.

The general object of this particular clause of the treaty involved in this action was to provide that the laws and judges of the land wherein the goods were, were to decide finally to whom they belonged in any controversy as to their ownership. The broad scope of the treaty was that if any question arose in the courts of either country where the goods were between subjects or citizens of the respective countries, the decision of the courts of that country, whichever it might be, should be final.

The laws and judges of Hawaii had under the treaty power to decide finally to whom the policy belonged, because that was the land wherein the goods were. The policy was covered by the word "goods" in the treaty.

A liberal and not a restrictive construction of the rights to be claimed under it should be followed. *Shanks* v. *Dupont*, 3 Pet. 242; *Hauenstein* v. *Lynham*, 100 U. S. 483, 487, and cases cited; *Tucker* v. *Alexandroff*, 183 U. S. 437.

The term "goods" is by no means limited to strictly tangible movables such as ordinary chattels, but in many cases it has been held to include such choses in action as policies, bonds, etc. *Dowdel* v. *Hamm*, 2 Watts, 61, 65; *Tisdale* v. *Harris*, 20 Pickering, 9; *Greenwood* v. *Law*, 25 Atl. Rep. 134; *Terhune* v. *Bray's Ex.*, 16 N. J. Law, 53. *Kirtland* v. *Hotchkiss*, 100 U. S. 491, 498, distinguished.

The *situs* of the goods was in Hawaii, either because their actual location was there, or because they were enforceable there against the debtor, the Mutual Life. *Equitable Life* v. *Brown*, 187 U. S. 308; *N. E. Life* v. *Woodworth*, 111 U. S.

138; *Sulz* v. *M. R. F. L. Assn.*, 145 N. Y. 563; *Wyman* v. *Halstead*, 109 U. S. 654; Holland's Jurisprudence, 9th ed. 391; Wharton's Conflict of Laws, §§ 305–307. It is evident that the treaty selected not the *lex domicilii* but the *lex loci rei sitæ*, and the United States had power by the treaty to declare that the law of the domicil should not govern, and it is merely a question of what was the intention. *Eidman* v. *Martinez*, 184 U. S. 578, 581; *Cross* v. *United States Trust Co.*, 131 N. Y. 330; *Ennis* v. *Smith*, 14 How. 400, 424; *Dammert* v. *Osborn*, 141 N. Y. 564. Serious encroachments have been made upon the ancient maxim. *Green* v. *Van Buskirk*, 5 Wall. 307; *S. C.*, 7 Wall. 139; *Hervey* v. *Rhode Island Locomotive Works*, 93 U. S. 664; *Walworth* v. *Harris*, 129 U. S. 355; *Security Trust Company* v. *Dodd*, 173 U. S. 624, and cases there cited. "The same principle has been applied not only to tangible property but to credits and effects." *Tappan* v. *Merchants' National Bank*, 19 Wall. 490; *Savings Society* v. *Multnomah Co.*, 169 U. S. 421; *New Orleans* v. *Stempel*, 175 U. S. 309; *Bristol* v. *Washington Co.*, 177 U. S. 133; *Mager* v. *Grima*, 8 How. 490; Story's Conflict of Laws, §§ 379, 385; Minor, Conflict of Laws, § 121, *et seq.*; Wharton, Conflict of Laws, §§ 299, 309, 311.

The treaty has removed the danger of any collision between independent systems of law.

The administrator's action was within the treaty and the goods were in Hawaii. On the death of Henri McGrew, Carter, administrator, a subject or citizen of Hawaii, and the Mutual Life Insurance Company, a subject or citizen of the United States, were parties to a controversy as to whom the policy belonged to, it having already been decided in the divorce case, and the Hawaiian court decided that Alphonsine was a necessary party to the later suit.

The instant the Constitution of the United States went into effect, the Supreme Court of California was bound by it to give full faith and credit to the divorce decree and public acts of Hawaii and the judgment in the administrator's action, as well as by the treaty. *Ex parte Edwards*, 13 Hawaii, 32, 38; *Ex parte Ah Oi*, 13 Hawaii, 556.

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The Constitution of the United States protected the company on account of the divorce decree. Civil Code, Hawaii, section 1331.

The Constitution of the United States required full faith and credit to be given to the decree in the divorce action in Hawaii. *Laing* v. *Rigney*, 160 U. S. 544; *Lynde* v. *Lynde*, 181 U. S. 186; *Bullock* v. *Bullock*, 57 New Jersey Law Reports, 508. The statute in question is not a penal statute in an international sense within the meaning of *Huntington* v. *Attrill*, 146 U. S. 657.

In the last case Mr. Justice Gray states that the question whether a statute of one State, which in some aspects may be called penal, is a penal law in the international sense, so that it cannot be enforced in the courts of another State, depends upon the question whether its purpose is to punish an offence against the public justice of the State, or to afford a private remedy to a person injured by the wrongful act. *Boston M. R. R. Co.* v. *Hurd*, 108 Fed. Rep. 116, 119; *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265.

The Supreme Court of California was bound always by the treaty and after 1898 by the Constitution of the United States. 31 Stat. 143.

The Supreme Court of California was bound to take notice of the change in the operation of the supreme law of the land effected by the annexation of Hawaii and the extension of the Constitution thereto. *Pugh* v. *McCormick*, 14 Wallace, 361; *Fairfax* v. *Hunter*, 7 Cranch, 603, 627; *United States* v. *Peggy*, 1 Cranch, 103; *Whitehead* v. *Watson*, 19 La. Ann. 68; *Stutsman Co.* v. *Wallace*, 142 U. S. 293; *Price* v. *Nesbitt*, 29 Maryland, 264; *Turner* v. *Bryan*, 83 Maryland, 374; *Ferry* v. *Campbell*, 110 Iowa, 290.

This question is important in view of recent past and possible future annexations. But the question has been already decided. *Armstrong* v. *Carson's Executors*, 2 Dallas, 302.

The attempted change of domicil by Alphonsine could not deprive the Hawaiian court of jurisdiction over the contingent interest in the policy any more than it could change the grounds for the divorce itself. Jurisdiction once acquired cannot be

ousted by subsequent events. *Koppel* v. *Heinrichs*, 1 Barb. 450; *Tindall* v. *Meeker*, 1 Scamm. 137; *Hard* v. *Shipman*, 6 Barb. 631; *Upton* v. *N. J. So. R. R.*, 25 N. J. Eq. 375. The actual physical location of the goods was not changed.

The treaty should be construed liberally. *The Pizarro*, 2 Wheaton, 227; *United States* v. *Chong Sam*, 47 Fed. Rep. 885; *The Friendschaft*, 3 Wheat. 114; *The Venus*, 8 Cranch, 252; *State* v. *Blackmo*, 6 Blackf. (Ind.) 489; *Case* v. *Clarke*, 5 Mason, 70; *Poppenhauser* v. *India Rubber Co.*, 14 Fed. Rep. 707; *Burnham* v. *Rangeley*, 4 Fed. Cas. 775.

While this is not the case of a double payment to identically the same person, yet the principle that a construction requiring a double payment should not be adopted applies. *American Central Ins. Co.* v. *Hettler*, 37 Nebraska, 853; *Jardin* v. *Madeiros*, 9 Hawaii, 503; *Kolb* v. *Swann*, 68 Maryland, 521; *Matter of Howard*, 26 N. Y. Misc. 233; *Haggerty* v. *Amory*, 89 Massachusetts, 462, and cases cited.

VII. The laws and judges of Hawaii had the final decision of this controversy, and the Hawaiian proceedings and statutes were entitled to full faith and credit in California. *Hancock Bank* v. *Farnum*, 176 U. S. 643.

Titles, rights, privileges or immunities claimed under the Constitution, laws or treaties of the United States have been placed under the final guardianship of this court, on whatever question of law the same might depend. The United States Supreme Court will not compel this insurance company to pay a second time to the wife of the deceased the amount of this policy, when it has already paid the amount thereof for the benefit of the son of the deceased on judgments based on Hawaiian law which the proper rules of international law, the treaty with the United States and the Constitution of the United States say shall be final.

Mr. J. Hubley Ashton for defendant in error. *Mr. Richard Bayne* and *Mr. H. G. Platt* were on the brief.

I. There is no Federal question in this case, because plaintiff in error did not claim in or for itself any right under the treaty. Plaintiff in error here does not claim in or for itself

any right under the treaty with Hawaii, or any right which is protected by that treaty, but only that a third person has a right under that treaty, or which is protected thereby, and that, by virtue of such alleged right, such third person, and not the defendant in error, is the owner of, and entitled to the subject matter of this action, to wit, said policy of insurance and the money due thereon ; and therefore, that said third person and not the defendant in error, is entitled to have and recover the amount of said policy from plaintiff in error. Hence, plaintiff in error is not asserting a right *in itself* under the treaty, but in a *third person;* which, if established, might be a defence in the state court, but presents no Federal question. *Owings* v. *Norwood*, 5 Cranch, 344; *Verden* v. *Coleman*, 1 Black, 472 ; *Henderson* v. *Tennessee*, 10 How. 323 ; *Hale* v. *Gaines*, 22 How. 160 ; *Giles* v. *Little*, 134 U. S. 650 ; *Tyler* v. *Judges*, 179 U. S. 407.

II. This writ should be dismissed for want of jurisdiction in this court to entertain it, because no Federal question was specially set up or claimed in the California courts. *Water Power Co.* v. *Columbia*, 172 U. S. 488 ; *Yazoo* v. *Adams*, 180 U. S. 14. These cases disposed of the contention of plaintiff in error that a Federal question under clause 3 of § 709 can be raised by inference or implication. *Oxley Stave Co.* v. *Butler Co.*, 166 U. S. 655 ; *Green Bay* v. *Patten Paper Co.*, 172 U. S. 67.

A right, title, privilege or immunity under the Constitution or laws of the United States, or under a treaty, must be especially set up or claimed at the proper time and in the proper way, *i. e.*, specially set up in the trial court. *Spies* v. *Illinois*, 123 U. S. 181; *Baldwin* v. *Kansas*, 129 U. S. 57 ; *Miller* v. *Texas*, 153 U. S. 538 ; *Parmalee* v. *Lawrence*, 11 Wall. 39. It cannot be first set up in the argument in the state Supreme Court. *Oxley Stave Co.* v. *Butler Co.*, 166 U. S. 655 ; *Maxwell* v. *Newbold*, 18 How. 516. This court did not mean that such a question can be presented to the state Supreme Court only in the oral or printed arguments. *Baldwin* v. *Kansas*, 129 U. S. 57 ; *Zadig* v. *Baldwin*, 166 U. S. 488 ; *Sayward* v. *Denny*, 158 U. S. 183 ; *Parmalee* v. *Lawrence*, 11 Wall. 49 ; *Gulf, etc., R. R. Co.* v. *Hewes*, 183 U. S. 66 ; *Loeb* v. *Columbia*, 179 U. S. 485 ;

Capital Bank v. *Cadiz*, 172 U. S. 431; *Mallett* v. *North Carolina*, 181 U. S. 592. Also by analogy, under § 5 of the judiciary act of March 3, 1891, *W. U. Tel. Co.* v. *Ann Arbor*, 178 U. S. 243; *Ansbro* v. *United States*, 159 U. S. 697; *Muse* v. *Arlington*, 168 U. S. 435.

The writ of error must be dismissed, unless it is shown that the particular Federal question relied upon, to wit, a right under the treaty, was specially set up or claimed at the proper time, and in the proper way, or that this case is one of the rare exceptions to the rule laid down in *Water Power Co.* v. *Columbia*, *supra*. This court has repeatedly held that it will take jurisdiction only when a Federal question was *actually raised and decided*, not when it simply *might have been raised*. *Maxwell* v. *Newbold*, 18 How. 511; *Crowel* v. *Randell*, 10 Pet. 368, 398; *Brown* v. *Colorado*, 106 U. S. 639; *Hagar* v. *California*, 154 U. S. 639; *Chouteau* v. *Gibson*, 111 U. S. 200. *Bell* v. *Bell*, 181 U. S. 175, and other cases on brief of plaintiff in error distinguished.

III. No Federal question was involved in the decision of the California court, nor is any Federal question apparent in the record. It not only does not appear from the record that the treaty in question was in any way involved in the decision, but on the contrary, it appears from the record that it was not so involved.

It was intended to protect only the citizens of the United States and the subjects of the Hawaiian kingdom in disputes between such citizens on the one side and such subjects on the other side, whereas the record shows or attempts to show that both the defendant in error and her husband (the only claimants to this policy of insurance) were both citizens of the Republic of Hawaii (successor to the kingdom of Hawaii) at the time of the beginning of the divorce proceedings.

The policy of insurance is not covered by the terms of the treaty. The term "goods" was clearly not intended to cover intangible property, such as a policy of insurance, as it cannot be said to be in any land, but must be in the owner thereof, whereas a horse, a piano, a barrel of sugar, necessarily has a corporeal situs, which may be different from the situs of its owner.

16 Am. & Eng. Ency. of Law, 843; *People* v. *Eastman*, 25 California, 604; *Estate of Fair*, 128 California, 612; *Kirtland* v. *Hotchkiss*, 100 U. S. 498. *N. E. Life* v. *Woodworth*, 111 U. S. 138, distinguished. The decision of the state court that the domicil of the defendant in error at the time of the divorce was in California, though a non-Federal question, is in line with the decisions of this court. *Anderson* v. *Watt*, 138 U. S. 706; *Cheever* v. *Wilson*, 19 Wall. 108, 123, 124. *Mutual Life* v. *Cohen*, 179 U. S. 262; *Huntington* v. *Attrill*, 146 U. S. 664, distinguished.

Mr. Chief Justice Fuller, after making the foregoing statement, delivered the opinion of the court.

Appellate jurisdiction was conferred on this court by the twenty-fifth section of the judiciary act of 1789, over final judgments and decrees in any suit in the highest court of law or equity of a State in which a decision in the suit could be had, in three classes of cases: The first class was where the validity of a treaty or statute of, or an authority exercised under, the United States, was drawn in question, and the decision was against their validity; the second was where the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, was drawn in question, and the decision was in favor of their validity; and the third was "or where is drawn in question the construction of any clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute or commission." 1 Stat. 73, 85, c. 20, § 25.

By the second section of the act of February 5, 1867, 14 Stat. 385, 386, c. 28, the original twenty-fifth section was reënacted with certain changes, and, among others, the words just quoted were made to read: "Or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of or commission held, or authority exercised under the United States, and the decision is against the title, right, priv-

ilege, or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission, or authority." And this was reproduced in § 709 of the Revised Statutes. The change from the drawing in question of the construction of a clause of the Constitution, or of a treaty, statute, or commission, to the claim of a right under the Constitution, treaty, statute, commission, or authority, emphasized the necessity that the right must be specially set up, and denied.

In *Baltimore & Potomac Railroad Company* v. *Hopkins*, 130 U. S. 210, the distinction between the denial of validity and the denial of a title, right, privilege or immunity specially set up or claimed, is pointed out, as well as the distinction between the construction of a statute or the extent of an authority and the validity of a statute or of an authority.

Our jurisdiction of this writ of error is asserted under the third of the classes of cases enumerated in § 709, and it is thoroughly settled that in order to maintain it, the right, title, privilege or immunity relied on must not only be specially set up or claimed, but at the proper time and in the proper way.

The proper time is in the trial court whenever that is required by the state practice, in accordance with which the highest court of a State will not revise the judgment of the court below on questions not therein raised. *Spies* v. *Illinois*, 123 U. S. 131; *Jacobi* v. *Alabama*, 187 U. S. 133; *Layton* v. *Missouri*, 187 U. S. 356; *Erie Railroad Company* v. *Purdy*, 185 U. S. 148.

The proper way is by pleading, motion, exception, or other action, part, or being made part, of the record, showing that the claim was presented to the court. *Loeb* v. *Trustees*, 179 U. S. 472, 481. It is not properly made when made for the first time in a petition for rehearing after judgment; or in the petition for writ of error; or in the briefs of counsel not made part of the record. *Sayward* v. *Denny*, 158 U. S. 180; *Zadig* v. *Baldwin*, 166 U. S. 485, 488. The assertion of the right must be made unmistakably and not left to mere inference. *Oxley Stave Company* v. *Butler County*, 166 U. S. 648.

If the highest court of a State entertains a petition for rehearing, which raises Federal questions, and decides them, that will be sufficient; *Mallett* v. *North Carolina*, 181 U. S. 589; or

if the court decides a Federal question which it assumes is distinctly presented to it in some way. *Home for Incurables* v. *New York*, 187 U. S. 155; *Sweringen* v. *St. Louis*, 185 U. S. 38, 46.

Jurisdiction may be maintained where a definite issue as to the possession of the right is distinctly deducible from the record and necessarily disposed of, but this cannot be made out by resort to judicial knowledge. *Powell* v. *Brunswick County*, 150 U. S. 433; *Mountain View Mining & Milling Company* v. *McFadden*, 180 U. S. 533; *Arkansas* v. *Kansas and Texas Coal Company*, 183 U. S. 185.

Counsel by their specification of errors, under rule 21, assert the Federal questions to be that the decision of the Supreme Court of California was against a title, right, privilege or immunity claimed by plaintiff in error under the treaty between the United States and Hawaii. And that the decision was in contravention of section 1 of Article IV of the Constitution.

1. We do not find that any claim under the treaty was made in the trial court, and the rule of practice of the Supreme Court of California is that it will not pass on questions raised for the first time in that court, and which might and should have been raised in the trial court. *Stoddard* v. *Treadwell*, 29 California, 281; *King* v. *Meyer*, 35 California, 646; *Deady* v. *Townsend*, 57 California, 298; *Williams* v. *McDonald*, 58 California, 527; *Anderson* v. *Black*, 70 California, 226, 231.

Neither the pleading of the decree of divorce nor of the statute of Hawaii providing for the forfeiture of Mrs. McGrew's rights in the policy of insurance, as construed by the Supreme Court of Hawaii, nor of both together, amounted to specially asserting any right under the treaty. Those averments did not assert that claim in the trial court in such manner as to bring it to the attention of that court, nor indeed, to show that any right under the treaty was present in the mind of counsel.

To give them that effect would be in the teeth of our decision in *Oxley Stave Company* v. *Butler County*, 166 U. S. 648, and numerous other decisions. That case involved a decree, in respect of which there was a general allegation that it was

rendered against dead persons, as well as in the absence of necessary parties who had no notice of the suit; and we held that such general allegations did not meet the statutory requirement that the final judgment of a state court may be reexamined here if it denies some title, right, privilege, or immunity "specially set up or claimed" under the Constitution or authority of the United States. Mr. Justice Harlan said (p. 655): "This statutory requirement is not met if such declaration is so general in its character that the purpose of the party to assert a Federal right is left to mere inference. It is the settled doctrine of this court that the jurisdiction of the Circuit Courts of the United States must appear affirmatively from the record, and that it is not sufficient that it may be inferred argumentatively from the facts stated. . . . Upon like grounds the jurisdiction of this court to reëxamine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right."

This also disposes of the suggestion that the offering in evidence of the judgment in the suit by the administrator, and of evidence of its payment, raised a Federal question under the treaty, for no such ground was taken in relation to that evidence, to say nothing of the fact that Mrs. McGrew was not a party to that suit.

In the bill of exceptions there is an enumeration of certain objections to the entry of judgment and certain errors of law alleged to have occurred during the trial, and to have been excepted to by defendant, which embraces the objection that the decision of the trial court was against law because, among other things, the findings of fact did not determine the issues raised by the allegation in the answer quoted in the statement preceding this opinion, and that the court erred in sustaining the objection of plaintiff to the introduction of evidence of payment by the company to the administrator of the amount due on the policy. But there is no reference to the treaty, and all this no more set up the claim than the answer itself.

In fact, the question was not even raised in the Supreme

Court, though, if so, the court was not then bound to regard it. Reference was made in the briefs in the Supreme Court to the treaty, but those references did not specially set up or claim any right as secured by the treaty, nor were the briefs made part of the record by any certificate or entry duly made, and our attention has not been called to any statute or rule of court in California making them such.

In the petition for rehearing it was said that the treaty made the decision in *Carter* v. *Insurance Company*, 10 Hawaii, 117, controlling, and if that could be considered as a compliance with § 709, which we do not think it could, it came too late, and the petition was denied without an opinion. In doing so that court adhered to the usual course of its judgments, and its action cannot be revised by us. If the Supreme Court of California had seen fit on that petition to entertain the contention of plaintiff in error as asserting a Federal right, and had then decided it adversely, the case would have occupied a different position.

Where a state court refuses to give effect to the judgment of a court of the United States, rendered upon a point in dispute, and with jurisdiction of the case and the parties, it denies the validity of an authority exercised under the United States; and where a state court refuses to give effect to the judgment of a court of another State, it refuses to give full faith and credit to that judgment. The one case falls within the first class of cases named in § 709 and the other within the third class.

Where a judgment of another State is pleaded in defence, and issue is made upon it, it may well be ruled that that sets up a right under the third subdivision, because the effect of the judgment is the only question in the case, but here the plea of the decree of divorce and the statute did not necessarily suggest or amount to a claim under the treaty. They were properly admitted in evidence under the state law for what they might be worth as a defence, but that did not involve the assertion of an absolute right under the treaty.

The Supreme Court of Hawaii in its second opinion in the administrator's case said that the company, not having brought Mrs. McGrew in by interplea, must rely on the courts of Cali-

fornia taking the same view that the courts of Hawaii did, but did not intimate that the courts of California were compelled by treaty to take that view.

Nor can this failure to claim under the treaty be supplied by judicial knowledge. We so held in *Mountain View Mining and Milling Company* v. *McFadden*, 180 U. S. 533, where we ruled that judicial knowledge could not be resorted to to raise controversies not presented by the record; and Professor Thayer's Treatise on Evidence was cited, in which, referring to certain cases relating to the pleadings and matters of record, it was said "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." *Arkansas* v. *Kansas and Texas Coal Company*, 183 U. S. 185, 190.

That rule must necessarily govern us in passing on the question of our appellate jurisdiction under § 709.

The Supreme Court of California held that the Hawaiian statute had no force in California "except by comity;" accorded full effect to the decree of divorce as dissolving the bond of matrimony, but decided that Mrs. McGrew was not affected by the statute because she was not domiciled in Hawaii, and was domiciled in California, when that decree was rendered, and when the statute could have operated if she had been domiciled in Hawaii; and that the statute "had no operation upon her or her personal property here; for the law which governs personal property is the law of the domicil." As to whether a Federal question was involved at all, see *Roth* v. *Ehman*, 107 U. S. 319; *Roth* v. *Roth*, 104 Illinois, 35; Württemberg Treaty, 1844, Comp. Treaties, (1899,) 656.

It is argued that by the judgment against the company in favor of McGrew's administrator, the Hawaiian courts had adjudicated that Mrs. McGrew's title passed to the administrator. But Mrs. McGrew was not a party to that action, and was not bound by it, so that it could be pleaded against her. The insurance company did not litigate the question of ownership on her behalf and was in no way authorized to represent

her. In any point of view we return to the contention that it was in virtue of the treaty that the California courts were obliged to accept the Hawaiian decisions, and the record fails to show that a right or title was set up thereunder.

2. The second question indicated by plaintiff in error is that the decision was in conflict with § 1 of Article IV of the Constitution, providing that full faith and credit in each State shall be given to the public acts, records and public proceedings of every other State, as carried out by § 905 of the Revised Statutes, because it is insisted that prior to the decision this constitutional provision applied to Hawaii, and should be regarded as an enlargement of and connected with the alleged claim of right under the treaty. But an alleged right under a treaty between two foreign nations is inconsistent with an alleged right arising under the Federal Constitution, and as a right under the Constitution it was not at any time or in any way brought to the attention of the state courts. The judgment of the trial court was rendered October 11, 1897. The resolutions of annexation were passed July 7, 1898. The act to provide a government for Hawaii was passed April 30, 1900. By this act it was provided that the laws of Hawaii, not inconsistent with the Constitution and laws of the United States, or the provisions of the act, should remain in force, subject to repeal or amendment, but the act forfeiting the wife's property was repealed May 12, 1896. Laws Hawaii, 1896, p. 70.

The judgment of the Supreme Court of California was rendered February 28, 1901, and we cannot retain jurisdiction on the ground of the assertion of a Federal right which did not exist when the judgment was rendered in the trial court, and which was not brought to the attention of the highest court of the State in any way whatever.

Writ of error dismissed.

MR. JUSTICE PECKHAM took no part in the consideration and disposition of this case.

MR. JUSTICE WHITE dissented.

HOOKER *v.* LOS ANGELES.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 149. Argued January 23, 1903.—Decided February 23, 1903.

Where the controversy in the state court does not involve the construction of the treaty of 1848 with Mexico, but only the validity of the title of certain Mexican and Spanish grants made prior to the treaty, no Federal question is involved.

The Fourteenth Amendment does not control the power of a State to determine the form of procedure by which legal rights may be ascertained, if the method adopted gives reasonable notice and affords a fair opportunity to be heard.

Where the validity, on account of repugnancy to the Federal Constitution, of statutes of California as to the paramount right of the City of Los Angeles to the surface and subterranean waters of the Los Angeles River is not drawn in question in the trial or in the Supreme Court of the State, the decisions of the state courts will not be reviewed in this court.

THIS is a writ of error to the Supreme Court of the State of California to review a judgment of that court affirming the judgment of the Superior Court of the county of Los Angeles, California, in favor of the city of Los Angeles, and against Hooker and Pomeroy. The city brought suit against Hooker and Pomeroy, to condemn all their "estate, right, title, and interest," in and to certain tracts of land, described in the complaint, for the purpose of enabling the city "to construct and maintain thereon the 'headworks' of its projected system for supplying water to its inhabitants for private and municipal purposes." All questions except the amount of compensation to be awarded were by stipulation tried by the court. The jury returned a verdict awarding $23,000 as the value "of an estate in fee simple in the lands described in the complaint, including all their elements of value, subject to the paramount right of the city of Los Angeles to take from the Los Angeles River, from time to time, all the water that may be needed at such time for the use of the inhabitants of said city, and for all municipal and public uses and purposes therein," and $2000 as damages to the re-

maining portion of the tract of which that land formed a part. Judgment was rendered thereon for the amount so found, and costs. The case was carried to the Supreme Court, and the judgment affirmed. 124 California, 597.

Mr. J. S. Chapman for plaintiff in error. *Mr. John Garber*, *Mr. R. H. F. Variel* and *Mr. J. G. North* were on the brief.

Mr. John F. Dillon and *Mr. J. R. Scott* for defendant in error. *Mr. Henry T. Lee*, *Mr. Harry Hubbard* and *Mr. John M. Dillon* were on the brief.

Mr. Chief Justice Fuller, after making the foregoing statement, delivered the opinion of the court.

We cannot find in the pleadings or other proceedings in the trial court, or in the Supreme Court, that any statute of California was asserted to be in conflict with the Constitution, or any law or treaty of the United States, or that any right was claimed by plaintiffs in error under the Constitution, or any treaty or statute of the United States.

The city alleged in its complaint that the Los Angeles River was a non-navigable stream, rising a few miles to the north and northwest of the city, and fed by streams rising to the surface in or near the bed of the river; that that bed was composed of sandy soil, into which the water sank and formed subterranean streams flowing beneath the bed and then rising to the surface; that the river flowed through the land sought to be condemned before reaching the city; that the city was the owner of the exclusive right to the use of all the water of the river in trust for the public purposes of supplying the inhabitants of the city with water for domestic use, supplying water for the irrigation of land embraced within the pueblo lands of the city, and other municipal uses; that plaintiffs in error were owners of the fee simple of the lands described, subject to the rights of the city to the water of the river; and the prayer was for the condemnation in fee simple of all the estate, right, title and interest of plaintiffs in error in the land.

The answer of plaintiffs in error denied that the river was fed by springs rising to the surface in or adjoining the bed of the river; admitted that the bed was composed of sandy soil, but denied that the waters of the river formed well-defined subterranean streams flowing in channels beneath the bed, or that such subterranean waters rose before reaching the city, or became a part of the surface water of the river; and denied that the city was the owner of any right to the use of all the water of the river, in trust, or otherwise; denied that the city had any right in the water or to the use thereof, other than as a riparian owner of lands through which the river flowed, and rights acquired by appropriation; and denied that the city owned the right to the water of the river to the exclusion of plaintiffs in error. On the contrary, the answer alleged that the lands of plaintiffs in error were riparian lands situated far above the north boundary of the city, and that, as riparian owners, plaintiffs in error were entitled to the use of the waters of the river for all lawful purposes, and, to a reasonable extent, for irrigating those lands and for domestic and other uses. And it set up grants of part of the land to the predecessors of plaintiffs in error in 1843 by the governor of both Californias, and of the remainder of the land by grant in 1784; that confirmation was petitioned for before the board of land commissioners appointed under the act of Congress of March 3, 1851, the grants confirmed, and the decrees of the board affirmed by the District Court of the United States for the Southern District of California, and patents duly issued; and averred that plaintiffs in error claimed title "under and through the aforesaid Mexican and Spanish grants, and the proceedings for the confirmation thereof, and the said patents issued by the United States founded thereon;" and that as owners of the land plaintiffs in error were also owners of the waters percolating in the soil thereof, and riparian owners, having the rights of riparian proprietors in the waters of the river.

The trial court decided that the city was, and had been since its organization, owner in fee simple of the paramount use of the waters of the Los Angeles River, so far as might be needed from time to time, for the public purposes of supplying the

inhabitants of the city with water for public and domestic purposes, as described in the complaint; but plaintiffs in error were the owners of the particular land, and had, subject to the rights of the city, the rights of riparian proprietors thereof, and the right to use the water of the river for all purposes for which riparian owners are entitled to use such waters.

The contentions seem to be that the state courts decided against the claim of plaintiffs in error to the rights of a riparian owner, and to the ownership of alleged percolating waters, as derived from patents of the United States as well as from Mexican grants, or under the treaty of Guadeloupe Hidalgo; that the statutes of California in authorizing the trial of title in condemnation proceedings, and the determination of compensation before the determination of title, amounted to providing for the taking of private property for public use without just compensation; that certain statutes declaring the city to be vested with a paramount right to the surface and subterranean waters deprived plaintiffs in error of their property without due process of law; and that the statute of the State in providing that compensation and damages should be deemed to have accrued at the date of the summons, as construed by the state courts, resulted in taking the property of plaintiffs in error without just compensation.

Obviously, the question as to the title or right of plaintiffs in error in the land, and whatever appertained thereto, was one of state law and of general public law, on which the decision of the state court was final. *San Francisco* v. *Scott*, 111 U. S. 768; *Powder Works* v. *Davis*, 151 U. S. 389. And the question of the existence of percolating water was merely a question of fact.

The patents were in the nature of a quit claim, and under the act of March 3, 1851, were "conclusive between the United States and the said claimants only, and shall not affect the interests of third persons." The validity of that act was not drawn in question in the state court, and as the right or title asserted by plaintiffs in error was derived under Mexican and Spanish grants, the decision of the state court on the claims asserted by plaintiffs in error to the waters of the river was not

against any title or right claimed under the Constitution, or any treaty, or statute of, or commission held, or authority exercised, under the Constitution. If the title of plaintiffs in error were protected by the treaty, still the suit did not arise thereunder, because the controversy in the state court did not involve the construction of the treaty, but the validity of the title of Mexican and Spanish grants prior to the treaty. *New Orleans* v. *De Armas*, 9 Pet. 224; *Iowa* v. *Rood*, 187 U. S. 87; *Phillips* v. *Mound City Association*, 124 U. S. 605.

In *Crystal Springs Land and Water Company* v. *City of Los Angeles*, 82 Fed. Rep. 114, the Circuit Court ruled that where both parties claimed under Mexican grants, confirmed and patented by the United States in accordance with the provisions of the treaty of Guadeloupe Hidalgo, and the controversy was only as to what were the rights thus granted and confirmed, the suit was not one arising under a treaty so as to confer jurisdiction on a Federal court, and that where the only ground of Federal jurisdiction was the allegation in a bill that defendant's claim of title was based in part on certain acts of the legislature of the State, which attempted to transfer to it, as alleged, the title held by complainant's grantors at the time of their passage, the court would not retain jurisdiction when an answer was filed by defendant denying the allegations, and disclaiming any title or claim of title not held by it before the passage of the acts. The bill was dismissed, and we affirmed the judgment. 177 U. S. 169.

The trial court determined for itself, among other questions, the nature and extent of the city's interest in the waters of the river, but while it instructed the jury in relation thereto it did not file its written findings until after the return of the verdict. And it is argued that the respective rights of the parties were not in fact adjudicated until after the amount of compensation had been found, and that in this way plaintiffs in error were deprived of their property without due process of law. The Fourteenth Amendment does not control the power of a State to determine the form of procedure by which legal rights may be ascertained, if the method adopted gives reasonable notice and affords a fair opportunity to be heard. *Iowa Central R.*

R. Co. v. *Iowa*, 160 U. S. 389; *Long Island Water Supply Company* v. *Brooklyn*, 166 U. S. 685.

The construction of a law of a State, that it was competent for the court to try and determine in a condemnation proceeding, an adverse claim of the plaintiff therein to an interest in property sought to be condemned, is conclusive on this court, and we cannot understand how the entry of the verdict of a jury as to the amount of compensation prior to the filing of written findings on the other issues could have the effect of depriving plaintiffs in error of their property without due process of law. The Chief Justice of California well said that it was of no importance in what order the other issues in the case were decided, except in so far as the determination of one point was necessary as a basis for the determination of another, and that if the instructions to the jury actually given were correct, the fact that these findings had not been previously filed was of no consequence.

And so as to certain statutes of the State of California, which declared that the city of Los Angeles is vested with the paramount right to the surface and subterranean water of the Los Angeles River. Those statutes were admitted in evidence merely to show that the city was the successor of the ancient pueblo. The court held that the right of the city of Los Angeles to take from the Los Angeles River all of the waters of the river to the extent of its reasonable domestic and municipal needs was based on the Spanish and Mexican law, and not on the charters of the city of Los Angeles. The validity of the statutes, on account of repugnancy to the Federal Constitution, was not drawn in question in the trial court nor in the Supreme Court of the State, and both courts held that they neither granted to the city nor took away from plaintiffs in error any rights or property.

Section 1249 of the Code of Civil Procedure of California provided that for the purpose of assessing compensation and damages, the right thereto should be taken to have accrued at the time of the summons, "and its actual value at that date, shall be the measure of compensation for all property to be actually taken, and the basis of damages to property not actually taken, but injuriously affected."

The validity of the statute under the state constitution had been repeatedly sustained by the state courts, and those courts held that the value referred to in the statute was the actual value at that date.

Plaintiffs in error asked the court to charge the jury that the date of estimating the value of the property was the date of the summons, and the Supreme Court held that in these circumstances they could not be permitted to attack the condemnation statute as unconstitutional so far as related to the appraising the value of the land as provided.

Moreover, this court cannot reverse the decisions of state courts in regard to questions of general justice and equitable considerations in the taking of property. *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112.

The truth is there is nothing in this record adequately showing that the state courts were led to suppose that any claim under the Constitution of the United States was made by plaintiffs in error, or that any ruling involved a decision against a right set up by them under that instrument.

In *Sayward* v. *Denny*, 158 U. S. 180, after stating the contention of plaintiff in error that the effect of the judgment of the state court was "to deprive him of his property without due process of law, or to deny him the equal protection of the laws, and amounted to a decision adverse to the right, privilege, or immunity of plaintiff in error under the Constitution of being protected from such deprivation or denial," we said: "But it nowhere affirmatively appears from the record that such a right was set up or claimed in the trial court when the demurrer to the complaint was overruled, or evidence admitted or excluded, or instructions given or refused, or in the Supreme Court in disposing of the rulings below. . . . We are not called on to revise these views of the principles of general law considered applicable to the case in hand. It is enough that there is nothing in the record to indicate that the state courts were led to suppose that plaintiff in error claimed protection under the Constitution of the United States from the several rulings, or to suspect that each ruling as made involved a decision against a right specially set up under that instrument. And

we may add that the decisions of state tribunals in respect of matters of general law cannot be reviewed on the theory that the law of the land is violated unless their conclusions are absolutely free from error."

This case comes within the rule there laid down and the writ of error must be

Dismissed.

MR. JUSTICE MCKENNA took no part in the decision of this case.

LOTTERY CASE.[1]

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 2. Argued December 15, 16, 1902.—Decided February 23, 1903.

Lottery tickets are subjects of traffic among those who choose to buy and sell them and their carriage by independent carriers from one State to another is therefore interstate commerce which Congress may prohibit under its power to regulate commerce among the several States.

Legislation under that power may sometimes and properly assume the form, or have the effect, of prohibition.

Legislation prohibiting the carriage of such tickets is not inconsistent with any limitation or restriction imposed upon the exercise of the powers granted to Congress.

THE general question arising upon this appeal involves the constitutionality of the first section of the act of Congress of March 2, 1895, c. 191, entitled "An act for the suppression of lottery traffic through national and interstate commerce and the postal service subject to the jurisdiction and laws of the United States." 28 Stat. 963.

The appeal was from an order of the Circuit Court of the United States for the Northern District of Illinois dismissing a writ of *habeas corpus* sued out by the appellant Champion, who in his application complained that he was restrained of his liberty by the Marshal of the United States in violation of the Constitution and laws of the United States.

[1] Docket title—*Champion* v. *Ames*, No. 2. *Francis* v. *United States*, No. 80, argued simultaneously. See p. 375, *post*.

Statement of the Case.

It appears that the accused was under indictment in the District Court of the United States for the Northern District of Texas for a conspiracy under section 5440 of the Revised Statutes, providing that "if two or more persons conspire either to commit any offence against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not less than one thousand dollars and not more than ten thousand dollars, and to imprisonment not more than two years."

He was arrested at Chicago under a warrant based upon a complaint in writing, under oath, charging him with conspiracy with others, at Dallas, in the Northern District of Texas, to commit the offence denounced in the above act of 1895; and the object of the arrest was to compel his appearance in the Federal court in Texas to answer the indictment against him.

The first section of the act of 1895, upon which the indictment was based, is as follows: "§ 1. That any person who shall cause to be brought within the United States from abroad, for the purpose of disposing of the same, or deposited in or carried by the mails of the United States, or carried from one State to another in the United States, any paper, certificate or instrument purporting to be or represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, so-called gift concert, or similar enterprise, offering prizes dependent upon lot or chance, or shall cause any advertisement of such lottery, so-called gift concert or similar enterprises, offering prizes dependent upon lot or chance, to be brought into the United States, or deposited in or carried by the mails of the United States, or transferred from one State to another in the same, shall be punishable in [for] the first offence by imprisonment for not more than two years or by a fine of not more than one thousand dollars, or both, and in the second and after offences by such imprisonment only." 28 Stat. 963.

The indictment charged, in its first count, that on or about the first day of February, A. D. 1899, in Dallas County, Texas, "C. F. Champion, alias W. W. Ogden, W. F. Champion and

Statement of the Case.

Charles B. Park did then and there unlawfully, knowingly and feloniously conspire together to commit an offence against the United States, to wit, for the purpose of disposing of the same, to cause to be carried from one State to another in the United States, to wit, from Dallas, in the State of Texas, to Fresno, in the State of California, certain papers, certificates and instruments purporting to be and representing tickets, as they then and there well knew, chances, shares and interests in and dependent upon the event of a lottery, offering prizes dependent upon lot and chance, that is to say, caused to be carried, as aforesaid, for the purpose of disposing of the same, papers, certificates or instruments purporting to be tickets to represent the chances, shares and interests in the prizes which by lot and chance might be awarded to persons, to these grand jurors unknown, who might purchase said papers, certificates and instruments representing and purporting to be tickets, as aforesaid, with the numbers thereon shown and indicated and printed, which by lot and chance should, on a certain day, draw a prize or prizes at the purported lottery or chance company, to wit, at the purported monthly drawing of the so-called Pan-American Lottery Company, which purported to draw monthly at Ascuncion, Paraguay, which said Pan-American Lottery Company purported to be an enterprise offering prizes dependent upon lot and chance, the specific method of such drawing being unknown to the grand jurors, but which said papers, certificates and instruments purporting to be and representing tickets upon their face purporting to be entitled to participation in the drawing for a certain capital prize amounting to the sum of thirty-two thousand dollars, and which said drawings for said capital prize, or the part or parts thereof allotted or to be allotted in conformity with the scheme of lot and chance, were to take place monthly, the manner and form of which is to the grand jurors unknown, but that said drawing and lot and chance by which said prize or prizes were to be drawn was purported to be under the supervision and direction of Enrigue Montes de Leon, manager, and Bernardo Lopez, intervenor, and which said papers, certificates and instruments purporting to be tickets of the said Pan-American Lottery Company were so divided as

to be called whole, half, quarter and eighth tickets, the whole tickets to be sold for the sum of two dollars, the half tickets for the sum of one dollar, the quarter tickets for the sum of fifty cents and the eighth tickets for the sum of twenty-five cents."

The indictment further charged that "in pursuance to said conspiracy, and to effect the object thereof, to wit, for the purpose of causing to be carried from one State to another in the United States, to wit, from the State of Texas to the State of California aforesaid, for the purpose of disposing of the same, papers, certificates and instruments purporting to be and representing tickets, chances and shares and interests in and dependent upon lot and chance, as aforesaid, as they then and there well knew, said W. F. Champion and Charles B. Park did then and there, to wit, on or about the day last aforesaid, in the year 1899, in the county aforesaid, in the Dallas division of the Northern District of Texas aforesaid, unlawfully, knowingly and feloniously, for the purpose of being carried from one State to another in the United States, to wit, from Dallas, in the State of Texas, to Fresno, in the State of California, for the purpose of disposing of the same, deposit and cause to be deposited and shipped and carried with and by the Wells-Fargo Express Company, a corporation engaged in carrying freight and packages from station to station along and over lines of railway, and from Dallas, Texas, to Fresno, California, for hire, one certain box or package containing, among other things, two whole tickets or papers or certificates of said purported Pan-American Lottery Company, one of which said whole tickets is hereto annexed by the grand jury to this indictment and made a part hereof."

It thus appears that the carrying in this case was by an incorporated express company, engaged in transporting freight and packages from one State to another.

The Commissioner who issued the warrant of arrest, having found that there was probable cause to believe that Champion was guilty of the offence charged, ordered that he give bond for his appearance for trial in the District Court of the United States for the Northern District of Texas, or in default thereof to be committed to jail. Having declined to give the required bond the accused was taken into custody. Rev. Stat. § 1014.

Argument for Appellants, Champion *et al.*

Thereupon he sued out the present writ of *habeas corpus* upon the theory that the act of 1895, under which it was proposed to try him was void, under the Constitution of the United States.

Mr. William D. Guthrie for appellant, his brief being also entitled in *Francis* v. *United States*, p. 375, *post.*

This case was first argued at the October term, 1900, but a reargument was directed to be heard at the October term, 1901, at the same time as the hearing in *Francis* v. *United States.* The two cases were argued in October, 1901, and at the commencement of the present term were ordered to be again set for reargument as one case before a full bench.

The two cases present substantially the same question as to the power of Congress to suppress lotteries by prohibiting any person from causing lottery tickets to be carried from one State to another, and alike involve the constitutionality of a provision in the act of Congress of March 2, 1895, c. 191, § 1, 28 Stat. 963, generally known as the Federal anti-lottery act, and which act contains three separate features of anti-lottery legislation, which were enacted at different times, namely, (1) use of the United States mails, (2) importations from abroad, and (3) causing lottery tickets to be carried from one State to another by any means other than the mails.

The courts below erred in sustaining the prohibitory legislation in question because—

1. The suppression of lotteries is not an exercise of any power committed to the Congress by the Constitution of the United States, and is, therefore, in contravention of article X of the amendments, which provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

2. The sending of lottery tickets or policy slips does not constitute or evidence any transaction belonging to interstate commerce and is not within the scope of the power of the national government to regulate commerce among the States.

3. The power to regulate lotteries, and to permit or prohibit

the sale of lottery tickets, is exclusively within the jurisdiction of the police power reserved to the States.

I. It cannot be reasonably doubted that the intention and purpose of Congress, in the legislation now before the court, was to suppress lotteries. There is no necessity to resort to the proceedings in Congress in which this purpose was openly avowed, for it appears on the face of the act itself expressly in its title and impliedly in its natural and reasonable effect. *Holy Trinity Church* v. *United States*, 143 U. S. 457, 462; *Henderson* v. *Mayor of N. Y.*, 92 U. S. 259, 268; *United States* v. *Fox*, 95 U. S. 670, 672; *Minnesota* v. *Barber*, 136 U. S. 313, 320. Yet hitherto no one has asserted that Congress has power to suppress lotteries any more than it has power to suppress insurance or speculation or other business between residents of different States not relating to interstate commerce. The suppression of lotteries or of any other harmful business is essentially an exercise of the police power exclusively within the domain of and expressly reserved to the several States. *In re Rahrer*, 140 U. S. 545, 554; *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 13.

Yet, on behalf of the United States it is now urged, in support of the legislation before the court, that there is a Federal police power of the broadest scope to be administered by Congress in its absolute discretion, and not reviewable by the courts.

No such absolute power in respect of police regulations was ever intended to be vested in Congress. On the contrary, it is well settled that there is no such thing as a Federal police power except in respect of those specific subjects delegated to Congress, such as treason, counterfeiting, piracies and felonies on the high seas and offences against the laws of nations. Of course, in exercising its delegated powers, Congress may create crimes and add the sanctions without which law exists but in name. Authority to legislate on a given subject necessarily includes authority to punish any one by whom the laws so made are violated. But this incidental power to enforce its legislation cannot extend the jurisdiction of Congress to subjects not delegated to the national government or support legislation not

"necessary and proper for carrying into execution" the power to regulate commerce or any other delegated power. In the case at bar, the prohibition in question, it is true, may well be deemed "necessary and proper" for the suppression of lotteries, but it has no relation to interstate commerce and, therefore, is not "necessary and proper for carrying into execution" the power to regulate commerce among the States or for accomplishing any result connected therewith. *McCulloch* v. *State of Maryland*, 4 Wheat. 316, 423; *The License Cases*, 5 How. 504, 600; *The Trade-Mark Cases*, 100 U. S. 82, 96.

Lottery tickets at most, are mere evidences of contracts made wholly within the boundaries of a State, which contracts are valid or invalid according to the municipal law of the State where made or attempted to be enforced. If the given subject thus attempted to be regulated be not commerce, it is not easy to perceive whence Congress derives the power to regulate it. Congress cannot conclusively determine what is or what is not an article of commerce. That inquiry is essentially judicial. Otherwise, Congress could determine for itself the extent and limit of its own powers and enlarge them at will. *The License Cases*, 5 How. 504, 574.

A legislative fiat cannot make that a commercial commodity which in its essential nature is not such. A transaction which is not commercial in its nature, cannot become so merely by the declaration of Congress. *Ex parte Jackson*, 96 U. S. 727, 735; *In re Rapier*, 143 U. S. 110, 133. In *France* v. *United States*, 164 U. S. 676, 683, this question arose but was not necessary to the decision and was left undecided.

In the case of *Cohens* v. *Virginia*, 6 Wheat. 264, a conviction under a statute of Virginia for selling lottery tickets for the national lottery authorized by the act of Congress of May 4, 1812, was sustained. But see *Welton* v. *State of Missouri*, 91 U. S. 275; *Webber* v. *Virginia*, 103 U. S. 344.

A lottery ticket, in all its aspects, is of the same nature as an insurance policy, which represents an analogous form of wagering contract. Both forms of contract depend upon chance and uncertain events, and in principle cannot be distinguished in their nature. Pothier's Obligations, Evans' Transl. vol. I, pp.

9–10; Louisiana Civil Code, act 1776; Civil Code of Spain of 1889, title XII, U. S. Govt. Transl. 1899, pp. 230–232; May on Insurance (4th ed.), vol. 1, p. 5; Clark on Contracts, pp. 405–406; Lawson on Contracts, secs. 284–287; Hollingsworth on Contracts, pp. 229–232; Anson on Contracts (2d Am. ed.), pp. 232–233; Angell on Fire and Life Insurance, pp. 12, 14; Joyce on Insurance, vol. 1, secs. 2, 7; Emerigon, Meredith's Transl. p. 13; Richards on Insurance, sec. 20.

In the case of *Paul* v. *Virginia*, 8 Wall. 168, 183, it was distinctly held that the issuing of insurance policies in New York and sending them to Virginia, to be there delivered to the insured on payment of premium, was not interstate commerce. See also *Hooper* v. *California*, 155 U. S. 648, 653, 655; *New York Life Insurance Co.* v. *Cravens*, 178 U. S. 389, 401.

These insurance cases cannot be distinguished on the ground that the transaction was not interstate commerce, because the agent of the foreign insurance company negotiated the contract of insurance in the State where the contract was to be finally completed and the policy delivered. See, however, *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489, 497; *Hopkins* v. *United States*, 171 U. S. 578, 601; *Collins* v. *New Hampshire*, 171 U. S. 30, 32; *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28, 46; *Williams* v. *Fears*, 179 U. S. 270, 276.

In so far as the law now under consideration is aimed against the lottery ticket or policy slip, either at the place where the paper started or delivery was made, or at the place where the paper will find itself, or where the contract may take effect at the end of its journey, it is an attempt to interfere with the local municipal laws and police regulations of either place. Lotteries, wherever found, are not interstate commerce, but at most interstate wagering, such as insurance and other forms of speculation or gambling. It is true that lotteries, which were once popular and extensively engaged in, have gradually fallen into disrepute and have become the subject of prohibition by most of the States. But the gradual prohibition of lotteries under state police powers did not make them interstate commerce, or diminish the power of the respective States to permit, regulate or prohibit them.

If the present question had arisen in the days of Marshall, when the public opinion of the country was not as hostile to lotteries as it is to-day, and if the Federal government had sought to prevent the people of any State from dealing as they saw fit in the lottery issues of other States, it would have been held that Congress had gone outside of the powers which had been conferred on it by the terms of the Constitution, and that the legislation was unconstitutional and void because it was not a regulation of commerce, but an unwarranted interference with the police power reserved to the States.

II. The argument on behalf of the United States as to the scope of the word *intercourse*, found in some of the opinions of the court, tends to prove altogether too much. It would make the power to regulate commerce embrace not merely "the entire sphere of mercantile activity in any way connected with trade between the States," but all the relations of life in so far as they involved intercourse between residents of different States.

The appellants do not dispute the proposition that the business of carriage for hire from one State to another or of facilitating such transportation or the transit of persons is a branch of interstate commerce within the authority of Congress to regulate, but it does not follow that Congress may, therefore, determine what may or may not be carried, irrespective of the nature of the thing carried. The broad powers claimed in the government's brief would enable Congress to regulate or prohibit every form of domestic intercourse and contractual relation between residents of different States, and to prohibit the transfer of promissory notes, of deeds, of bonds, of contracts for personal service, etc. It is submitted that no such power was intended to be delegated to Congress by the grant of authority to regulate commerce among the several States.

Further, if the Constitution delegated to Congress the express power to prohibit interstate commerce, that grant would not confer the power to prohibit directly or indirectly what was not interstate commerce. If Congress may prohibit the transportation of diseased animals or infected goods or obscene literature, it is because they are essentially commercial in their nature, and hence they are dealing with subjects of commerce.

Such prohibition may be necessary and proper in order to protect the instrumentalities of interstate commerce and to safeguard such commerce. But this would not sanction the prohibition of things not constituting commerce, any more than Congress could forbid a citizen to go from one State to another on any business he saw fit and whatever his purpose might be.

In reply to the government's brief, undoubtedly the State could not tax the transportation of the box of lottery matter from one State to another, because that would be taxing the business of interstate commerce and not because it would be taxing lottery tickets as such.

Whilst the State is concededly impotent to tax the business of interstate carriage for hire of lottery tickets, that fact does not in any degree militate against its power to tax or prohibit dealings in lottery tickets under the exercise of its reserved powers. *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, distinguished, and *United States* v. *E. C. Knight Co.*, cited.

III. As to the suggestion that *commerce* means *intercourse* in the broadest sense of that term, and includes all forms of transactions or intercourse among the people of the several States, what has been ruled is, not that commerce is the equivalent or synonym of intercourse, but that commerce is synonymous with "commercial intercourse," which no one could dispute. *Gibbons* v. *Ogden*, 9 Wheat. 1, 189.

It is always necessary to bear distinctly in mind that, when adopting the Federal Constitution, the people of the United States deliberately "reserved to the States respectively or to the people" many objects which might have been appropriate for Federal legislative action. The student of the history of that critical period cannot fail to be impressed with the conviction that a grant to the Federal government of police powers, such as the regulation and suppression of lotteries, could not have been secured, and that the Constitution itself would not have been ratified if any attempt had been made to give greater scope to Federal legislation. *Hooper* v. *California*, 155 U. S. 648; *United States* v. *Fox*, 95 U. S. 670; *Trade-Mark Cases*, 100 U. S. 82; *Nathan* v. *Louisiana*, 8 How. 73; *United States*

v. *Dewitt*, 9 Wall. 41; *United States* v. *Boyer*, 85 Fed. Rep. 425; *Williams* v. *Fears*, 179 U. S. 270, 277; *Ex parte Milligan*, 4 Wall. 2, 120; *In re Debs, Petitioner*, 158 U. S. 564, 591.

However desirable—or however necessary—Federal power in any case may now seem to be, if it was not expressly conferred upon Congress, it cannot be read into the Constitution by legislative declaration or by judicial decree. The Constitution "neither changes with time, nor does it in theory bend to the force of circumstances." It is to-day what it was when Hamilton and Madison and Jay and Marshall wrote and argued in its support. The surrounding circumstances have changed, usages of life and trade and modes of thinking have changed, the manners and morals and ideas of the functions and ends of government, conceptions of civic duty and patriotism, all these have changed, but the Constitution remains as it was then. New conditions of society are evolving; systems of municipal law are being altered incessantly to meet novel and complicated conditions; but the fundamental principles of the Constitution are the same as they were when it was adopted. We are not at liberty to give the provisions of the Constitution new meanings because of considerations of expediency. If we could, then "there is no power which may not, by this mode of construction, be conferred on the general government and denied to the States." Chief Justice Taney in the *Passenger Cases*, 7 How. 283, 478. See also *Ex parte William Wells*, 18 How. 307, 311.

If the argument of expediency could be adopted, in its last analysis it would vest in Congress power to legislate in all criminal matters whenever the state laws were not duly enforced as to any acts or transactions arising from or affecting directly or indirectly intercourse among the inhabitants of the several States.

The reasoning of this court in the *Rahrer Case*, 140 U. S. 545, shows that it was by no means the idea in that opinion that Congress might prohibit all interstate traffic in liquors.

It must be evident that any attempt by Congress to prohibit interstate traffic in liquor, notwithstanding the wishes of the various States and their local preferences, would be a departure which would cause much astonishment and opposition and be

of doubtful constitutionality because of interference with the rightful jurisdiction of the States, whilst the legislation discussed in the *Rahrer* case involved the exercise by Congress of a power which recognizes to the fullest extent the jurisdiction of any State to permit or prohibit, according to its local policy. As to attempt to prevent the circulation of anti-slavery publications from one State to another by excluding them from the United States mails, see 49 Niles' Register, 228; North Carolina, 1830, Laws, vol. 14, p. 10, and Maryland, 1831; 49 Niles' Register, 228. Cf. Rev. Sts. La. 1852; 48 Niles' Register, 447–448; 49 Niles' Register, 7–8; Cong. Globe, 24th Cong. 1st Sess. 10, 164, 165, 347; Cong. Globe, 24th Cong. 1st Sess. App. 348, 453, 454, 539.

The significance of this episode lies in the fact that Congress was grappling with the proposition to regulate the transmission from State to State of documents which lacked entirely the quality of merchandise. It was admitted throughout the debate that, if Congress could not regulate this matter indirectly through the mails, it could not regulate it at all; and no suggestion was ever made that such a bill could be passed under the commerce clause.

IV. In reply to the question in the government's brief why may not the prohibitive power exercised in respect of foreign nations be applied to interstate commerce, and to the question why the same prohibitive power exercised in regulating trade with the Indian tribes may not be applied to interstate commerce, it should be sufficient to answer that there is nowhere in the Constitution or any of the amendments thereto a reservation of police powers or of any power either to any foreign nation or to any Indian tribe, and, therefore, the power of Congress over commerce with both is exclusive and absolute. Citing as to extent of powers of Congress: *United States* v. *43 Gallons of Whiskey*, 93 U. S. 188, 194; 2 Tucker on Constitution, 528–533; *Groves* v. *Slaughter*, 15 Peters, 449, 503; *Passenger Cases*, 7 How. 283, 406; *Crandall* v. *Nevada*, 6 Wall. 35, 44, 48; *Slaughter-House Cases*, 16 Wall. 36, 75, 119; *Paul* v. *Virginia*, *Hooper* v. *California* and *New York Life Ins. Co.* v. *Cravens*, cited *supra*; *Head Money Cases*, 112 U. S. 580, 591.

Argument for Appellants, Champion *et al.*

The whole power to regulate every form of relations and intercourse with foreign countries resides in the sovereign national power created by the Constitution of the United States; and every manner of intercourse in its broadest signification, whether commercial intercourse or otherwise, is to be regulated, permitted or prohibited by Congress alone.

The source and scope of this power to regulate international commerce are, in their very nature, essentially different from the source and scope of the power to regulate domestic commerce. In the case of international commerce, there is no limitation whatever upon the power of Congress and no implied or reserved power in the States. In the case of internal or interstate commerce, the only power Congress exercises is that expressly delegated.

It may, therefore, be conceded that Congress, under the plenary power to regulate our relations with foreign countries, may well exclude persons, commodities, or printed matter of any nature whatsoever, whether or not relating to or connected with commerce. The power of Congress—the legislative power of a sovereign nation—to exclude foreign persons or commodities or printed matter in its judgment and discretion need not be challenged in the slightest degree. But no one would seriously suggest that any class of American citizens could be excluded or deported under the same power which enables Congress to exclude or deport aliens. *Nishimura Ekiu* v. *United States*, 142 U. S. 651, 659; *Fong Yue Ting* v. *United States*, 149 U. S. 698, 707, 712; *United States* v. *Brigantine "William,"* 2 Hall's Am. Law Journal, 255; *Gibbons* v. *Ogden*, 9 Wheaton, 1, 191, 192; *United States* v. *Wong Kim Ark*, 169 U. S. 649, 653.

That this attribute of sovereignity under the treaty power has been surrendered by and does not belong to the States cannot for a moment be doubted, for the States are expressly forbidden to enter into any form of treaty.

The power to regulate commerce among the several States, it is true, is given in the same section and in the same language as the power to regulate foreign or international commerce, but the scope of the power is not the same in both cases and may

not be exercised to the same extent. The same terms in relation to separate subjects frequently differ in meaning and scope.

Mr. John G. Carlisle, with whom *Mr. Miller Outcalt* and *Mr. Thomas F. Shay* were on the brief, appeared for John Francis and others, appellants in No. 80, which was argued simultaneously with this case. In that part of the brief relating to the constitutionality of the act of March 2, 1895, they argued:

The validity of the first section of the act of March 2, 1895, can only be sustained as a regulation of commerce "among the several States" under the powers conferred upon Congress by the Constitution, as embraced in paragraph 3, section 8, article I, thereof. The act by its title is not in terms declaratory of a regulation of commerce but the suppression of an evil, citing as to definitions of commerce: *Gibbons* v. *Ogden*, 9 Wheat. 1; *United States* v. *E. C. Knight Company*, 156 U. S. 1–12; *Brown* v. *Maryland*, 12 Wheat. 419–448; *The License Cases*, 5 How. 204–599; *Mobile* v. *Kimball*, 102 U. S. 691; *Bowman* v. *Chicago & N. W. Railway*, 125 U. S. 465; *Leisy* v. *Hardin*, 135 U. S. 100; *In re Rahrer*, 140 U. S. 545, 555; *City of New York* v. *Miln*, 11 Pet. 103; *Passenger Cases*, 7 How. 283; *Henderson* v. *Mayor*, 92 U. S. 259; *United States* v. *Fox*, 95 U. S. 670; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Morgan Rd.* v. *Louisiana*, 118 U. S. 455, 462.

Having in mind, therefore, at all times the rules by which in our judgment, a proper construction and interpretation of this act of March 2, 1895, is to be determined, we contend that there are but two interpretations of the words of the Constitution, "carried from one State to another in the United States," namely:

First. That the act of carrying an article must be in furtherance of some commercial transaction, otherwise Congress would have no power under the commerce clause of the Constitution or otherwise, to make such act of carriage or transportation from one State to another, a crime; and,

Second. The article carried must be a recognized article of

commerce, otherwise if the article has ceased to be such, Congress no longer has any power over it.

Lottery tickets cannot in any sense be held to be legitimate articles of commerce. *Douglass* v. *Kentucky*, 168 U. S. 458; *Stone* v. *Mississippi*, 101 U. S. 824.

We understand this language to emphasize the declaration that the States of the Union are at all times clothed with the exclusive power to suppress and prevent by proper legislation, at any time that they see fit, at their discretion, acts or things affecting the morals or welfare of the communities of the several States, and that the suppression of lotteries is declared to be within the category of subjects to be controlled by state legislation.

If what we contend for in regard to lottery tickets is true, how much more forceful does the argument bear upon "lottery advertisements," the subject of the concluding paragraph of section 1, of the act in question. Can there, in the nature of things, be any "commercial intercourse" in advertisements?

Mr. Assistant Attorney General James M. Beck for the United States.

1. The proceedings of the Convention of 1787 clearly show that the purpose of the framers was to vest in the Federal government control, not merely over traffic, but over all intercommunication between the colonies themselves, or either of them, and the outside world.

Profoundly as the framers differed in other respects, it is clear that the absolute power which each constituent State had theretofore had over its external relations, of whatsoever nature, and which was denominated by the comprehensive word "commerce," should pass to the Federal government. No residuum was left in the States. The purpose clearly was to empower Congress "to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation." 2 Madison Papers, 859.

To remedy these evils the constitutional convention of 1787 was called, and so clearly were all delegates agreed as to the

wisdom of taking from the thirteen States all control over their external relations, whether intercolonial or foreign, that the clause of the Constitution which was designed to effectuate this (art. 7, sec. 1) was passed without a dissenting voice and with comparatively little debate. While they did not in this section define commerce, yet they threw a searchlight on their meaning in a subsequent section, whose history clearly reveals their purposes. Art. 1, sec. 9.

The power, therefore, that was taken from the States and vested in the United States was the power of each constituent State over its external relations, and in its transfer to the Federal government it was in no respect diminished, except by certain express limitations in the Federal compact, such as the prohibition of any preference of the port of one State over the port of another State (art. 1, sec. 9, par. 6) and the prohibition of duties upon exports (art. 1, sec. 9, par. 5) and of clearance duties (art. 1, sec. 9, par. 6).

With these minor limitations the delegated power was as exhaustive and plenary as that which it was intended to supersede. The question, therefore, as to what commerce is under the Federal Constitution necessarily depends upon what commerce was regarded to be by the colonies prior to the formation of the Constitution. Commerce meant the intercourse or intercommunication of a colony with the other colonies and the rest of the world, either by the importation or exportation of goods or by the ingress or egress of individuals, and was not confined to mere traffic in purchasable commodities.

This view of the nature of commerce was accepted by this court in the leading case of *Gibbons* v. *Ogden*, 9 Wheat. 1, and, far from being weakened, has been supported and confirmed by subsequent adjudications until it should be regarded as beyond controversy.

In that case, Marshall defined commerce as "intercourse." This is doubly true of this age of steam and electricity, when the States of the Union are indissolubly bound together by shining paths of steel, aggregating two hundred thousand miles in length. These lines of communication are the arteries through which the life blood of the nation courses, and the

telegraph wires are the sensitive nerves of our complex social system. Commerce is the life blood of intercommunication, and comprehends every object to which the steamship, the railroad, the telegraph, or other form of conveyance can be applied, and the transportation of merchandise, which is intended for sale, is but one of many incidents to this comprehensive view of commerce, as Marshall's clear insight saw it.

This leading case, therefore, clearly established that commerce was more than traffic; that it was intercourse, and comprised intercommunication between the peoples of one country and another, whether by shipment of commodities, the transmission of intelligence, or by personal ingress and egress, and the sovereign power which each State formerly possessed over such external communication was the power which it delegated, subject to the limitations above averted to, to the Federal Government. *Passenger Cases*, 7 Howard, 282; *County of Mobile* v. *Kimball*, 102 U. S. 691; *Gloucester Ferry Company* v. *Pennsylvania*, 114 U. S. 196, 203; *Pickard* v. *Pullman Southern Car Company*, 117 U. S. 34.

If any doubt existed whether the transit of individuals was commerce, irrespective of the means of locomotion, it was set at rest by this court in the case of *Covington Bridge Co.* v. *Kentucky*, 154 U. S. 204, 218, where it was held that the mere passage of foot passengers from one side of the Ohio River to the other side is commerce. It is no answer to suggest that that involved an interstate highway in the form of a bridge, for it is obvious that the passage of citizens did not become commerce because they crossed an interstate highway, but the bridge was an instrumentality of commerce because of the transit of the people. Indeed, neither the transit of individuals nor the transportation of goods are essential to commerce. The mere transmission of intelligence is also commerce. *Pensacola Telegraph Company* v. *The Western Union Telegraph Company*, 96 U. S. 1; *Western Union Telegraph Company* v. *Pendleton*, 122 U. S. 374. There is no essential difference between foreign commerce and interstate commerce except as to the terminus *a quo* and the terminus *ad quem*. In both instances the idea of commerce is the same. Nothing is clearer than that the mere transit of

persons arriving at our ports of entry is, without reference to traffic, the subject of Congressional regulation, because it is commerce. *People* v. *Compagnie*, 107 U. S. 59; *Head Money Cases*, 112 U. S. 580; *Henderson* v. *Mayor*, 92 U. S. 259; *Nishimura Ekiu* v. *United States*, 142 U. S. 651.

If the transit of persons from a foreign country to our country is commerce without respect to the purpose of their entrance into this country, then the same must be true of the transit of persons from State to State, assuming that foreign commerce is the same as interstate commerce, with the exception of the *locus in quo*. That they are identical is clearly established by the decisions of this court. *Brown* v. *Houston*, 114 U. S. 630; *Bowman* v. *Chicago*, 125 U. S. 482; *Crutcher* v. *Kentucky*, 141 U. S. 47; *Pittsburg Coal Co.* v. *Bates*, 156 U. S. 587.

2. Transportation of property for hire from State to State is commerce. The method of transportation is wholly unimportant. Conveyance of property for hire by a rowboat is as much commerce as by the largest steamship, and a wheelbarrow may be as completely an instrument of commerce as an express train. Transportation may be by hand and still be commerce. The telegraph boys, who deliver messages by hand, are engaged in commerce. See *Western Union Telegraph Co.* v. *Pendleton*, *supra*. In the cases at bar the carriage of things from State to State for hire is involved. The subject of the transportation is unimportant. Transportation is *per se* commerce.

A fair test of the soundness of the appellants' contention is to ask whether the State of California could lawfully have passed a law taxing the transportation of the box of lottery matter from Dallas, Texas, to Fresno, California, or could the State of Ohio have taxed the carriage of the policy ticket from Newport, Kentucky, to Cincinnati, Ohio. Their impotence to do so is predicated on the theory that such carriage is commerce.

3. But, assuming that the character of the thing conveyed or transported is an important question, I submit that lottery tickets—title to which passes by delivery and which from time immemorial have been subject of barter and sale—are articles of commerce. Congress has held them to be articles of com-

merce, and this court has ruled that the judgment of the legislative branch of the government is, in this respect, controlling upon the judiciary. In this respect there is a clear distinction between the effect of state statutes and acts of Congress. Unquestionably no state statute, by any declaration as to what is an article of commerce, could trench upon the supreme authority of the Federal government with regard to commerce, and therefore state statutes which have sought to prohibit altogether certain forms of traffic have been held not to divest the articles in question of their commercial character, or to forbid their importation into a State in the original package. But when Congress, by legislation, recognizes a traffic in a given form of property, the judiciary will not question the *fact* of such traffic or the commercial character of the article thus bought or sold, but will simply consider whether Congress has exceeded its authority with reference to the subject matter of the legislation. *Leisy* v. *Hardin*, 135 U. S. 100; *In re Rahrer*, 140 U. S. 545.

Without regard to this legislative declaration, however, it seems clear that lottery tickets are articles of commerce in the sense that they are things which have been for many generations the subjects of barter and sale. It is true that under the stress of repressive legislation the traffic in them in this country has materially lessened, but the necessity of legislation under consideration clearly manifests that the traffic has by no means ceased, and is already of sufficient magnitude to justify the National Legislature in closing the channels of foreign and interstate commerce to this merchandise.

The fact that the United States and the various States have seen fit to make that illegal which was before legal cannot in any way affect the character of lottery tickets as articles which have been for centuries the subject of purchase and sale. Whether an article is or is not an article of commerce is dependent, not upon the question of its noxiousness or usefulness, nor upon the question whether the States have prohibited it within their borders in the exercise of their police power, but upon the fact as to whether such articles have been, in the ordinary and usual channels of trade, the subjects of purchase and sale. It is not a question of opinion as to their utility or mo-

rality. It is a question of fact. Any article that men buy or sell is an article of commerce, and as such within the power of Congress when its exchange is interstate in its character. *Schollenberger* v. *Pennsylvania*, 171 U. S. 1, 7, 8.

The commercial power of the Union can extend to written instruments, where they effect or are instruments of the purchase and sale of property interests. *Almy* v. *California*, 24 Howard, 169; *Woodruff* v. *Parham*, 8 Wall. 123; *Fairbanks* v. *United States*, 181 U. S. 283.

The insurance cases, carefully read, are not authority for the proposition that a written instrument, like a bond or lottery ticket, which passes title to property upon delivery, may not be a commercial commodity. It will be noticed that this court has never had the question squarely presented whether Congress may enact legislation regulating the interstate insurance business. In reading the court's opinion upon these insurance cases the question actually presented to the court must be kept in mind. *Woodruff* v. *Parham*, 8 Wall. 123, 138. The precise point decided is that the insurance business is not so commercial in character that a State is *obliged* to admit such foreign insurance corporations. The foundation of all these decisions was that such corporations, being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created, and that, therefore, their right to do business in another State depends upon the grace of such State, which can impose terms or restrain altogether.

All these cases were predicated upon the fact that the method of transacting the business made the transactions *intra-state* and not *interstate*. The contract of insurance was completed within the borders of the State in which the insured had his domicil, the insuring company acting through a local representative, of whom Mr. Justice White said, in *Hooper* v. *California*, 155 U. S. 648, that "in the discharge of his business he is the representative of both parties to a certain extent." See also *Paul* v. *Virginia*, 8 Wall. 168.

4. That the power to prohibit is absolute, and the legislature is the final judge of the wisdom of its exercise, seems to be clearly established upon both principle and authority.

The most familiar exercise of the power to regulate commerce in the minds of the men who framed the Federal Constitution was, doubtless, the total or partial prohibition of traffic in particular articles. This was often accomplished by duties; and those duties, so far as they were laid for prohibition, total or partial, and not for revenue, were regarded as regulations of commerce.

Refer to the journals of the Continental Congress, vol. 1, pp. 28, 175, 176; vol. 2, p. 189; the examination of Dr. Benjamin Franklin at the bar of the House of Commons on February 7, 1776 (1 Bigelow's Life of Franklin, pp. 478, 479); John Dickinson's "Letters from a Farmer," published in 1768, pp. 15, 18–19, 37–42, 43 (note), 60, 61, 66; Dr. Franklin's letter to Joseph Galloway of February 25, 1775 (8 Spark's Franklin's Works, p. 146); John Adams's letter to Jay of July 19, 1785 (Works of John Adams, vol. 8, pp. 282, 283). The same view was maintained by the leading jurists and statesmen of the first two generations after the adoption of the Constitution; and with practical unanimity they based the protective tariff duties on the commerce clause of the Constitution. 1 Story on the Constitution, sec. 963; 2 Story, 1080 *et seq.*; James Madison's letter to Joseph C. Cabell of March 22, 1827 (Writings of James Madison, vol. 3, p. 571); his letter to Cabell of September 18, 1828 (3 Madison, p. 636); Henry Clay's reply to Barbour, March 31, 1824 (Annals of Congress, p. 1994); Gulian C. Verplanck's letter to Drayton, New York, 1831, pp. 21–23; Speech of Thomas Smith Grimké, etc., Charleston, 1829, p. 51.

Apart from the history of the period and the utterances of contemporaneous writers, the Constitution itself affords the most convincing proof that the right to regulate included the right to prohibit.

This is shown beyond question when we consider the great compromises of the Constitution. So clearly did the framers recognize that the power to regulate commerce would include the power to prohibit, that they inserted an express exception to such power. Art. 1, sec. 9.

If the power to regulate did not include the right to prohibit, all the heated discussion in the Constitutional Convention on

the prohibition of the slave trade was a case of "much ado about nothing."

It cannot be contended that the power to prohibit the migration of freemen and the importation of slaves is referable to any other clause in the Constitution. The framers of the Constitution regarded it as inherent in the power to regulate trade, and the exception that such legislation should not be made prior to 1808 is the clearest possible statement that after that year the prohibitory regulation could be made under the commerce clause of the Constitution.

In the exercise of its power to regulate foreign commerce, Congress has never hesitated to prohibit commerce in any particular article, or even to stop foreign commerce altogether, either for a fixed period of time or indefinitely. A well-known instance of partial prohibition is that of obscene literature, which has been part of our laws ever since the tariff act of August 30, 1842, ch. 270, sec. 28. To the latter class belong the well-known non-importation and embargo laws of the period prior to the war of 1812. See *Gibbons* v. *Ogden*, 9 Wheat. 1, 192-193; 2 Story on the Constitution, secs. 1264, 1289, 1290.

Congress has the same power over interstate commerce as over commerce with the Indian tribes. The question whether, under its power to regulate commerce with the Indian tribes, it could exclude any selected article from such commerce as deleterious, came up for decision in *United States* v. *Holliday*, 3 Wall. 407, 416-418, and was decided in the affirmative in an opinion by Mr. Justice Miller. *United States* v. *Le Bris*, 12 U. S. 278; *Sarlls* v. *United States*, 152 U. S. 570; *United States* v. *Mayrand*, 154 U. S. 552.

If Congress can exclude obscene literature from foreign commerce, why not from interstate commerce also; and if it can exclude obscene literature, why can it not exclude lottery tickets? If it can exclude spirituous liquors from commerce with the Indian tribes, why not from interstate commerce also; and if it can exclude spirituous liquors, why can it not exclude lottery tickets?

The principle has in effect already been decided by this court. States have undertaken in the interests of the public health to

exclude importations of a certain kind from other States, and their legislation has been held by this court to be unconstitutional. *Railroad Co.* v. *Husen*, 95 U. S. 465; *Minnesota* v. *Barber*, 136 U. S. 313; *Brimmer* v. *Rebman*, 136 U. S. 78; *Voight* v. *Wright*, 141 U. S. 62. These laws were not held to be void, because they in effect levied taxes upon imports; for it is well settled that the word "imports" in the Constitution refers only to articles brought in from foreign countries. *License Cases*, 5 How. 504, 623; *Woodruff* v. *Parham*, 8 Wall. 123; *Brown* v. *Houston*, 114 U. S. 622, 628; *Coe* v. *Errol*, 116 U. S. 517, 526; *Pittsburg Co.* v. *Louisiana*, 156 U. S. 590, 600.

The laws were held void because they were regulations of commerce. But the Constitution does not expressly prohibit States from regulating commerce. It merely gives the power of regulation to Congress. Whenever, therefore, this court has held a state law void as being a regulation of commerce, it has impliedly held that a law to the same effect could constitutionally be passed by Congress; that is, so far as Congress is not restrained by some express prohibition.

The legislative history of the United States gives many instances of prohibitory regulations of trade, none of which, to my knowledge, has ever been declared unconstitutional. Reference has already been made to the embargo acts and the prohibitions of trade with the Indians. The exclusion of aliens has already been discussed, and the identity of foreign and interstate commerce established by decisions of this court.

5. *In re Rahrer*, 140 U. S. 545, evidences very strongly the power of Congress to prohibit interstate trade. The act of August 8, 1890, was passed by Congress with the full knowledge that in certain States of the Union the manufacture and sale of a recognized article of commerce was absolutely prohibited.

Disregarding the mere form of words, and looking to the substance of this act, in connection with state legislation, it was a virtual prohibition of transportation to that State. It is obvious that the power to pass such a law could not depend in any wise upon the state statute, but must be inherent in Congress, and therefore an absolute prohibition of transportation would have been valid if there had been no state statute. This court

held the virtual prohibition of the transportation of liquors to certain States a valid exercise of constitutional power.

In this connection it is well to remember that the lottery act was not passed to conflict with or trespass upon the police powers of the State. Just as the Wilson Act, which was sustained in *In re Rahrer*, 140 U. S. 545, was designed to make effective the police statutes of the State where prohibitory liquor laws were in force, this act of Congress was obviously intended to remove an obstruction which the channels of interstate trade presented to the various States in their attempt to suppress the lottery traffic.

Steam and electricity have woven the American people into a closeness of life of which the framers of the Constitution never dreamed, and the necessity for Federal police regulations as to any matter within the Federal sphere of power becomes increasingly apparent. The constitutionality of arbitrary prohibitions can be discussed when such a case arises, and as yet no such case has arisen, but a reasonable and proper prohibition of immoral or unsafe trade through the channels of interstate commerce is a police power which belongs to the Republic as the sovereign authority over interstate trade. Such police power must exist somewhere as to interstate trade. It cannot be nonexistent. Obviously it does not exist in the States; therefore it must exist in the Federal government, and there is nothing in the legislative or judicial history of the country that in any manner gainsays this conclusion.

Mr. Justice Harlan, after making the foregoing statement of facts, delivered the opinion of the court.

The appellant insists that the carrying of lottery tickets from one State to another State by an express company engaged in carrying freight and packages from State to State, although such tickets may be contained in a box or package, does not constitute, and cannot by any act of Congress be legally made to constitute, *commerce* among the States within the meaning of the clause of the Constitution of the United States providing that Congress shall have power "to regulate commerce with

foreign nations, and among the several States, and with the Indian tribes;" consequently, that Congress cannot make it an offence to cause such tickets to be carried from one State to another.

The Government insists that express companies when engaged, for hire, in the business of transportation from one State to another, are instrumentalities of commerce among the States; that the carrying of lottery tickets from one State to another is commerce which Congress may regulate; and that as a means of executing the power to regulate interstate commerce Congress may make it an offence against the United States to cause lottery tickets to be carried from one State to another.

The questions presented by these opposing contentions are of great moment, and are entitled to receive, as they have received, the most careful consideration.

What is the import of the word "commerce" as used in the Constitution? It is not defined by that instrument. Undoubtedly, the carrying from one State to another by independent carriers of things or commodities that are ordinary subjects of traffic, and which have in themselves a recognized value in money, constitutes interstate commerce. But does not commerce among the several States include something more? Does not the carrying from one State to another, by independent carriers, of lottery tickets that entitle the holder to the payment of a certain amount of money therein specified also constitute commerce among the States?

It is contended by the parties that these questions are answered in the former decisions of this court, the Government insisting that the principles heretofore announced support its position, while the contrary is confidently asserted by the appellant. This makes it necessary to ascertain the import of such decisions. Upon that inquiry we now enter, premising that some propositions were advanced in argument that need not be considered. In the examination of former judgments it will be best to look at them somewhat in the order in which they were rendered. When prior adjudications have been thus collated the particular grounds upon which the judgment in the present case must necessarily rest can be readily determined. We may

here remark that some of the cases referred to may not bear directly upon the questions necessary to be decided, but attention will be directed to them as throwing light upon the general inquiry as to the meaning and scope of the commerce clause of the Constitution.

The leading case under the commerce clause of the Constitution is *Gibbons* v. *Ogden*, 9 Wheat. 1, 189, 194. Referring to that clause, Chief Justice Marshall said: "The subject to be regulated is commerce; and our Constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. . . . It has been truly said, that commerce, as the word is used in the Constitution, is a unit, every part of which is indicated by the term. If this be the admitted meaning of the word, in its application to foreign nations, it must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain intelligible cause which alters it. The subject to which the power is next applied, is to commerce, 'among the several States.' The word 'among' means intermingled with. A thing which is among others is intermingled with them. Commerce among the States cannot stop at the external boundary line of each State, but may be introduced into the interior. It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient and is certainly unnecessary. Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one. . . .

The genius and character of the whole Government seem to be, that its action is to be applied to all the external concerns of the Nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the Government. . . ."

Again: "We are now arrived at the inquiry—what is this power? It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is *complete in itself*, may be exercised *to its utmost extent*, and acknowledges *no limitations, other than are prescribed in the Constitution.* These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress *as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States.*"

Mr. Justice Johnson, in the same case, expressed his entire approbation of the judgment rendered by the court, but delivered a separate opinion indicating the precise grounds upon which his conclusion rested. Referring to the grant of power over commerce, he said: "My opinion is founded on the application of the words of the grant to the subject of it. The 'power to regulate commerce,' here meant to be granted, was that power to regulate commerce which previously existed in the States. But what was that power? The States were, unquestionably, supreme; and each possessed that power over commerce, which is acknowledged to reside in every sovereign State. . . . The law of nations, regarding man as a social animal, pronounces all commerce legitimate, in a state of peace, until prohibited by positive law. The power of a sovereign State over commerce, therefore, amounts to nothing more than a power to limit and restrain it at pleasure. And since the power to pre-

scribe the limits to its freedom, necessarily implies the power to determine what shall remain unrestrained, it follows that the power must be exclusive; it can reside but in one potentate; and hence, the grant of this power carries with it the whole subject, leaving nothing for the State to act upon."

The principles announced in *Gibbons* v. *Ogden* were reaffirmed in *Brown* v. *Maryland*, 12 Wheat. 419, 446. After expressing doubt whether any of the evils proceeding from the feebleness of the Federal Government contributed more to the establishing of the present constitutional system than the deep and general conviction that commerce ought to be regulated by Congress, Chief Justice Marshall, speaking for the court, said: "It is not, therefore, matter of surprise that the grant should be as extensive as the mischief, and should comprehend all foreign commerce, and all commerce among the States." Considering the question as to the just extent of the power to regulate commerce with foreign nations and among the several States, the court reaffirmed the doctrine that the power was "complete in itself, and to acknowledge no limitations other than are prescribed by the Constitution. . . . Commerce is intercourse; one of its most ordinary ingredients is traffic."

In the *Passenger Cases*, 7 How. 283, the court adjudged certain statutes of New York and Massachusetts, imposing taxes upon alien passengers arriving in the ports of those States, to be in violation of the Constitution and laws of the United States. In the separate opinions delivered by the Justices there will not be found any expression of doubt as to the doctrines announced in *Gibbons* v. *Ogden*. Mr. Justice McLean said: "Commerce is defined to be 'an exchange of commodities.' But this definition does not convey the full meaning of the term. It includes 'navigation and intercourse.' That the transportation of passengers is part of commerce is not now an open question." Mr. Justice Grier said: "Commerce, as defined by this court, means something more than traffic—it is intercourse; and the power committed to Congress to regulate commerce is exercised by prescribing rules for carrying on that intercourse." The same views were expressed by Mr. Justice Wayne, in his separate opinion. He regarded the question then before the

court as covered by the decision in *Gibbons* v. *Ogden*, and in respect to that case he said: "It will always be a high and honorable proof of the eminence of the American bar of that day, and of the talents and distinguished ability of the Judges who were then in the places which we now occupy." Mr. Justice Catron and Mr. Justice McKinley announced substantially the same views.

In *Almy* v. *State of California*, 24 How. 169, a statute of California imposing a stamp duty upon bills of lading for gold or silver transported from that State to any port or place out of the State was held to be a tax on exports, in violation of the provision of the Constitution declaring that "no tax or duty shall be laid on articles exported from any State." But in *Woodruff* v. *Parham*, 8 Wall. 123, 138, this court, referring to the *Almy* case, said it was well decided upon a ground not mentioned in the opinion of the court, namely, that, although the tax there in question was only on bills of lading, "such a tax was a regulation of commerce, a tax imposed upon the transportation of goods from one State to another, over the high seas, in conflict with that freedom of transit of goods and persons between one State and another, which is within the rule laid down in *Crandall* v. *Nevada*, and with the authority of Congress to regulate commerce among the States."

In *Henderson &c.* v. *Mayor &c.*, 92 U. S. 259, 270, which involved the constitutional validity of a statute of New York relating to vessels bringing passengers to that port, this court, speaking by Mr. Justice Miller, said: "As already indicated, the provisions of the Constitution of the United States, on which the principal reliance is placed to make void the statute of New York, is that which gives to Congress the power 'to regulate commerce with foreign nations.' As was said in *United States* v. *Holliday*, 3 Wall. 417, 'commerce with foreign nations means commerce between citizens of the United States and citizens or subjects of foreign governments.' It means trade, and it means intercourse. It means commercial intercourse between nations, and parts of nations, in all its branches. It includes navigation, as the principal means by which foreign intercourse is effected. To regulate this trade and intercourse is

to prescribe the rules by which it shall be conducted. 'The mind,' says the great Chief Justice, 'can scarcely conceive a system for regulating commerce between nations which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of one nation into the ports of another;' and he might have added, with equal force, which prescribed no terms for the admission of their cargo or their passengers. *Gibbons* v. *Ogden*, 9 Wheat. 190."

The question of the scope of the commerce clause was again considered in *Pensacola Tel. Co.* v. *Western Union Tel. Co.*, 96 U. S. 1, 9, 12, involving the validity of a statute of Florida, which assumed to confer upon a local telegraph company the exclusive right to establish and maintain lines of electric telegraph in certain counties of Florida. This court held the act to be unconstitutional. Chief Justice Waite, delivering its judgment, said: "Since the case of *Gibbons* v. *Ogden*, 9 Wheat. 1, it has never been doubted that commercial intercourse is an element of commerce which comes within the regulating power of Congress. Post offices and post roads are established to faciliate the transmission of intelligence. Both commerce and the postal service are placed within the power of Congress, because, being national in their operation, they should be under the protecting care of the National Government. The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage coach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances. As they were entrusted to the General Government for the good of the nation, it is not only the right, but the duty, of Congress to see to it that intercourse among the States and the transmission of intelligence are not

obstructed or unnecessarily encumbered by state legislation. The electric telegraph marks an epoch in the progress of time. In a little more than a quarter of a century it has changed the habits of business, and become one of the necessities of commerce. It is indispensable as a means of intercommunication, but especially is it so in commercial transactions." In his dissenting opinion in that case Mr. Justice Field speaks of the importance of the telegraph "as a means of intercourse," and of its constant use in commercial transactions.

In *County of Mobile* v. *Kimball*, 102 U. S. 691, Mr. Justice Field, delivering the judgment of the court, said: "Commerce with foreign countries and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities." This principle was expressly reaffirmed in *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 203.

Applying the doctrine announced in *Pensacola Tel. Co.* v. *Western Union Tel. Co.*, it was held in *Telegraph Co.* v. *Texas*, 105 U. S. 460, that the law of a State imposing a tax on private telegraph messages sent out of the State was unconstitutional, as being, in effect, a regulation of interstate commerce.

In *Brown* v. *Houston*, 114 U. S. 622, 630, it was declared by the court, speaking by Mr. Justice Bradley, that "the power to regulate commerce among the several States is granted to Congress in terms as absolute as is the power to regulate commerce with foreign nations." The same thought was expressed in *Bowman* v. *Chicago &c. Railway Co.*, 125 U. S. 465, 482; *Crutcher* v. *Kentucky*, 141 U. S. 47, 58, and *Pittsburg Coal Co.* v. *Bates*, 156 U. S. 577, 587.

In *Pickard* v. *Pullman Southern Car Company*, 117 U. S. 34, it was said to be settled by the adjudged cases that to tax "the transit of passengers from foreign countries or between the States, is to regulate commerce."

In *Western Union Tel. Co.* v. *Pendleton*, 122 U. S. 347, 356, the court recognized the commerce with foreign countries and among the States which Congress could regulate as including not only the exchange and transportation of commodities, or

visible, tangible things, but the carriage of persons, and the transmission by telegraph of ideas, wishes, orders and intelligence. See also *Ratterman* v. *Tel. Co.*, 127 U. S. 411, and *Leloup* v. *Port of Mobile*, 127 U. S. 640.

In *Covington &c. Bridge Company* v. *Kentucky*, 154 U. S. 204, 218, the question was as to the validity, under the commerce clause of the Constitution, of an act of the Kentucky Legislature relating to tolls to be charged or received for passing over the bridge of the Covington and Cincinnati Bridge Company, a corporation of both Kentucky and Ohio, erected between Covington and Cincinnati. A state enactment prescribing a rate of toll on the bridge was held to be unconstitutional, as an unauthorized regulation of interstate commerce. The court, reaffirming the principles announced in *Gloucester Ferry Company* v. *Pennsylvania*, 114 U. S. 196, and in *Wabash &c. Railway Company* v. *Illinois*, 118 U. S. 557, said, among other things: "Commerce was defined in *Gibbons* v. *Ogden*, 9 Wheat. 1, 189, to be 'intercourse,' and the thousands of people who daily pass and repass over this bridge may be as truly said to be engaged in commerce as if they were shipping cargoes of merchandise from New York to Liverpool. While the bridge company is not itself a common carrier, it affords a highway for such carriage, and a toll upon such bridge is as much a tax upon commerce as a toll upon a turnpike is a tax upon the traffic of such turnpike, or the charges upon a ferry a tax upon the commerce across a river."

At the present term of the court we said that "transportation for others, as an independent business, is commerce, irrespective of the purpose to sell or retain the goods which the owner may entertain with regard to them after they shall have been delivered." *Hanley &c.* v. *Kansas City Southern Railway*, 187 U. S. 617.

This reference to prior adjudications could be extended if it were necessary to do so. The cases cited however sufficiently indicate the grounds upon which this court has proceeded when determining the meaning and scope of the commerce clause. They show that commerce among the States embraces navigation, intercourse, communication, traffic, the transit of persons,

and the transmission of messages by telegraph. They also show that the power to regulate commerce among the several States is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States; that such power is plenary, complete in itself, and may be exerted by Congress to its utmost extent, subject *only* to such limitations as the Constitution imposes upon the exercise of the powers granted by it; and that in determining the character of the regulations to be adopted Congress has a large discretion which is not to be controlled by the courts, simply because, in their opinion, such regulations may not be the best or most effective that could be employed.

We come then to inquire whether there is any solid foundation upon which to rest the contention that Congress may not regulate the carrying of lottery tickets from one State to another, at least by corporations or companies whose business it is, for hire, to carry tangible property from one State to another.

It was said in argument that lottery tickets are not of any real or substantial value in themselves, and therefore are not subjects of commerce. If that were conceded to be the only legal test as to what are to be deemed subjects of the commerce that may be regulated by Congress, we cannot accept as accurate the broad statement that such tickets are of no value. Upon their face they showed that the lottery company offered a large capital prize, to be paid to the holder of the ticket winning the prize at the drawing advertised to be held at Asuncion, Paraguay. Money was placed on deposit in different banks in the United States to be applied by the agents representing the lottery company to the prompt payment of prizes. These tickets were the subject of traffic; they could have been sold; and the holder was assured that the company would pay to him the amount of the prize drawn. That the holder might not have been able to enforce his claim in the courts of any country making the drawing of lotteries illegal, and forbidding the circulation of lottery tickets, did not change the fact that

the tickets issued by the foreign company represented so much money payable to the person holding them and who might draw the prizes affixed to them. Even if a holder did not draw a prize, the tickets, before the drawing, had a money value in the market among those who chose to sell or buy lottery tickets. In short, a lottery ticket is a subject of traffic, and is so designated in the act of 1895. 28 Stat. 963. That fact is not without significance in view of what this court has said. That act, counsel for the accused well remarks, was intended to supplement the provisions of prior acts excluding lottery tickets from the mails and prohibiting the importation of lottery matter from abroad, and to prohibit the causing lottery tickets to be carried, and lottery tickets and lottery advertisements to be transferred, from one State to another by any means or method. 15 Stat. 196; 17 Stat. 302; 19 Stat. 90; Rev. Stat. § 3894; 26 Stat. 465; 28 Stat. 963.

We are of opinion that lottery tickets are subjects of traffic and therefore are subjects of commerce, and the regulation of the carriage of such tickets from State to State, at least by independent carriers, is a regulation of commerce among the several States.

But it is said that the statute in question does not regulate the carrying of lottery tickets from State to State, but by punishing those who cause them to be so carried Congress in effect prohibits such carrying; that in respect of the carrying from one State to another of articles or things that are, in fact, or according to usage in business, the subjects of commerce, the authority given Congress was not to *prohibit*, but only to *regulate*. This view was earnestly pressed at the bar by learned counsel, and must be examined.

It is to be remarked that the Constitution does not define what is to be deemed a legitimate regulation of interstate commerce. In *Gibbons* v. *Ogden* it was said that the power to regulate such commerce is the power to prescribe the rule by which it is to be governed. But this general observation leaves it to be determined, when the question comes before the court, whether Congress in prescribing a particular rule has exceeded its power under the Constitution. While our Government

must be acknowledged by all to be one of enumerated powers, *McCulloch* v. *Maryland*, 4 Wheat. 316, 405, 407, the Constitution does not attempt to set forth all the means by which such powers may be carried into execution. It leaves to Congress a large discretion as to the means that may be employed in executing a given power. The sound construction of the Constitution, this court has said, "must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." 4 Wheat. 421.

We have said that the carrying from State to State of lottery tickets constitutes interstate commerce, and that the regulation of such commerce is within the power of Congress under the Constitution. Are we prepared to say that a provision which is, in effect, a *prohibition* of the carriage of such articles from State to State is not a fit or appropriate mode for the *regulation* of that particular kind of commerce? If lottery traffic, *carried on through interstate commerce*, is a matter of which Congress may take cognizance and over which its power may be exerted, can it be possible that it must tolerate the traffic, and simply regulate the manner in which it may be carried on? Or may not Congress, for the protection of the people of all the States, and under the power to regulate interstate commerce, devise such means, within the scope of the Constitution, and not prohibited by it, as will drive that traffic out of commerce among the States?

In determining whether regulation may not under some circumstances properly take the form or have the effect of prohibition, the nature of the interstate traffic which it was sought by the act of May 2, 1895, to suppress cannot be overlooked. When enacting that statute Congress no doubt shared the views upon the subject of lotteries heretofore expressed by this court.

In *Phalen* v. *Virginia*, 8 How. 163, 168, after observing that the suppression of nuisances injurious to public health or morality is among the most important duties of Government, this court said: "Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the widespread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; it plunders the ignorant and simple." In other cases we have adjudged that authority given by legislative enactment to carry on a lottery, although based upon a consideration in money, was not protected by the contract clause of the Constitution; this, for the reason that no State may bargain away its power to protect the public morals, nor excuse its failure to perform a public duty by saying that it had agreed, by legislative enactment, not to do so. *Stone* v. *Mississippi*, 101 U. S. 814; *Douglas* v. *Kentucky*, 168 U. S. 488.

If a State, when considering legislation for the suppression of lotteries within its own limits, may properly take into view the evils that inhere in the raising of money, in that mode, why may not Congress, invested with the power to regulate commerce among the several States, provide that such commerce shall not be polluted by the carrying of lottery tickets from one State to another? In this connection it must not be forgotten that the power of Congress to regulate commerce among the States is plenary, is complete in itself, and is subject to no limitations except such as may be found in the Constitution. What provision in that instrument can be regarded as limiting the exercise of the power granted? What clause can be cited which, in any degree, countenances the suggestion that one may, of right, carry or cause to be carried from one State to another that which will harm the public morals? We cannot think of any clause of that instrument that could possibly be invoked by those who assert their right to send lottery tickets from State to State except the one providing that no person shall be deprived of his liberty without due process of law. We have said that the liberty protected by the Constitution

embraces the right to be free in the enjoyment of one's faculties; "to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts that may be proper." *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589. But surely it will not be said to be a part of any one's liberty, as recognized by the supreme law of the land, that he shall be allowed to introduce into commerce among the States an element that will be confessedly injurious to the public morals.

If it be said that the act of 1895 is inconsistent with the Tenth Amendment, reserving to the States respectively or to the people the powers not delegated to the United States, the answer is that the power to regulate commerce among the States has been expressly delegated to Congress.

Besides, Congress, by that act, does not assume to interfere with traffic or commerce in lottery tickets carried on exclusively within the limits of any State, but has in view only commerce of that kind among the several States. It has not assumed to interfere with the completely internal affairs of any State, and has only legislated in respect of a matter which concerns the people of the United States. As a State may, for the purpose of guarding the morals of its own people, forbid all sales of lottery tickets within its limits, so Congress, for the purpose of guarding the people of the United States against the "widespread pestilence of lotteries" and to protect the commerce which concerns all the States, may prohibit the carrying of lottery tickets from one State to another. In legislating upon the subject of the traffic in lottery tickets, as carried on through interstate commerce, Congress only supplemented the action of those States—perhaps all of them—which, for the protection of the public morals, prohibit the drawing of lotteries, as well as the sale or circulation of lottery tickets, within their respective limits. It said, in effect, that it would not permit the declared policy of the States, which sought to protect their people against the mischiefs of the lottery business, to be overthrown or disregarded by the agency of interstate commerce. We should hesitate long before adjudging that an evil of such

appalling character, carried on through interstate commerce, cannot be met and crushed by the only power competent to that end. We say competent to that end, because Congress alone has the power to occupy, by legislation, the whole field of interstate commerce. What was said by this court upon a former occasion may well be here repeated: "The framers of the Constitution never intended that the legislative power of the Nation should find itself incapable of disposing of a subject matter specifically committed to its charge." *In re Rahrer*, 140 U. S. 545, 562. If the carrying of lottery tickets from one State to another be interstate commerce, and if Congress is of opinion that an effective regulation for the suppression of lotteries, carried on through such commerce, is to make it a criminal offence to cause lottery tickets to be carried from one State to another, we know of no authority in the courts to hold that the means thus devised are not appropriate and necessary to protect the country at large against a species of interstate commerce which, although in general use and somewhat favored in both national and state legislation in the early history of the country, has grown into disrepute and has become offensive to the entire people of the Nation. It is a kind of traffic which no one can be entitled to pursue as of right.

That regulation may sometimes appropriately assume the form of prohibition is also illustrated by the case of diseased cattle, transported from one State to another. Such cattle may have, notwithstanding their condition, a value in money for some purposes, and yet it cannot be doubted that Congress, under its power to regulate commerce, may either provide for their being inspected before transportation begins, or, in its discretion, may prohibit their being transported from one State to another. Indeed, by the act of May 29, 1884, c. 60, Congress has provided: "That no railroad company within the United States, or the owners or masters of any steam or sailing or other vessel or boat, shall receive for transportation or transport, from one State or Territory to another, or from any State into the District of Columbia, or from the District into any State, any live stock affected with any contagious, infectious, or communicable disease, and especially the disease known as

pleuro-pneumonia; nor shall any person, company, or corporation deliver for such transportation to any railroad company, or master or owner of any boat or vessel, any live stock, knowing them to be affected with any contagious, infectious, or communicable disease; nor shall any person, company, or corporation drive on foot or transport in private conveyance from one State or Territory to another, or from any State into the District of Columbia, or from the District into any State, any live stock, knowing them to be affected with any contagious, infectious, or communicable disease, and especially the disease known as pleuro-pneumonia." *Reid* v. *State of Colorado*, 187 U. S. 137, present term.

The act of July 2, 1890, known as the Sherman Anti-Trust Act, and which is based upon the power of Congress to regulate commerce among the States, is an illustration of the proposition that regulation may take the form of prohibition. The object of that act was to protect trade and commerce against unlawful restraints and monopolies. To accomplish that object Congress declared certain contracts to be illegal. That act, in effect, prohibited the doing of certain things, and its prohibitory clauses have been sustained in several cases as valid under the power of Congress to regulate interstate commerce. *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290; *United States* v. *Joint Traffic Association*, 171 U. S. 505; *Addyston Pipe & Steel Company* v. *United States*, 175 U. S. 211. In the case last named the court, referring to the power of Congress to regulate commerce among the States, said: "In *Gibbons* v. *Ogden*, *supra*, the power was declared to be complete in itself, and to acknowledge no limitations other than are prescribed by the Constitution. Under this grant of power to Congress, that body, in our judgment, may enact such legislation as shall declare void and *prohibit* the performance of any contract between individuals or corporations where the natural and direct effect of such a contract will be, when carried out, to directly, and not as a mere incident to other and innocent purposes, regulate to any substantial extent interstate commerce. (And when we speak of interstate we also include in our meaning foreign commerce.) We do not assent to the cor-

rectness of the proposition that the constitutional guaranty of liberty to the individual to enter into private contracts limits the power of Congress and prevents it from legislating upon the subject of contracts of the class mentioned. The power to regulate interstate commerce is, as stated by Chief Justice Marshall, full and complete in Congress, and there is no limitation in the grant of the power which excludes private contracts of the nature in question from the jurisdiction of that body. Nor is any such limitation contained in that other clause of the Constitution which provides that no person shall be deprived of life, liberty or property without due process of law." Again: "The provision in the Constitution does not, as we believe, exclude Congress from legislating with regard to contracts of the above nature while in the exercise of its constitutional right to regulate commerce among the States. On the contrary, we think the provision regarding the liberty of the citizen is, to some extent, limited by the commerce clause of the Constitution, and that the power of Congress to regulate interstate commerce comprises the right to enact a law *prohibiting* the citizen from entering into those private contracts which directly and substantially, and not merely indirectly, remotely, incidentally and collaterally, regulate to a greater or less degree commerce among the States."

That regulation may sometimes take the form or have the effect of prohibition is also illustrated in the case of *In re Rahrer*, 140 U. S. 545. In *Mugler* v. *Kansas*, 123 U. S. 623, it was adjudged that state legislation prohibiting the manufacture of spirituous, malt, vinous, fermented or other intoxicating liquors within the limits of the State, to be there sold or bartered for general use as a beverage, does not necessarily infringe any right, privilege or immunity secured by the Constitution of the United States or by the amendments thereto. Subsequently in *Bowman* v. *Chicago &c. Railway Co.*, 125 U. S. 465, this court held that ardent spirits, distilled liquors, ale and beer were subjects of exchange, barter and traffic, and were so recognized by the usages of the commercial world, as well as by the laws of Congress and the decisions of the courts. In *Leisy* v. *Hardin*, 135 U. S. 100, the

court again held that spirituous liquors were recognized articles of commerce, and declared a statute of Iowa prohibiting the sale within its limits of any intoxicating liquors, except for pharmaceutical, medicinal, chemical or sacramental purposes, under a state license, to be repugnant to the commerce clause of the Constitution, if applied to the sale, within the State, by the importer, in the original, unbroken packages, of such liquors manufactured in and brought from another State. And in determining whether a State could prohibit the sale within its limits, in original, unbroken packages, of ardent spirits, distilled liquors, ale and beer, imported from another State, this court said that they were recognized by the laws of Congress as well as by the commercial world "as subjects of exchange, barter and traffic," and that "whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we cannot hold that any articles which Congress recognized as subjects of commerce are not such." *Leisy* v. *Hardin*, 135 U. S. 100, 110, 125.

Then followed the passage by Congress of the act of August 8, 1890, 26 Stat. 313, c. 728, providing "that all fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory, or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." That act was sustained in the *Rahrer* case as a valid exercise of the power of Congress to regulate commerce among the States.

In *Rhodes* v. *Iowa*, 170 U. S. 412, 426, that statute—all of its provisions being regarded—was held as not causing the power of the State to attach to an interstate commerce shipment of intoxicating liquors "whilst the merchandise was in transit under such shipment, and until its arrival at the point of destination and delivery there to the consignee."

Thus under its power to regulate interstate commerce, as in-

volved in the transportation, in original packages, of ardent spirits from one State to another, Congress, by the necessary effect of the act of 1890 made it impossible to transport such packages to places within a prohibitory State and there dispose of their contents by sale; although it had been previously held that ardent spirits were recognized articles of commerce and, until Congress otherwise provided, could be imported into a State, and sold in the original packages, despite the will of the State. If at the time of the passage of the act of 1890 all the States had enacted liquor laws prohibiting the sale of intoxicating liquors within their respective limits, then the act would necessarily have had the effect to exclude ardent spirits altogether from commerce among the States; for no one would ship, for purposes of sale, packages containing such spirits to points within any State that forbade their sale at any time or place, even in unbroken packages, and, in addition, provided for the seizure and forfeiture of such packages. So that we have in the *Rahrer* case a recognition of the principle that the power of Congress to regulate interstate commerce may sometimes be exerted with the effect of excluding particular articles from such commerce.

It is said, however, that if, in order to suppress lotteries carried on through interstate commerce, Congress may exclude lottery tickets from such commerce, that principle leads necessarily to the conclusion that Congress may arbitrarily exclude from commerce among the States any article, commodity or thing, of whatever kind or nature, or however useful or valuable, which it may choose, no matter with what motive, to declare shall not be carried from one State to another. It will be time enough to consider the constitutionality of such legislation when we must do so. The present case does not require the court to declare the full extent of the power that Congress may exercise in the regulation of commerce among the States. We may, however, repeat, in this connection, what the court has heretofore said, that the power of Congress to regulate commerce among the States, although plenary, cannot be deemed arbitrary, since it is subject to such limitations or restrictions as

are prescribed by the Constitution. This power, therefore, may not be exercised so as to infringe rights secured or protected by that instrument. It would not be difficult to imagine legislation that would be justly liable to such an objection as that stated, and be hostile to the objects for the accomplishment of which Congress was invested with the general power to regulate commerce among the several States. But, as often said, the possible abuse of a power is not an argument against its existence. There is probably no governmental power that may not be exerted to the injury of the public. If what is done by Congress is manifestly in excess of the powers granted to it, then upon the courts will rest the duty of adjudging that its action is neither legal nor binding upon the people. But if what Congress does is within the limits of its power, and is simply unwise or injurious, the remedy is that suggested by Chief Justice Marshall in *Gibbons* v. *Ogden*, when he said: "The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments."

The whole subject is too important, and the questions suggested by its consideration are too difficult of solution, to justify any attempt to lay down a rule for determining in advance the validity of every statute that may be enacted under the commerce clause. We decide nothing more in the present case than that lottery tickets are subjects of traffic among those who choose to sell or buy them; that the carriage of such tickets by independent carriers from one State to another is therefore interstate commerce; that under its power to regulate commerce among the several States Congress—subject to the limitations imposed by the Constitution upon the exercise of the powers granted—has plenary authority over such commerce, and may prohibit the carriage of such tickets from State to State; and that legislation to that end, and of that character, is not incon-

sistent with any limitation or restriction imposed upon the exercise of the powers granted to Congress.

The judgment is

Affirmed.

MR. CHIEF JUSTICE FULLER, with whom concur MR. JUSTICE BREWER, MR. JUSTICE SHIRAS and MR. JUSTICE PECKHAM, dissenting.

Although the first section of the act of March 2, 1895, 28 Stat. 963, c. 191, is inartificially drawn, I accept the contention of the Government that it makes it an offence (1) to bring lottery matter from abroad into the United States; (2) to cause such matter to be deposited in or carried by the mails of the United States; (3) to cause such matter to be carried from one State to another in the United States; and further, to cause any advertisement of a lottery or similar enterprise to be brought into the United States, or be deposited or carried by the mails, or transferred from one State to another.

The case before us does not involve in fact the circulation of advertisements and the question of the abridgement of the freedom of the press; nor does it involve the importation of lottery matter, or its transmission by the mails. It is conceded that the lottery tickets in question, though purporting to be issued by a lottery company of Paraguay, were printed in the United States, and were not imported into the United States from any foreign country.

The naked question is whether the prohibition by Congress of the carriage of lottery tickets from one State to another by means other than the mails is within the powers vested in that body by the Constitution of the United States. That the purpose of Congress in this enactment was the suppression of lotteries cannot reasonably be denied. That purpose is avowed in the title of the act, and is its natural and reasonable effect, and by that its validity must be tested. *Henderson* v. *Mayor &c.*, 92 U. S. 259, 268; *Minnesota* v. *Barber*, 136 U. S. 313, 320.

The power of the State to impose restraints and burdens on persons and property in conservation and promotion of the pub-

lic health, good order and prosperity is a power originally and always belonging to the States, not surrendered by them to the General Government nor directly restrained by the Constitution of the United States, and essentially exclusive, and the suppression of lotteries as a harmful business falls within this power, commonly called of police. *Douglas* v. *Kentucky*, 168 U. S. 488.

It is urged, however, that because Congress is empowered to regulate commerce between the several States, it, therefore, may suppress lotteries by prohibiting the carriage of lottery matter. Congress may indeed make all laws necessary and proper for carrying the powers granted to it into execution, and doubtless an act prohibiting the carriage of lottery matter would be necessary and proper to the execution of a power to suppress lotteries; but that power belongs to the States and not to Congress. To hold that Congress has general police power would be to hold that it may accomplish objects not entrusted to the General Government, and to defeat the operation of the Tenth Amendment, declaring that: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The ground on which prior acts forbidding the transmission of lottery matter by the mails was sustained, was that the power vested in Congress to establish post offices and post roads embraced the regulation of the entire postal system of the country, and that under that power Congress might designate what might be carried in the mails and what excluded. *In re Rapier*, 143 U. S. 110; *Ex parte Jackson*, 96 U. S. 727.

In the latter case, Mr. Justice Field, delivering the unanimous opinion of the court, said: "But we do not think that Congress possesses the power to prevent the transportation in other ways, as merchandise, of matter which it excludes from the mails. To give efficiency to its regulations and prevent rival postal systems, it may perhaps prohibit the carriage by others for hire, over postal routes, of articles which legitimately constitute mail matter, in the sense in which those terms were used when the Constitution was adopted, consisting of letters, and of newspa-

pers and pamphlets, when not sent as merchandise; but further than this its power of prohibition cannot extend." And this was repeated in the case of *Rapier*.

Certainly the act before us cannot stand the test of the rule laid down by Mr. Justice Miller in the *Trade-Mark Cases*, 100 U. S. 82, 96, when he said: "When, therefore, Congress undertakes to enact a law, which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of the law, or from its essential nature, that it is a regulation of commerce with foreign nations, or among the several States, or with the Indian tribes. If not so limited, it is in excess of the power of Congress."

But apart from the question of *bona fides*, this act cannot be brought within the power to regulate commerce among the several States, unless lottery tickets are articles of commerce, and, therefore, when carried across state lines, of interstate commerce; or unless the power to regulate interstate commerce includes the absolute and exclusive power to prohibit the transportation of anything or anybody from one State to another.

Mr. Justice Catron remarked in the *License Cases*, 5 How. 504, 600, that "that which does not belong to commerce is within the jurisdiction of the police power of the State; and that which does belong to commerce is within the jurisdiction of the United States;" and the observation has since been repeatedly quoted by this court with approval.

In *United States* v. *E. C. Knight Company*, 156 U. S. 1, 13, we said: "It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by our dual form of government; and acknowledged evils, however grave and urgent they may appear to be, had better be borne, than the risk be run, in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality. It will be perceived how far reaching the proposition is that the power of dealing with a monopoly directly may be exercised by the

FULLER, C. J., BREWER, SHIRAS and PECKHAM, JJ., dissenting.

General Government whenever interstate or international commerce may be ultimately affected. The regulation of commerce applies to the subjects of commerce and not to matters of internal police." This case was adhered to in *Addyston Pipe and Steel Company* v. *United States*, 175 U. S. 211, where it was decided that Congress could prohibit the performance of contracts, whose natural effect, when carried out, would be to directly regulate interstate and foreign commerce.

It cannot be successfully contended that either Congress or the States can, by their own legislation, enlarge their powers, and the question of the extent and limit of the powers of either is a judicial question under the fundamental law.

If a particular article is not the subject of commerce, the determination of Congress that it is, cannot be so conclusive as to exclude judicial inquiry.

When Chief Justice Marshall said that commerce embraced intercourse, he added, commercial intercourse, and this was necessarily so since, as Chief Justice Taney pointed out, if intercourse were a word of larger meaning than the word commerce, it could not be substituted for the word of more limited meaning contained in the Constitution.

Is the carriage of lottery tickets from one State to another commercial intercourse?

The lottery ticket purports to create contractual relations and to furnish the means of enforcing a contract right.

This is true of insurance policies, and both are contingent in their nature. Yet this court has held that the issuing of fire, marine, and life insurance policies, in one State, and sending them to another, to be there delivered to the insured on payment of premium, is not interstate commerce. *Paul* v. *Virginia*, 8 Wall. 168; *Hooper* v. *California*, 155 U. S. 648; *New York Life Insurance Company* v. *Cravens*, 178 U. S. 389.

In *Paul* v. *Virginia*, Mr. Justice Field, in delivering the unanimous opinion of the court, said: "Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of com-

merce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one State to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different States. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the States any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce."

This language was quoted with approval in *Hooper* v. *California*, 155 U. S. 648, and it was further said: "If the power to regulate interstate commerce applied to all the incidents to which said commerce might give rise and to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any way connected with trade between the States; and would exclude state control over many contracts purely domestic in their nature. The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against 'the perils of the sea.'" Or, as remarked in *New York Life Insurance Company* v. *Cravens*, 178 U. S. 389, "against the uncertainty of man's mortality."

The fact that the agent of the foreign insurance company negotiated the contract of insurance in the State where the contract was to be finally completed and the policy delivered, did not affect the result. As Mr. Justice Bradley said in the leading case of *Robins* v. *Shelby County Taxing District*, 120 U. S. 489: "The negotiation of sales of goods which are in an-

other State, for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce." And see *Collins* v. *New Hampshire*, 171 U. S. 30, and other cases.

Tested by the same reasoning, negotiable instruments are not instruments of commerce; bills of lading are, because they stand for the articles included therein; hence it has been held that a State cannot tax interstate bills of lading because that would be a regulation of interstate commerce, and that Congress cannot tax foreign bills of lading, because that would be to tax the articles exported, and in conflict with Article I, § 9, cl. 5, of the Constitution of the United States, that "No tax or duty shall be laid on articles exported from any State." *Fairbank* v. *United States*, 181 U. S. 283.

In *Nathan* v. *Louisiana*, 8 How. 73, it was held that a broker dealing in foreign bills of exchange was not engaged in commerce, but in supplying an instrumentality of commerce, and that a state tax on all money or exchange brokers was not void as to him as a regulation of commerce.

And in *Williams* v. *Fears*, 179 U. S. 270, that the levy of a tax by the State of Georgia on the occupation of a person engaged in hiring laborers to be employed beyond the limits of the State, was not a regulation of interstate commerce, and that the tax fell within the distinction between interstate commerce or an instrumentality thereof, and the mere incidents that might attend the carrying on of such commerce.

In *Cohens* v. *Virginia*, 6 Wheat. 264, 440, Congress had empowered the corporation of the city of Washington to "authorize the drawing of lotteries for effecting any improvement in the city, which the ordinary funds or revenue thereof will not accomplish." The corporation had duly provided for such lottery, and this case was a conviction under a statute of Virginia for selling tickets issued by that lottery. That statute forbade the sale within the State of any ticket in a lottery not authorized by the laws of Virginia.

The court held, by Chief Justice Marshall, that the lottery was merely the emanation of a corporate power, and "that the

mind of Congress was not directed to any provision for the sale of the tickets beyond the limits of the corporation."

The constitutionality of the act of Congress, as forcing the sale of tickets in Virginia, was therefore not passed on, but if lottery tickets had been deemed articles of commerce, the Virginia statute would have been invalid as a regulation of commerce, and the conviction could hardly have been affirmed, as it was.

In *Nutting* v. *Massachusetts*, 183 U. S. 553, 556, Mr. Justice Gray said: "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."

If a State should create a corporation to engage in the business of lotteries, could it enter another State, which prohibited lotteries, on the ground that lottery tickets were the subjects of commerce?

On the other hand, could Congress compel a State to admit lottery matter within it, contrary to its own laws?

In *Alexander* v. *State*, 86 Georgia, 246, it was held that a state statute prohibiting the business of buying and selling what are commonly known as "futures," was not protected by the commerce clause of the Constitution, as the business was gambling, and that clause protected interstate commerce but did not protect interstate gambling. The same view was expressed in *State* v. *Stripling*, 113 Alabama, 120, in respect of an act forbidding the sale of pools on horse races conducted without the State.

In *Ballock* v. *Maryland*, 73 Maryland, 1, it was held that when the bonds of a foreign government are coupled with conditions and stipulations that change their character from an

obligation for the payment of a certain sum of money to a species of lottery tickets condemned by the police regulations of the State, the prohibition of their sale did not violate treaty stipulation or constitutional provision. Such bonds with such conditions and stipulations ceased to be vendible under the law.

So lottery tickets forbidden to be issued or dealt in by the laws of Texas, the *terminus a quo*, and by the laws of California or Utah, the *terminus ad quem*, were not vendible; and for this reason also not articles of commerce.

If a lottery ticket is not an article of commerce, how can it become so when placed in an envelope or box or other covering, and transported by an express company? To say that the mere carrying of an article which is not an article of commerce in and of itself nevertheless becomes such the moment it is to be transported from one State to another, is to transform a non-commercial article into a commercial one simply because it is transported. I cannot conceive that any such result can properly follow.

It would be to say that everything is an article of commerce the moment it is taken to be transported from place to place, and of interstate commerce if from State to State.

An invitation to dine, or to take a drive, or a note of introduction, all become articles of commerce under the ruling in this case, by being deposited with an express company for transportation. This in effect breaks down all the differences between that which is, and that which is not, an article of commerce, and the necessary consequence is to take from the States all jurisdiction over the subject so far as interstate communication is concerned. It is a long step in the direction of wiping out all traces of state lines, and the creation of a centralized Government.

Does the grant to Congress of the power to regulate interstate commerce impart the absolute power to prohibit it?

It was said in *Gibbons* v. *Ogden*, 9 Wheat. 1, 211, that the right of intercourse between State and State was derived from "those laws whose authority is acknowledged by civilized man throughout the world;" but under the Articles of Confederation the States might have interdicted interstate trade, yet

when they surrendered the power to deal with commerce as between themselves to the General Government it was undoubtedly in order to form a more perfect union by freeing such commerce from state discrimination, and not to transfer the power of restriction.

"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." *Dooley* v. *United States*, 183 U. S. 151, 171.

It will not do to say—a suggestion which has heretofore been made in this case—that state laws have been found to be ineffective for the suppression of lotteries, and therefore Congress should interfere. The scope of the commerce clause of the Constitution cannot be enlarged because of present views of public interest.

In countries whose fundamental law is flexible it may be that the homely maxim, "to ease the shoe where it pinches," may be applied, but under the Constitution of the United States it cannot be availed of to justify action by Congress or by the courts.

The Constitution gives no countenance to the theory that Congress is vested with the full powers of the British Parliament, and that, although subject to constitutional limitations, it is the sole judge of their extent and application; and the decisions of this court from the beginning have been to the contrary.

"To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?" asked Marshall, in *Marbury* v. *Madison*, 1 Cranch, 137, 176.

"Should Congress," said the same great magistrate in *McCulloch* v. *Maryland*, 4 Wheat. 316, 423, "under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the Government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land."

FULLER, C. J., BREWER, SHIRAS and PECKHAM, JJ., dissenting.

And so Chief Justice Taney, referring to the extent and limits of the powers of Congress: "As the Constitution itself does not draw the line, the question is necessarily one for judicial decision, and depending altogether upon the words of the Constitution."

It is argued that the power to regulate commerce among the several States is the same as the power to regulate commerce with foreign nations, and with the Indian tribes. But is its scope the same?

As in effect, before observed, the power to regulate commerce with foreign nations and the power to regulate interstate commerce, are to be taken *diverso intuitu*, for the latter was intended to secure equality and freedom in commercial intercourse as between the States, not to permit the creation of impediments to such intercourse; while the former clothed Congress with that power over international commerce, pertaining to a sovereign nation in its intercourse with foreign nations, and subject, generally speaking, to no implied or reserved power in the States. The laws which would be necessary and proper in the one case, would not be necessary or proper in the other.

Congress is forbidden to lay any tax or duty on articles exported from any State, and while that has been applied to exports to a foreign country, it seems to me that it was plainly intended to apply to interstate exportation as well; Congress is forbidden to give preference by any regulation of commerce or revenue to the ports of one State over those of another; and duties, imposts and excises must be uniform throughout the United States.

"The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." This clause of the second section of Article IV was taken from the fourth Article of Confederation, which provided that "the free inhabitants of each of these States . . . shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and egress to and from any other State, and shall enjoy therein all the privileges of trade and commerce;" while other parts of the

same article were also brought forward in Article IV of the Constitution.

Mr. Justice Miller, in the *Slaughter-House Cases*, 16 Wall. 36, 75, says that there can be but little question that the purpose of the fourth Article of the Confederation, and of this particular clause of the Constitution, "is the same, and that the privileges and immunities intended are the same in each."

Thus it is seen that the right of passage of persons and property from one State to another cannot be prohibited by Congress. But that does not challenge the legislative power of a sovereign nation to exclude foreign persons or commodities, or place an embargo, perhaps not permanent, upon foreign ships or manufactures.

The power to prohibit the transportation of diseased animals and infected goods over railroads or on steamboats is an entirely different thing, for they would be in themselves injurious to the transaction of interstate commerce, and, moreover, are essentially commercial in their nature. And the exclusion of diseased persons rests on different ground, for nobody would pretend that persons could be kept off the trains because they were going from one State to another to engage in the lottery business. However enticing that business may be, we do not understand these pieces of paper themselves can communicate bad principles by contact.

The same view must be taken as to commerce with Indian tribes. There is no reservation of police powers or any other to a foreign nation or to an Indian tribe, and the scope of the power is not the same as that over interstate commerce.

In *United States* v. *43 Gallons of Whiskey*, 93 U. S. 188, 194, Mr. Justice Davis said: "Congress now has the exclusive and absolute power to regulate commerce with the Indian tribes,—a power as broad and free from restrictions as that to regulate commerce with foreign nations. The only efficient way of dealing with the Indian tribes was to place them under the protection of the General Government. Their peculiar habits and character required this; and the history of the country shows the necessity of keeping them 'separate, subordinate, and dependent.' Accordingly, treaties have been made and laws passed

separating Indian territory from that of the State, and providing that intercourse and trade with the Indians should be carried on solely under the authority of the United States."

I regard this decision as inconsistent with the views of the framers of the Constitution, and of Marshall, its great expounder. Our form of government may remain notwithstanding legislation or decision, but, as long ago observed, it is with governments, as with religions, the form may survive the substance of the faith.

In my opinion the act in question in the particular under consideration is invalid, and the judgments below ought to be reversed, and my brothers BREWER, SHIRAS and PECKHAM concur in this dissent.

FRANCIS *v.* UNITED STATES.

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

No. 80. Argued December 15, 16, 1902.—Decided February 23, 1903.

A slip retained by the agent of a lottery which is the duplicate of a slip retained by the purchaser, indicating the numbers selected by him, is not a paper, certificate or interest purporting to be or to represent chances, shares and interest in the prizes thereafter to be awarded by lot in the drawings of a lottery commonly known as the game of policy within the meaning of the act of Congress of March 2, 1895, c. 191, 28 Stat. 963.

THE case is stated in the opinion of the court.

Mr. John G. Carlisle and *Mr. Miller Outcalt* for petitioners.

Mr. William D. Guthrie's brief in No. 2 (p. 321, *ante*,) was also entitled in this action.

Mr. Assistant Attorney General Beck for the respondent argued and submitted the same brief as in *Champion* v. *Ames*, the *Lottery Case*, p. 321, *ante*.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an indictment under Rev. Stat. § 5440, for conspiring

to commit an offence against the United States. The offence which the defendants are alleged to have conspired to commit and to have committed is that of causing to be carried from one State to another, viz., from Kentucky to Ohio, five papers, certificates and instruments, purporting to be and to represent chances, shares and interests in the prizes thereafter to be awarded by lot in the drawings of a lottery, commonly known as the game of policy. Act of March 2, 1895, c. 191, 28 Stat. 963. It appears that the lottery in question had its headquarters in Ohio and agencies in different States. A purchaser, or person wishing to take a chance, went to one of these agencies, in this case in Kentucky, selected three or more numbers, wrote them on a slip, and handed the slip to the agent, in this case to the defendant Hoff, paying the price of the chance at the same time, and keeping a duplicate, which was the purchaser's voucher for his selection. The slip in this case was taken by the defendant Edgar to be carried to the principal office, where afterwards, in the regular course, there would be a drawing by the defendant Francis. If the purchaser's number should win, the prize would be sent to the agency and paid over. The carriage from one State to another, relied upon as the object of the conspiracy, and as the overt act in pursuance of the conspiracy, was the carriage by Edgar of slips delivered to Hoff, as above described. The case was sent to the jury by the District Court, the defendants were found guilty, and the judgment against them was affirmed by the Circuit Court of Appeals. *Reilley* v. *United States*, 106 Fed. Rep. 896. The case then was brought here on certiorari.

An exception was taken at every step of the trial in the hope that some shot might hit the mark. We entirely agree with the Circuit Court of Appeals in its unfavorable comments on the practice. But, little attention as most of the objections may deserve, they at least succeeded in raising the broad questions whether the act of 1895 is constitutional and whether the offence proved is within it. The former is disposed of by the case of *Champion* v. *Ames*, p. 321, *ante*, decided this day. The latter remains, and thus far seems to us not to have received quite sufficient notice.

Opinion of the Court.

The game was played by mixing seventy-eight consecutive numbers and drawing out twelve after all the purchases for the game had been reported. If the three on any slip corresponded in number and order with three drawn out, the purchaser won. The purpose of bringing in the slips to headquarters was that all purchases should be known there before the drawing, and thus swindling by agents of the lottery made impossible. It is said by the Circuit Court of Appeals that the successful slips were returned with the prizes. If this is correct we do not perceive that it materially affects the case. The arrangement, whatever it was, was for the convenience and safety of those who managed this lottery, and was in no way essential to the interests of the person making the purchase or bet. The daily report of the result of the drawings to Hoff, with whom he dealt, and the forwarding of the prize, if drawn, filled all his needs. It would seem from the evidence, as the government contended—certainly the contrary does not appear and was not argued—that Hoff and Edgar, the carrier, were agents of the lottery company. Thus the slips were at home, as between the purchaser and the lottery, when put into Hoff's hands. They had reached their final destination in point of law, and their later movements were internal circulation within the sphere of the lottery company's possession. Therefore the question is suggested whether the carriage of a paper of any sort by its owner or the owner's servant, properly so-called, with no view of a later change of possession, can be commerce, even when the carriage is in aid of some business or traffic. The case is different from one where, the carriage being done by an independent carrier, it is commerce merely by reason of the business of carriage.

The question just put need not be answered in this case. For on another ground we are of opinion that there was no evidence of an offence within the meaning of the act of 1895. The assumption has been that the slips carried from Kentucky to Ohio were papers purporting to be or represent a ticket or interest in a lottery. But in our opinion these papers did not purport to be or do either. A ticket, of course, is a thing which is the holder's means of making good his rights. The essence of

it is that it is in the hands of the other party to the contract with the lottery as a document of title. It seems to us quite plain that the alternative instrument mentioned by the statute, viz., a paper representing an interest in a lottery, equally is a document of title to the purchaser and holder—the thing by holding which he makes good his right to a chance in the game. But the slips transported, as we have pointed out, were not the purchasers' documents. It is true that they corresponded in contents, and so in one sense represented or depicted the purchasers' interests. But "represent" in the statute means, as we already have said in other words, represent to the purchaser. It means stand as the representative of title to the indicated thing—and that these slips did not do. The function of the slips might have been performed by descriptions in a book, or by memory, if the whole lottery business had been done by one man. They as little represented the purchasers' chances, as the stubs in a check book represent the sums coming to the payees of the checks.

We assume for purposes of decision that the papers kept by the purchasers were tickets or did represent an interest in a lottery. But those papers did not leave Kentucky. There was no conspiracy that they should. We need not consider whether, if it had been necessary to take them to Ohio in order to secure the purchasers' rights, the lottery keepers could be said to conspire to cause them to be carried there, when the carriage would be in an interest adverse to theirs, and they would be better off and presumably glad if the papers never were presented. See *Commonwealth* v. *Peaslee*, 177 Massachusetts, 267, 271; *Graves* v. *Johnson*, 179 Massachusetts, 53, 58.

The judgment of the Circuit Court of Appeals is reversed; the judgment of the District Court is also reversed and the cause remanded to that court with directions to set aside the verdict and grant a new trial.

MR. JUSTICE HARLAN dissenting.

This is a criminal prosecution based upon the first section of the act of Congress of March 2, 1895, c. 191, entitled "An act

for the suppression of lottery traffic through national and interstate commerce and the postal service subject to the jurisdiction and laws of the United States."

That section reads: "§ 1. That any person who shall cause to be brought within the United States from abroad, for the purpose of disposing of the same, *or* deposited in or carried by the mails of the United States, *or* carried from one State to another in the United States, any paper, certificate, or instrument purporting to be or represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, so-called gift concert, or similar enterprise, offering prizes dependent upon lot or chance, *or* shall cause any advertisement of such lottery, so-called gift concert, or similar enterprises, offering prizes dependent upon lot or chance, to be brought into the United States, *or* deposited in or carried by the mails of the United States, *or* transferred from one State to another in the same, shall be punishable in the first offence by imprisonment for not more than two years or by a fine of not more than one thousand dollars, or both, and in the second and after offences by such imprisonment only." 28 Stat. 963.

The indictment charges a conspiracy to commit the offence denounced by that section.

Judge Severens, delivering the judgment of the Circuit Court of Appeals, thus stated, and I think accurately, the result of certain evidence on the part of the Government: "Upon the trial the Government offered evidence tending to prove that the respondents adopted a scheme of lottery business called by them 'policy,' which they subsequently carried into operation, of the character following: The principal office for the transaction of the business was located in a building in Cincinnati, Ohio. The place where the drawings of numbers from a wheel were made was located in another building or room adjoining the principal office and connected with it by a private way. In various places in that city and elsewhere, in Ohio and other States, one, at least, being in Newport, Kentucky, they had offices or stations at which the patrons purchased tickets or chances in the drawings to be thereafter made in Cincinnati, at the place mentioned. Successive numbers from one to seventy-eight, inclusive, were each day

put into the wheel, and at each drawing twelve numbers were taken out. A list of these twelve numbers was taken into the principal office and there recorded. Several hours in the day before these drawings respectively took place, the patrons purchased chances at the sub-offices or stations from an agent of the respondents, or from one of the latter, in charge at that place. In this instance the purchase was made of the respondent Hoff at the Newport office. The purchaser (Harrison, in this instance) chose three of the numbers from one to seventy-eight, inclusive, and wrote them upon a slip of paper, of which, according to the method of doing business, he kept a duplicate. He handed his list of numbers, with figures to denote the sum paid, upon a slip of paper, and the money to pay for his chance, to the person in charge to be transmitted to the principal office in Cincinnati, by the 'carrier,' who would call to take them up. When these slips and the moneys were all brought into the principal office, the drawing above mentioned took place. If the three numbers on the slip were of the twelve drawn from the wheel, the purchaser would win the prize, $200, when the game (of which there were several forms) was played on the basis above stated. If not, he lost. A report of the drawings was sent back to the station from which the slip came, and if any purchaser had made a 'hit' his slip would be returned with the prize to be there delivered to him. Of the respondents, Reilley was in charge of the principal office, Francis of the drawings, Hoff of the station in Newport, as already stated, and Edgar was the carrier. The slip of paper taken by the carrier represented the interest of the purchaser of the chance, and, although containing figures only, it had a definite meaning and was understood by all the parties concerned. It was the transportation of some of such lists, one being that of Harrison, from Newport, Kentucky, to Cincinnati, Ohio, with knowledge of their character that constituted the overt act done in pursuance of the conspiracy." That the counsel for the accused held the same view of the evidence is shown in an extract from their brief printed in the margin.[1]

[1] "In the *Francis* case, now before the court, it was shown that the principal office of the 'policy' concern was located in Cincinnati, Ohio, that the

JUSTICE HARLAN, dissenting.

I. The act of March 2, 1895, c. 191, was under examination by this court in *France* v. *United States*, 164 U. S. 676. That was an indictment for a conspiracy to violate its first section. The judgment of conviction in that case was reversed upon the ground that the evidence showed that the papers and instruments which the defendants caused to be carried from Kentucky to Ohio did not relate to a lottery to be thereafter drawn, but to one that had previously been drawn. The court said: "There is no contradiction in the testimony, and the Government admits and assumes that the drawing in regard to which these papers contained any information had already taken place in Kentucky, and it was the result of that drawing only that was on its way in the hands of messengers to the agents of the lottery in Cincinnati. The statute does not cover the transaction, and however reprehensible the acts of the plaintiffs in error may be thought to be, we cannot sustain a conviction on that ground. Although the objection is a narrow one, yet the statute being highly penal, rendering its violator liable to fine

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drawings took place in an adjoining building or room, and that sub-offices or agencies were maintained in various places in that city and in other cities in Ohio and other States, at which patrons or players would select numbers in the drawings to be made in Cincinnati. One desiring to play such a game would choose three of the numbers from 1 to 78 inclusive, and write them upon a slip of paper, of which he kept a duplicate. He would hand his list of numbers, with figures to denote the sum paid, together with the money to pay for his chance, to the person in charge of the sub-office or agency to be transmitted to the principal office in Cincinnati. When these slips and the moneys were brought to the principal office, the drawing took place. Successive numbers from 1 to 78 inclusive were put into a wheel, and at each drawing twelve numbers were taken out. If the three numbers on the slip were of the twelve drawn from the wheel, the purchaser would win a prize. If not, he lost. A report of the drawings was sent back to the agency from which the slip came, and, if any purchaser had won a prize or, as it is termed, made a 'hit,' his slip was returned with the prize to be there delivered to him. In the instance shown by the testimony, the selection was made by the witness Harrison at the Newport office. The defendant Reilley was claimed to be in charge of the principal office in Cincinnati, Francis in charge of the drawings, and Hoff in charge of the station in Newport. Edgar carried the slips from Newport to Cincinnati, and this carriage of the slips constituted the alleged overt act done in pursuance of a comspiracy in violation of the act of Congress."

and imprisonment, we are compelled to construe it strictly. Full effect is given to the statute by holding that the language applies only to that kind of a paper which depends upon a lottery the drawing of which has not yet taken place, and which paper purports to be a certificate, etc., as described in the act. If it be urged that the act of these plaintiffs in error is within the reason of the statute, the answer must be that it is so far outside of its language that to include it within the statute would be to legislate and not to construe legislation."

No such point can be made in this case, because the indictment presents a case within the provisions of the statute as interpreted in *France* v. *United States;* for it refers to papers and instruments relating to a lottery thereafter to be drawn. Besides, there was evidence tending to show that the papers and instruments which the defendants were charged to have caused to be carried from Kentucky to Ohio had reference to a future drawing and not to one that had already occurred. And the trial judge, after stating the facts, said to the jury: "Did these papers, or so-called lottery tickets, which it is alleged defendants conspired to carry from Kentucky to Ohio, purport to represent interests of players in a drawing afterwards to take place? It is not necessary, gentlemen, that they should purport or show upon their face that they were tickets in a lottery giving an interest to the holder, in a drawing afterwards to take place, but their purport may be shown outside of the papers. Now, as to the evidence offered by the Government upon that point, you will recall the evidence of France, who was introduced as an expert, to tell what they were, and the evidence of Harrison, that he wrote out his ticket and delivered one half of it to the agent, paid his money and held the duplicate—one of the duplicates, his evidence of the interest he had in the drawing that was to come off that day, and the evidence to which I have before referred as to the fact that the duplicate left with Hoff was afterwards found in possession of Edgar at the end of the bridge shortly after the play was made. If, from these facts you are satisfied that it represented an interest in the drawings afterwards to take place then, within the meaning of the law, it purported to represent the interest of the

player in the drawing, although it did not so state upon its face."

II. In *Champion* v. *Ames*, p. 321, *ante*, this day decided, it has been held that lottery tickets were subjects of traffic among those who choose to sell or buy them; that the carriage of such tickets by independent carriers from one State to another was therefore interstate commerce; that under its power to regulate commerce among the several States, Congress—subject to the limitations imposed by the Constitution upon the powers granted by it—has plenary authority over such commerce, and may prohibit the carriage of such tickets from State to State; and that legislation to that end and of that character is not inconsistent with any limitation or restriction imposed by the Constitution upon the exercise of the powers granted to Congress.

Here, there was no carrying of lottery tickets from Kentucky to Ohio by an independent carrier engaged in the transportation, for hire, of freight and packages from one State to another. But the carrying was by an individual acting in pursuance of a conspiracy between himself and others that had for its object the carrying from Kentucky to Ohio of certain papers or instruments representing a chance, share or interest in or dependent upon the event of a lottery, thereafter to be drawn, which offered prizes dependent upon lot or chance. Those who were parties to the conspiracy were, in effect, partners in committing the crime denounced by the above act of Congress; and the act of one of the parties in execution of the objects of such conspiracy was the act of all the conspirators.

The judgment therefore should be affirmed, unless it be that the carrying of lottery tickets from one State to another by an individual, acting in coöperation with his co-conspirators, is not interstate "commerce." But is it true that the "commerce among the several States," which Congress has the power to regulate, cannot be carried on by an individual, or by a combination of individuals? We think not. In *Paul* v. *Virginia*, 8 Wall. 168, 183, the court, referring to the grant to Congress of power to regulate commerce among the several States, said: "The language of the grant makes no reference to the instru-

mentalities by which commerce may be carried on; it is general, and includes alike commerce by individuals, partnerships, associations, and corporations." In *Welton* v. *State of Missouri*, 91 U. S. 275, 280, it was said that the power to regulate commerce embraces "all the instruments by which such commerce may be conducted." That the commerce clause of the Constitution embraces alike commerce by individuals, partnerships, associations and corporations was recognized in *Pensacola Tel. Co.* v. *Western Union Tel. Co.*, 96 U. S. 1, 21. And in *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 205, the court said that commerce among the States "includes commerce by whomsoever conducted, whether by individuals or by corporations."

In *Champion* v. *Ames* the carrying of lottery tickets happened to be by an incorporated express company. But if it had been by an express company organized as a partnership or joint stock company the result of the decision could not have been different. In this case, if the carrying had been by an ordinary express wagon, owned by a private person, but employed by the accused and other conspirators to carry the lottery papers in question from Kentucky to Ohio, surely the carrying in that mode would be commerce within the meaning of the Constitution. It cannot be any less commerce because the carrying was by an individual who, in conspiracy or coöperation with others, caused the carrying to be done in violation of the act of Congress. The learned counsel for the accused, referring to the legislation enacted prior to 1895, which had for its object to exclude lottery matter from the mails, and to prohibit the importation of lottery matter from abroad, says: "In 1895 the act now in question was passed, supplementing the provisions of the prior acts so as to prohibit the act of causing lottery tickets to be carried and lottery advertisements to be transferred from one State to another by *any means or methods*."

It seems to me that the evidence made a case within the act of Congress, and that no error of law was committed by the trial court. The papers carried from Kentucky to Ohio were of the class described in the act, "any paper, certificate, or in-

strument purporting to be or represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, so-called gift concert, or similar enterprise, offering prizes dependent upon lot or chance." The paper or instrument carried from Kentucky to Ohio, of which the purchaser had a duplicate, certainly represented, to all the parties concerned, a chance, or interest dependent upon an event of a lottery or "similar enterprise," offering prizes dependent upon a lot or chance. To hold otherwise is to stick in the bark. It informed the policy gambler, if a prize was drawn, that the person who held the duplicate was entitled to the prize, and it was therefore a paper the carrying of which from one State to another made the conspirators causing it to be so carried, guilty of an offence under the act of Congress. The reasoning by which the case is held not to be embraced by the act of Congress is too astute and technical to commend itself to my judgment. It excludes from the operation of the act a case which, as I think, is clearly within its provisions.

LOUISVILLE AND JEFFERSONVILLE FERRY COMPANY *v.* KENTUCKY.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 17. Argued December 8, 9, 1902.—Decided February 23, 1903.

A franchise granted by the proper authorities of Indiana, for maintaining a ferry across the Ohio River from the Indiana shore to the Kentucky shore, is an Indiana franchise, an incorporeal hereditament derived from, and having its legal *situs* for purposes of taxation in, Indiana.

The fact that such franchise was granted to a Kentucky corporation, which held a Kentucky franchise to carry on the ferry business from the Kentucky shore to the Indiana shore (the jurisdiction of Kentucky extending only to low water mark on the northern and western side of the Ohio River) does not bring the Indiana franchise within the jurisdiction of Kentucky for purposes of taxation. The taxation of the Indiana franchise by Kentucky would amount to a deprivation of property without

Statement of the Case.

due process of law, in violation of the provisions of the Fourteenth Amendment.

Quære: Whether such taxation would be a burden on interstate commerce and make it inconsistent with the power of Congress to regulate commerce among the several States, not decided.

THIS action was brought against the Louisville and Jeffersonville Ferry Company, a corporation of Kentucky, to recover certain taxes alleged to be due that Commonwealth in virtue of the valuation and assessment by the State Board of Valuation and Assessment of the corporate franchise of the defendant company for the year 1894.

Some of the provisions of the Revised Statutes of Kentucky under which that Board proceeded are given in the margin.[1]

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[1] Barb. & Carr. Stat. 1894. "§ 4077. Every railway company . . . and every other like company, corporation or association, also every other corporation, company or association having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town and taxing district, where its franchise may be exercised. The Auditor, Treasurer and Secretary of State are hereby constituted a Board of Valuation and Assessment, for fixing the value of said franchise, except as to turnpike companies, which are provided for in section 4095 of this article, the place or places where such local taxes are to be paid by other corporations on their franchise, and how apportioned, where more than one jurisdiction is entitled to a share of such tax, shall be determined by the Board of Valuation and Assessment, and for the discharge of such other duties as may be imposed on them by this act. The Auditor shall be chairman of said Board, and shall convene the same from time to time, as the business of the Board may require.

"§ 4078. In order to determine the value of the franchises mentioned in the next preceding section, the corporations, companies and associations mentioned in the next preceding section, except banks and trust companies whose statements shall be filed as hereinafter required by section 4092 of this article, shall annually, between the 15th day of September and the 1st day of October, make and deliver to the Auditor of Public Accounts of this State a statement, verified by its president, cashier, secretary, treasurer, manager, or other chief officer or agent, in such form as the Auditor may prescribe, showing following facts, viz.: The name and principal place of business of the corporation, company, or association; the kind of business engaged in; the amount of capital stock, preferred and common; the number of shares of each; the amount of stock paid up; the par and real

Statement of the Case.

The company filed an answer, which upon demurrer was adjudged to be insufficient. The defendant declining to answer further, judgment was rendered for the Commonwealth. That judgment was affirmed by the Court of Appeals of Kentucky, 57 S. W. Rep. 624, and the case is here upon writ of error sued out by the ferry company. The ground of our jurisdiction is

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value thereof; the highest price at which such stock was sold at a *bona fide* sale within twelve months next before the 15th day of September of the year in which the statement is required to be made; the amount of surplus fund and undivided profits, and the value of all other assets; the total amount of indebtedness as principal; the amount of gross or net earnings or income, including interest on investments, and incomes from all other sources for twelve months next preceding the 15th day of September of the year in which the statement is required; the amount and kind of tangible property in this State, and where situated, assessed, or liable to assessment in this State, and the fair cash value thereof, estimated at the price it would bring at a fair voluntary sale; and such other facts as the Auditor may require.

"§ 4079. Where the line or lines of any such corporation, company or association extend beyond the limits of the State or county, the statement shall, in addition to the other facts hereinbefore required, show the length of the entire lines operated, owned, leased or controlled in this State, and in each county, incorporated city, town, or taxing district, and the entire line operated, controlled, leased, or owned elsewhere. If the corporation, company, or association be organized under the laws of any other State or Government, or organized and incorporated in this State, but operating and conducting its business in other States as well as in this State, the statement shall show the following facts, in addition to the facts hereinbefore required: The gross and net income or earnings received in this State and out of this State, on business done in this State, and the entire gross receipts of the corporation, company, or association in this State and elsewhere during the twelve months next before the 15th day of September of the year in which the assessment is required to be made. In cases where any of the facts above required are impossible to be answered correctly, or will not afford any valuable information in determining the value of the franchises to be taxed, the said Board may excuse the officer from answering such questions: *Provided*, That said Board, from said statement, and from such other evidence, as it may have, if such corporation, company or association be organized under the laws of this State, shall fix the value of the capital stock of the corporation, company or association, as provided in the next succeeding section, and from the amount thus fixed shall deduct the assessed value of all tangible property assessed in this State, or in the counties where situated. The remainder thus found shall be the value of its corporate franchise subject to taxation as aforesaid."

that the company claims that, by the judgment of the highest court of Kentucky, affirming the judgment of the court of original jurisdiction, it has been denied rights belonging to it under the Constitution of the United States.

The facts admitted by the demurrer to the answer and therefore, for the purposes of the present hearing, to be taken as true are substantially as follows:

By an act of the General Assembly of Kentucky approved March the 16th, 1869, the Louisville and Jeffersonville Ferry Company was created a corporation, with power to carry on the business of ferrying freight, passengers and vehicles over the Ohio River and to purchase ferry boats, wharves and ferry franchises for any ferry or ferries between Louisville, Kentucky, and Jeffersonville, Indiana; and upon the purchase of such franchises to have the right to carry on and conduct a ferry or ferries between those cities. It was also authorized to accept boats, franchises, wharves and other property in payment of stock subscribed and at such prices as might be agreed on.

In the year of 1802 William Henry Harrison, then Governor and commander-in-chief of the Indiana Territory, granted to Marsden G. Clark a license for a ferry at Jeffersonville, Indiana, for the transportation of passengers, carriages, horses and cattle across the Ohio River at that place.

In the same year Governor Harrison granted to one Joseph Bowman a license to keep a ferry from the landing near the spring in the town of Jeffersonville across the Ohio River to the public road at the mouth of Bear Grass Creek in Kentucky.

In 1820 George White, by an act of the Indiana Legislature, was authorized to keep a ferry in the town of Jeffersonville and to ferry off and from any portion of the public ground or commons in that town lying upon or bordering upon the Ohio River across that river to the opposite shore or mouth of Bear Grass Creek—that creek being then as well as now within the corporate limits of Louisville and near the point at which the defendant company now lands its ferry boats in Kentucky.

These three ferry franchises, about the year 1837, vested in A. Wathen, Charles Strader, John Shallcross and James

Statement of the Case.

Thompson, and in 1865 came to be owned by John Shallcross, Moses Brown, Hiram Mayberry, James Wathen, A. Wathen, Charles Woolfolk & Co., J. B. Smith, W. C. Hite, E. S. Hoffman, P. Varble and Daniel Park. During all the intervening years ferries had been maintained.

In 1865 the persons then owning the ferry organized as a partnership for the purpose of operating it, and in that capacity continued to operate it until the Louisville and Jeffersonville Ferry Company was incorporated, as above stated. Under its act of incorporation the company procured to be conveyed to itself the above-mentioned ferry franchises with the boats then owned by the partnership, and issued therefor its fully paid capital stock for $200,000. The boats and personal property so acquired were not of great value—the principal value being in the franchises acquired as above set forth.

In 1887 the defendant company made a contract with the Sinking Fund Commissioners of the city of Louisville, a corporation having charge of certain fiscal affairs of that city, under which the defendant leased the ferry privileges in Louisville, agreeing to pay therefor $800 a year and a wharfage fee annually of $400. That contract by its terms expired January the 1st, 1902.

The defendant company states in its answer "that the only ferry franchises owned by it are those above mentioned, which were granted by the authorities of the State of Indiana."

All tangible property of the defendant company in Kentucky was assessed in the fall of 1893 for the state tax for the year 1894, and that tax was paid. The property so assessed consisted of all the company's boats and other personal property, it having no real estate in Kentucky. For the same year all real estate owned by the defendant in Indiana was assessed by the authorities of that State and the tax thereon paid.

The company had no intangible property except the franchise heretofore described.

"The Board of Valuation and Assessment ascertained what had been the net earnings of the defendant up to September 15, 1893, for the year preceding that date. It then capitalized said net earnings at 6 per cent—that is, to have been such an amount

as at 6 per cent would produce the sum of $121,050. From this the board deducted $54,164, being the assessed value of the defendant's property in Kentucky and Indiana, leaving the sum of $66,886 as the value of defendant's franchise."

The boats owned by the defendant company when this action was brought and also those owned by it in 1893 "were regularly enrolled, under the laws of the United States, at the port of Louisville and were assessed, as above stated, by the sheriff of Jefferson County, in the fall of that year and the tax paid upon them in the year 1894."

The defendant brought "before the Board of Valuation and Assessment, before that board had made its assessment final, the fact that its whole capital stock had been issued in consideration of the transfer of the said ferry franchises granted by the State of Indiana and attendant property, and showed that all its property had been assessed as above explained, and protested against any assessment being made upon its franchises as being beyond the jurisdiction of the said board and outside of the territorial jurisdiction of the State of Kentucky, and not taxable in Kentucky; and it protested against the said board making any valuation whatever of its capital stock because all of its property had been once assessed, and any valuation made upon its capital stock would include alone these franchises and profits resulting to the defendant from engaging in interstate commerce; and the defendant further requested the said board, if it should insist upon making a valuation upon its capital stock, to deduct therefrom the value of these franchises. The said board refused to enter into the question of the valuation of the said franchise granted by the State of Indiana, as aforesaid, and owned and operated by this defendant, and refused to regard the fact that the profits which were earned by this defendant came from interstate commerce."

Substantially the whole revenue of the defendant company is derived from interstate commerce, and its net returns upon which the above capitalization was made represent its gains from interstate commerce; that is, from the carriage of persons and property between the States of Indiana and Kentucky. Such was the case presented by the answer.

Mr. Alexander Pope Humphrey for plaintiff in error.

Mr. Clifton J. Pratt, attorney general of the State of Kentucky, and *Mr. D. W. Sanders* for defendant in error.

Mr. Justice Harlan, after making the foregoing statement, delivered the opinion of the court.

The ferry company insists that the judgment of the Court of Appeals of Kentucky, affirming the judgment of the court of original jurisdiction, (which sustained the action of the State Board of Valuation and Assessment,) had the effect to deny rights belonging to it under the Constitution of the United States.

It is appropriate here to state the grounds upon which the Court of Appeals of Kentucky proceeded. That court said: "The judgments from which the appeals are prosecuted are for the franchise tax for the years 1894, 1895, 1896, 1897, and 1898. The appellant is a corporation organized under a special act of the Legislature passed in 1869. It purchased a ferry franchise which had been originally granted by the territorial authorities of Indiana, which authorized the original grantee to conduct a ferry business across the Ohio River from Indiana to Kentucky. By regular devolution of title, through descents and conveyances, appellant owns the rights thus granted. The franchise thus acquired authorizes the appellant to transport persons and property from Jeffersonville, Indiana, to Louisville, Kentucky. There was vested in the Sinking Fund Commissioners of the city of Louisville title to the ferry rights along the Ohio River within the boundaries of that city, and by an agreement with them the appellant became the owner of it. The appellant owned certain ferry boats which are enrolled at the port of Louisville. It owned certain real estate in the State of Indiana. It has paid its taxes upon its real property in Indiana, and upon its personal property in this State. It has paid its taxes only upon its tangible property. It appears to have no income except the revenue derived from carrying persons and property from one side of the river to the other. The

Board of Valuation and Assessment fixed the value of the franchise for the corporation as if it conducted all of its business in the territorial limits of the State of Kentucky, not deducting anything from that value on account of the fact that it exercised the privilege of conveying passengers from Jeffersonville to Louisville by reason of its acquisition of privileges which were originally granted under the laws of that State. . . . The appellant is a Kentucky corporation. The Board of Valuation and Assessment did not attempt to assess or tax its revenues coming from the exercise of its franchise in the transportation of persons and property over the Ohio River. But under certain sections of the Kentucky statutes, it assessed the value of appellant's franchise, which is its intangible property. The board did not assess or attempt to assess the property, either tangible or intangible, which it owned in the State of Indiana."

Again: "By virtue of its corporate authority the appellant acquired ferry boats, the ferry rights within the city of Louisville, which included the right to transport persons and property from Kentucky to Indiana over the Ohio River, and the necessary use of its wharf to carry on that business. It also, by contract (which its charter seems to have authorized it to do), acquired wharf privileges on the Indiana side, and also the right which had been previously granted by Indiana to transport persons and property from Indiana to Kentucky over the Ohio River. It also owns a park in Indiana. The property thus acquired constituted all of its property, tangible and intangible, in Kentucky and Indiana. Having thus acquired the foregoing property, and having profitably used it, its corporate franchise presumably became of the value fixed by the Board of Valuation and Assessment. If the franchise of the appellant became valuable by the acquisition of tangible or intangible property, or both, the effect is exactly the same, whether it is acquired in Indiana or in Kentucky, or both. It is not the tangible or intangible property in Indiana which the appellant acquired by purchase which is sought to be taxed, but the value of its franchise which has been created in, and now exists in, Kentucky. . . . The State of Kentucky is not attempting to impose a tax upon receiving and handling persons and prop-

erty, but is simply attempting to collect a franchise tax on the corporation created by law. . . . There is no doubt but what the business which the appellant carries on may be properly designated as 'interstate commerce,' and that it is a subject of national character; Congress having the authority and the power under the Constitution to regulate it. The State of Kentucky is not attempting to impose a tax upon receiving and handling persons and property, but is simply attempting to collect a franchise tax on the corporation created by law. As authorized by the laws and Constitution, the State is entitled to impose a tax upon its tangible property. . . . The appellant is domiciled in Kentucky, and the property sought to be taxed has its *situs* in Kentucky; and, as we have said, there is no attempt to tax the appellant's business, income, or revenues, but its income is alone considered in fixing the value of its franchise."

It thus appears from the admitted facts and from the opinion of the court below that the State Board, in its valuation and assessment of the franchise derived by that company from Kentucky, included the value of the franchise obtained from Indiana for a ferry from its shore to the Kentucky shore. In short, as stated by the Court of Appeals, the value of the franchise of the ferry company was fixed "as if it conducted all of its business in the territorial limits of the State of Kentucky," making no deduction for the value of the franchise obtained from Indiana.

The boundary of Kentucky extends only to low water mark on the western and northwestern banks of the Ohio River. *Henderson Bridge Company* v. *Henderson City*, 173 U. S. 592, 609–613, and authorities there cited. In that case it was said that although the jurisdiction of that Commonwealth for all the purposes for which any State possesses jurisdiction within its territorial limits was co-extensive with its established boundaries, that jurisdiction was attended by the fundamental condition that it must not be exerted so as to entrench upon the authority of the National Government or to impair any rights secured or protected by the National Constitution.

So that the authority of the ferry company, derived from

Kentucky, to transport persons, freight and property across the Ohio River from Kentucky did not invest it with authority to establish and maintain a ferry from the Indiana shore to the Kentucky shore. That is admitted by the counsel for Kentucky. Indeed, in *Newport &c.* v. *Taylor's Ex'rs*, 16 B. Mon. 699, 786, the Court of Appeals of Kentucky said that "Kentucky has never claimed the exclusive right of ferriage across the Ohio River except from this shore, and while she has interdicted the establishment of ferries from this side, within a certain distance of an established ferry on this side, she has constantly recognized the right of the authorities on the other side, to establish ferries from that side, without regard to the interdict." The same thought was expressed in *Reeves* v. *Little*, 7 Bush, 470. The case of *Newport &c.* v. *Taylor's Ex'rs*, was brought to this court, and the judgment of the Court of Appeals of Kentucky was affirmed. *Conway* v. *Taylor's Ex'r*, 1 Black, 603, 631. Referring to the ferry franchise granted by Kentucky, this court there said: "The franchise is confined to the transit from the shore of the State. The same rights which she claims for herself she concedes to others. She has thrown no obstacle in the way of the transit from the States lying upon the other side of the Ohio and Mississippi. She has left that to be wholly regulated by their ferry laws. We have heard of no hostile legislation, and of no complaints, by any of those States. It was shown in the argument at bar that similar laws exist in most, if not all, the States bordering upon those streams. They exist in other States of the Union bounded by navigable waters."

It must therefore be assumed that the franchise granted by Indiana to maintain the ferry from the Indiana shore is wholly distinct from the franchise obtained from Kentucky to maintain the ferry from the Kentucky shore, although the enjoyment of both are essential to a complete ferry right for the transportation of persons and property across the river both ways. And each franchise is property entitled to the protection of the law. Kent says that the privilege of establishing a ferry and taking tolls for the use of the same is a franchise, and that "an estate in such a franchise, and an estate in land, rest upon the same

principle, being equally grants of a right or privilege for an adequate consideration." 3 Kent, 459. In his Treatise on the American Law of Real Property, Washburn says that the right granted by the legislature, as representing the sovereign power, to carry passengers across streams, or bodies of water, or the arms of the sea, from one point to another, for compensation, is to be deemed a franchise, and belongs to the class of estates called incorporeal hereditaments. 2 Washburn, §§ 1212, 1215, 6th edition. See also 1 Cooley's Blackstone, Bk. II, pp. 21, 36. In *Conway* v. *Taylor's Ex'r*, above cited, this court approved of Kent's view, and said: "A ferry franchise is as much property as a rent or any other incorporeal hereditament, or chattels, or realty. It is clothed with the same sanctity and entitled to the same protection as other property." In Kentucky the right of the widow to have dower assigned to her in a ferry has been recognized. *Stevens* v. *Stevens*, 3 Dana, 371.

As, then, the privilege of maintaining the ferry in question from the Indiana shore to the Kentucky shore is a franchise derived from Indiana, and as that franchise is a valuable right of property, is it within the power of Kentucky to tax it directly or indirectly? It is said that the Indiana franchise has not been taxed, but only the franchise derived from Kentucky; that the tax is none the less a tax on the Kentucky franchise, because of the value of that franchise being increased by the acquisition by the Kentucky corporation of the franchise granted by Indiana. This view sacrifices substance to form. If the Board of Valuation and Assessment, for purposes of taxation, had separately valued and assessed at a given sum the franchise derived by the ferry company from Kentucky, and had separately valued and assessed at another given sum the franchise obtained from Indiana, the result would have been the same as if it had assessed, as it did assess, the Kentucky franchise as an unit upon the basis of its value as enlarged or increased by the acquisition of the Indiana franchise.

The learned counsel for Kentucky says that it is the value of the company's franchise contained "in its charter" which is the subject of taxation. But the franchise obtained from Indiana is not in the company's charter granted by Kentucky.

It is contained only in the act of the Legislature of Indiana. The Indiana franchise was not carried into the charter of the Kentucky corporation by reason of that corporation having the authority to purchase it. Its existence and validity depend entirely upon the laws of Indiana.

Counsel further say that Kentucky does not impose a tax upon the company's privilege, *as such*, granted by the State of Indiana. If it had done so the tax so imposed would not have been defended as valid. Yet by her statute, under which the Board of Valuation and Assessment proceeded, Kentucky has accomplished that result by including for purposes of taxation, in the valuation of the franchise granted by it, the value of the franchise granted by Indiana, and then taxing the franchise of the Kentucky corporation upon the basis of the aggregate value of both franchises. Although now owned by one corporation these are separate franchises.

There is, in our judgment, no escape from the conclusion that Kentucky thus asserts its authority to tax a property right, an incorporeal hereditament, which has its *situs* in Indiana. While the mode, form and extent of taxation are, speaking generally, limited only by the wisdom of the legislature, that power is limited by a principle inhering in the very nature of constitutional Government, namely, that the taxation imposed must have relation to a subject within the jurisdiction of the taxing Government. Hence, this court, speaking by Chief Justice Marshall, in *McCulloch* v. *Maryland*, 4 Wheat. 316, 429, said that, while all subjects over which the sovereign power of a State extends are objects of taxation, "those over which it does not extend, are, upon the soundest principles, exempt from taxation." That proposition, he said, could almost be pronounced self-evident. It was therefore held in *Hays* v. *Pacific Mail S. S. Co.*, 17 How. 596, 599, that certain steamers engaged in interstate commerce were not subject to taxation in a State where they might be temporarily when prosecuting their business, but were taxable at their home port, which was their *situs*, and where they belonged, the court saying, "we are satisfied that the State of California had no jurisdiction over these vessels for the purpose of taxation; they were not, prop-

erly, abiding within its limits, so as to become incorporated with the other personal property of the State; they were there but temporarily, engaged in lawful trade and commerce, with their *situs* at the home port, where the vessels belonged, and where the owners were liable to be taxed for the capital invested, and where the taxes had been paid;" in *St. Louis* v. *Ferry Co.*, 11 Wall. 423, 429, 431, that certain ferry boats belonging to an Illinois corporation and plying between East St. Louis, Illinois, and St. Louis, Missouri, were not taxable in the latter State, but at their home port in the former State, the court saying that a tax was void when there was no jurisdiction as to the property taxed; in *Morgan* v. *Parham*, 16 Wall. 471, 476, that a vessel engaged in interstate commerce and being from time to time in Mobile while prosecuting its business, was not taxable in Alabama, but was taxable in New York, where it was owned and registered, the court saying that, in its opinion, "the State of Alabama had no jurisdiction over this vessel for the purpose of taxation, for the reason that it had not become incorporated into the personal property of the State, but was there temporarily only, and that it was engaged in lawful commerce between the States with its *situs* at the home port of New York, where it belonged and where its owner was liable to be taxed for its value;" and in *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 206, that "the property of foreign corporations engaged in foreign or interstate commerce, as well as the property of corporations engaged in other business, is subject to state taxation, provided always it be within the jurisdiction of the State." In Cooley on Taxation, the author, while conceding that the legislative power extends over everything, whether it be person, property, possession, franchise, privilege, occupation or right, says that "persons and property not within the territorial limits of a State cannot be taxed by it;" and that "a State can no more subject to its power a single person or a single article of property whose residence or legal *situs* is in another State, than it can subject all the citizens or all the property of such other State to its power." 2d ed. pp. 5, 55, 159.

We recognize the difficulty which sometimes exists in par-

ticular cases in determining the *situs* of personal property for purposes of taxation, and the above cases have been referred to because they have gone into judgment and recognize the general rule that the power of the State to tax is limited to subjects within its jurisdiction or over which it can exercise dominion. No difficulty can exist in applying the general rule in this case; for, beyond all question, the ferry franchise derived from Indiana is an incorporeal hereditament derived from and having its legal *situs* in that State. It is not within the jurisdiction of Kentucky. The taxation of that franchise or incorporeal hereditament by Kentucky is, in our opinion, a deprivation by that State of the property of the ferry company without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States; as much so as if the State taxed the real estate owned by that company in Indiana.

This view is not met by the suggestion that Kentucky can make it a condition of the exercise of corporate powers under its authority that the tax upon the franchise granted by it shall be measured by the value of all its property, wherever situated, of whatever nature, or from whatever source derived. It is a sufficient answer to this suggestion to say that no such condition was prescribed in the charter of the ferry company when it was granted and accepted. Nor does the taxing statute in question make it a condition of the ferry company's continuing to exercise its corporate powers that it shall pay a tax for its property having a *situs* in another State. There is no suggestion in the company's charter that the State would ever, in any form, tax its property having a *situs* in another State. We express no opinion as to the validity of such a condition if it had been inserted in the company's charter, or if it were now, in terms, prescribed by any statute. We decide nothing more than it is not competent for Kentucky, under the charter granted by it, and under the Constitution of the United States, to tax the franchise which its corporation, the ferry company, lawfully acquired from Indiana, and which franchise or incorporeal hereditament has its *situs*, for purposes of taxation, in Indiana.

As what has been said is sufficient to dispose of the case, we need not consider the question arising upon the record and urged

by counsel, whether the taxation by Kentucky of the ferry company's Indiana franchise to transport persons and property from Indiana to Kentucky is not, by its necessary effect, a burden on interstate commerce forbidden by the Constitution of the United States.

The judgment of the Court of Appeals of Kentucky is reversed and the cause remanded for such further proceedings as may not be inconsistent with this opinion.

Reversed.

THE CHIEF JUSTICE and MR. JUSTICE SHIRAS dissent.

LOUISVILLE AND JEFFERSONVILLE FERRY COMPANY *v.* KENTUCKY, No. 18. SAME *v.* SAME, No. 19. SAME *v.* SAME, No. 20. SAME *v.* SAME, No. 21. SAME *v.* SAME, No. 22. Error to the Court of Appeals of the State of Kentucky.

MR. JUSTICE HARLAN delivered the opinion of the court.

It having been stipulated between the parties that the above cases should abide the decision in No. 17, just decided, the judgment in each case is reversed, and each case is remanded to the state court for such further proceedings as may not be inconsistent with the opinion in No. 17.

Reversed.

BIGBY *v.* UNITED STATES.

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

No. 111. Argued December 4, 5, 1902.—Decided February 23, 1903.

There is no contract, express or implied, which can be made the basis for jurisdiction by a United States Circuit Court under the act of Congress of March 3, 1887, known as the Tucker Act, between the United States and a person who, while properly in a government building, sustains injuries by the fall of an elevator belonging to the government and operated by one of its employés. An action against the United States to recover damages for such injuries is necessarily one sounding in tort and is not maintainable in any court.

BIGBY, the plaintiff in error, claimed in his petition to have been damaged to the extent of ten thousand dollars on account of certain personal injuries received by him while entering an elevator placed by the United States in its court-house and post-office building in the city of Brooklyn, and asked judgment for that sum against the Government.

The petition was demurred to upon three grounds, namely, that the court had no jurisdiction of the person of the defendant, or of the subject of the action, and that the petition did not state facts sufficient to constitute a cause of action against the United States.

The demurrer was sustained by the Circuit Court on each of the grounds specified, and so far as it was sustained upon the ground that the petition did not state a cause of action, it was sustained because the action was not authorized by the act of Congress known as the Tucker Act, approved March 3, 1887, c. 359, and entitled "An act to provide for the bringing of suits against the Government of the United States." 24 Stat. 505. The action was accordingly dismissed. 103 Fed. Rep. 597.

The specific allegations of the petition are—

That the United States is a corporation created by the Con-

stitution with its principal office in Washington, and within the meaning of the New York Code of Civil Procedure is a foreign corporation;

That on or about November 27, 1899, the petitioner, while on his way to the office of the Marshal of the United States for the Eastern District of New York, and at the request of the United States and of its officers, employés and duly authorized agents, each acting within the scope of his authority, entered into a passenger elevator in the United States court-house and post-office building in Brooklyn, which building and elevator was owned and controlled by the United States, and was designed and intended by it for the use of persons on their way to the office of its said Marshal;

That the United States "then and there entered into an implied contract" with the petitioner, "wherein and whereby, for a sufficient valuable consideration, it agreed to carry your petitioner safely, to operate said elevator with due care, and to employ for the purposes of the operation of said elevator a competent and experienced person;"

That in "violation of said contract, the United States failed to carry the petitioner safely, or to operate the elevator with due care, or to employ for the operation and to put in charge of such elevator a competent and experienced person, and violated its contract with the petitioner in other ways; and,

That in consequence of said failures, respectively, the petitioner, "while entering the said elevator without negligence on his part was caused to fall and his foot, ankle and leg were crushed between said elevator and the top of the entrance into the elevator shaft or a projection in the shaft of said elevator or in some other manner and the back of your petitioner and other parts of the body of your petitioner were also consequently injured and your petitioner consequently suffered a laceration of the ligaments of his ankle and he consequently was caused much bodily and mental pain."

The transcript contains a certificate from the Circuit Court to the effect that in said cause the jurisdiction of that court was in issue, and that the question was "whether a person who is not, and has not been, an employé of the United States, can

sue the United States, in the Circuit Court of the United States, in the district where he resides, to recover damages to the amount of ten thousand dollars, which damages were caused by personal injury received by said person through the negligence of an employé of the United States, while said person injured as aforesaid, was being carried on an elevator in a public building, owned and used by the United States as a post-office and for other governmental uses and purposes, when said person entered said elevator for the purpose of visiting the office of the United States Marshal of such district on official business."

Mr. Roger Foster for plaintiff in error.

Mr. Assistant Attorney General Pradt for defendant in error.

Mr. Justice Harlan, after making the foregoing statement, delivered the opinion of the court.

This being an action against the United States, the authority of the Circuit Court to take cognizance of it depends upon the construction of the above act of March 3, 1887. 24 Stat. 505.

By that act it is provided that the Court of Claims shall have jurisdiction to hear and determine "all claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an Executive Department or upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: *Provided, however,* That nothing in this section shall be construed as giving to either of the courts herein mentioned, jurisdiction to hear and determine claims growing out of the late civil war, and commonly known as 'war claims,' or to hear and determine other claims, which have heretofore been rejected, or reported on adversely by any

court, Department, or commission authorized to hear and determine the same." The act further provided that "the District Courts of the United States shall have concurrent jurisdiction with the Court of Claims as to all matters named in the preceding section where the amount of the claim does not exceed one thousand dollars, and the Circuit Courts of the United States shall have such concurrent jurisdiction in all cases where the amount of such claim exceeds one thousand dollars and does not exceed ten thousand dollars."

It is clear that the act excludes from judicial cognizance any claim against the United States for damages in a case "sounding in tort." But the contention of the plaintiff is, in substance that although the facts constituting the negligence of which he complains, made a case of tort, he may waive the tort; that his present claim is founded upon an implied contract with the Government, whereby it agreed to carry him safely in its elevator, to operate the elevator with due care, and to employ for the purposes of such carriage a competent and experienced person; and, consequently, that his suit is embraced by the words "upon any contract, express or implied, with the Government of the United States." The contention of the United States is that no such implied contract with the Government arose from the plaintiff's entering or attempting to enter and use the elevator in question, and that the claim is distinctly for damages in a case "sounding in tort," of which the act of Congress did not authorize the Circuit Court to take cognizance.

Can the plaintiff's cause of action be regarded as founded upon implied contract with the Government, within the meaning of the act of 1887?

The precise question thus presented has not been determined by this court. But former decisions may be consulted in order to ascertain whether this suit is embraced by the words, in that act, "upon any contract, express or implied, with the Government of the United States." Do those words include an action against the United States to recover damages for personal injuries caused by the negligent management of an elevator erected and maintained by it in one of its court-house and post-office buildings?

In *Gibbons* v. *United States*, 8 Wall. 269, 274—which was an action in the Court of Claims to recover an amount alleged to have been wrongfully exacted by a quartermaster of the United States in the execution of a contract for the delivery of oats—this court said: "But it is not to be disguised that this case is an attempt, under the assumption of an implied contract, to make the Government responsible for the unauthorized acts of its officer, those acts being in themselves torts. No government has ever held itself liable to individuals for the misfeasance, laches, or unauthorized exercise of power by its officers and agents. In the language of Judge Story, 'it does not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs, since that would involve it in all its operations in endless embarrassments, and difficulties, and losses, which would be subversive of the public interests.' . . . The language of the statutes which confer jurisdiction upon the Court of Claims, excludes by the strongest implication demands against the Government founded on torts. The general principle which we have already stated as applicable to all governments, forbids, on a policy imposed by necessity, that they should hold themselves liable for unauthorized wrongs inflicted by their officers on the citizen, though occurring while engaged in the discharge of official duties. . . . These reflections admonish us to be cautious that we do not permit the decisions of this court to become authority for the righting, in the Court of Claims, of all wrongs done to individuals by the officers of the General Government, though they may have been committed while serving that Government, and in the belief that it was for its interest. In such cases, where it is proper for the Nation to furnish a remedy, Congress has wisely reserved the matter for its own determination. It certainly has not conferred it on the Court of Claims."

The same general question arose in *Langford* v. *United States*, 101 U. S. 341, 342, 344, which was an action in the Court of Claims to recover for the use and occupation of lands and buildings, of which certain Indian agents acting for the United States had taken possession without the consent of the American Board of Foreign Missions, which had erected the buildings, and under

which Board the plaintiff claimed title. The United States asserted ownership of the property and disputed the title of the claimant. This court held that the action could not be maintained, and said that the reason for limiting suits to cases of express and implied contracts, as distinguished from cases formed on tort, "is very obvious on a moment's reflection. While Congress might be willing to subject the Government to the judicial enforcement of valid contracts, which could only be valid as against the United States when made by some officer of the Government acting under lawful authority, *with power vested in him to make such contracts*, or to do acts which implied them, the very essence of a tort is that it is an unlawful act, done in violation of the legal rights of some one. For such acts, however high the position of the officer or agent of the Government who did or commanded them, Congress did not intend to subject the Government to the results of a suit in that court. This policy is founded in wisdom, and is clearly expressed in the act defining the jurisdiction of the court; and it would ill become us to fritter away the distinction between actions *ex delicto* and actions *ex contractu*, which is well understood in our system of jurisprudence, and thereby subject the Government to payment of damages for all the wrongs committed by its officers or agents, under a mistaken zeal, or actuated by less worthy motives."

The subject was again considered in *Hill* v. *United States*, 149 U. S. 593, 598–9, which was an action to recover damages for the use and occupation of certain property in the possession of the United States, but of which the plaintiff asserted ownership. This court said: "The United States cannot be sued in their own courts without their consent, and have never permitted themselves to be sued in any court for torts committed in their name by their officers. Nor can the settled distinction, in this respect, between contract and tort, be evaded by framing the claim as upon an implied contract. *Gibbons* v. *United States*, 8 Wall. 269, 274; *Langford* v. *United States*, 101 U. S. 341, 346; *United States* v. *Jones*, 131 U. S. 1, above cited. An action in the nature of assumpsit for the use and occupation of real estate will never lie where there has been no relation of contract

between the parties, and where the possession has been acquired and maintained under a different or adverse title, or where it is tortious and makes the defendant a trespasser. *Lloyd* v. *Hough*, 1 How. 153, 159; *Carpenter* v. *United States*, 17 Wall. 489, 493. In *Langford* v. *United States*, it was accordingly adjudged that, when an officer of the United States took and held possession of land of a private citizen, under a claim that it belonged to the Government, the United States could not be charged upon an implied obligation to pay for its use and occupation."

In *Robertson* v. *Sichel*, 127 U. S. 507, 515, the court said: "The Government itself is not responsible for the misfeasances, or wrongs, or negligences, or omissions of duty of the subordinate officers or agents employed in the public service; for it does not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs; since that would involve it, in all its operations, in endless embarrassments, and difficulties, and losses, which would be subversive of the public interests." So in *German Bank of Memphis* v. *United States*, 148 U. S. 573, 579: "It is a well-settled rule of law that the Government is not liable for the nonfeasances or misfeasances or negligence of its officers, and that the only remedy to the injured party in such cases is by appeal to Congress."

In *Schillinger* v. *United States*, 155 U. S. 163, 168, the question was whether a suit could be maintained against the United States to recover damages for the use of a patent for an improvement in a concrete pavement. It appeared that the patent had been used by a contractor who undertook to construct a pavement for the United States. The pavement was constructed, and at the time the action was brought was in use by the Government. It was contended that the United States, having appropriated to public use property that belonged to the plaintiff, came under an implied obligation to compensate him—such implied obligation arising from the constitutional provision that private property should not be taken for public use except upon payment of just compensation. This view was rejected, and the court said: "Can it be that Congress intended that every wrongful arrest and detention of an individual, or

seizure of his property by an officer of the Government, should expose it to an action for damages in the Court of Claims? If any such breadth of jurisdiction was contemplated, language which had already been given a restrictive meaning would have been carefully avoided. . . . Here the claimants never authorized the use of the patent right by the Government; never consented to, but always protested against it, threatening to interfere by injunction or other proceedings to restrain such use. There was no act of Congress in terms directing, or even by implication suggesting, the use of the patent. No officer of the Government directed its use, and the contract which was executed by Cook did not name or describe it. There was no recognition by the Government or any of its officers of the fact that in the construction of the pavement there was any use of the patent, or that any appropriation was being made of claimant's property. The Government proceeded as though it were acting only in the management of its own property and the exercise of its own rights, and without any trespass upon the rights of the claimants. There was no point in the whole transaction from its commencement to its close where the minds of the parties met or where there was anything in the semblance of an agreement."

It thus appears that the court has steadily adhered to the general rule that, without its consent given in some act of Congress, the Government is not liable to be sued for the torts, misconduct, misfeasances or laches of its officers or employés. There is no reason to suppose that Congress has intended to change or modify that rule. On the contrary, such liability to suit is expressly excluded by the act of 1887.

Cases of this kind are to be distinguished from those in which private property was taken or used by the officers of the Government with the consent of the owner or under circumstances showing that the title or right of the owner was recognized or admitted. As, in *United States* v. *Russell*, 13 Wall. 623, 626, which was an action to recover for the use of certain steamers used in the business of the Government pursuant to an understanding with the owner that he should be compensated; or, in *United States* v. *Great Falls Manufacturing Company*, 112

U. S. 645, in which it appeared that certain private property was appropriated by officers of the Government for public use, pursuant to an act of Congress, the title of the owner being recognized or not disputed; or, in *United States* v. *Palmer*, 128 U. S. 262, 269, which was an action to recover for the use of a patent which the Government was invited by the patentee to use. In all such cases the law implies a meeting of the minds of the parties, and an agreement to pay for that which was used for the Government, no dispute existing as to the title to the property used. The important fact in each of those cases was that the officers who appropriated and used the property of others were authorized to do so, and hence the implied contract that the Government would pay for such use.

But, as we have seen, the plaintiff contends that when he entered or attempted to enter the elevator the Government must be deemed to have contracted that its employé in charge of it would use due care so as not to needlessly injure him. In other words—for it comes to that—by the mere construction and maintenance of such elevator the Government, contrary to its established policy, impliedly agreed to be responsible for the torts of an employé having charge of the elevator, if, by his negligence, injury came to one using it. We find no authority for this position in any act of Congress, and nothing short of an act of Congress can make the United States responsible for a personal injury done to the citizen by one of its employés who, while discharging his duties, fails to exercise such care and diligence as a proper regard to the rights of others required. "Causing harm by negligence is a tort." One of the definitions of a tort is "an act or omission causing harm which the person so acting or omitting did not intend to cause, but might and should with due diligence have foreseen and prevented." Pollock on Torts, 1, 19. The elevator in question was erected in order to facilitate the transaction of the public business, and also, it may be assumed, for the convenience and comfort of those who might choose to use it when going to a room in the court-house and post-office building occupied by public officers, and not pursuant to any agreement, express or implied, between the United States and the general public, or

under any agreement between the United States and the individual person who might seek to use it. No one was compelled or required to use it, and no officer in charge of the building had any authority to say that a person using it could sue the Government if he was injured by reason of the want of due care on the part of the employé operating it. No officer had authority to make an express contract to that effect and no contract of that kind could be implied merely from the Government's ownership of the elevator and from the negligence of its employé. The facts alleged show a case in which the plaintiff was injured by reason of the negligence of the manager of the elevator. It is therefore a case of pure tort on the part of such manager for which he could be sued. It is a case "sounding in tort," because it had its origin in and is founded on the wrongful and negligent act of the elevator manager. There is in it no element of contract as between the plaintiff and the Government; for, as we have said, no one was authorized to put upon the Government a liability for damages arising from the wrongful, tortious act of its employé. The plaintiff therefore cannot by the device of waiving the tort committed by the elevator operator make a case against the Government of implied contract. A party may in some cases waive a tort, that is, he may forbear to sue in tort, and sue in contract, where the matter out of which his claim arises has in it the elements both of contract and tort. But it has been well said that "a right of action in contract cannot be created by waiving a tort, and the duty to pay damages for a tort does not imply a promise to pay them, upon which assumpsit can be maintained." *Cooper* v. *Cooper*, 147 Massachusetts, 370, 373. If the plaintiff could sue the elevator employé upon an implied contract that due care should be observed by him in managing the elevator, it does not follow that he could sue the Government upon implied contract. For under existing legislation no relation of contract could arise between the Government and those who chose to use its elevator. It is easy to perceive how disastrous to the operations of the Government would be a rule under which it could be sued for torts committed by its agents and employés in the management of its property. It is for Congress to determine in all such cases

what justice requires upon the part of the Government. If any exceptions ought to be made to the general rule it is for Congress to make them.

We have not overlooked the allegation in the petition that the plaintiff entered the elevator "at the request of the United States, and of its officers, employés and duly authorized agents, each acting within the scope of his authority." This, we assume, means at most only that the plaintiff entered, or attempted to enter, the elevator with the assent of those who had control of it and of the building in which it was erected. But if more than this was meant to be alleged; if the plaintiff intended to allege an express or affirmative request by officers or agents of the United States, the case would not, in our view, be changed; for the court knows that, without the authority of an act of Congress, no officer or agent of the United States could, in writing or verbally, make the Government liable to suit by reason of the want of due care on the part of those having charge of an elevator in a public building.

We are of opinion that this case is one sounding in tort, within the meaning of the act of 1887, and therefore not maintainable in any court.

The judgment of the Circuit Court dismissing the action for want of jurisdiction is

Affirmed.

CUMMINGS *v.* CHICAGO.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 136. Submitted December 19, 1902.—Decided February 23, 1903.

1. The plaintiffs by their complaint asserted a right, under the Constitution of the United States and certain acts of Congress and a permit of the Secretary of War, issued in conformity with those acts, to construct a dock in the Calumet River, a navigable water of the United States within the limits of the city of Chicago. The bill showed that this

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right was denied by the city of Chicago, upon the ground that the plaintiffs had not complied with its ordinances requiring a permit from its Department of Public Works before any such structure could be erected within the limits of that city. *Held:*

(1) That the suit was one arising under the Constitution and laws of the United States, and was therefore one of which, under the act of August 13, 1888, c. 866, the Circuit Court of the United States could take jurisdiction, without reference to the citizenship of the parties.

(2) As such a suit involved the construction and application of the Constitution of the United States, the appeal from the final judgment of the Circuit Court in such an action could be taken directly to the Supreme Court of the United States under the act of March 3, 1891, c. 517.

2. Neither the act of Congress of March 3, 1899, c. 425, nor any previous act relating to the erection of structures in the navigable waters of the United States manifested any purpose on the part of Congress to assert the power to invest private persons with power to erect such structures within a navigable water of the United States, wholly within the territorial limits of a State, without regard to the wishes of the State upon the subject.

3. Under existing legislation, the right to erect a structure in a navigable water of the United States, wholly within the limits of a State, depends upon the concurrent or joint assent of the state and National Governments.

THE appellants, citizens of Illinois, brought this suit against the city of Chicago for the purpose of obtaining a decree restraining the defendant, its officers and agents, from interfering with the construction of a dock in front of certain lands owned by the plaintiffs and situated on Calumet River, within the limits of that city.

The city demurred to the bill upon the ground that it did not state facts entitling the plaintiffs to the relief asked. The demurrer was sustained and the bill was dismissed for want of equity.

The controlling question in the case is whether the plaintiffs have the right, in virtue of certain legislation of Congress and of certain action of the Secretary of War, to which reference will be presently made, to proceed with the proposed work in disregard of an ordinance of the city of Chicago requiring the permission of its Department of Public Works as a condition precedent to the construction of any dock within the limits of

the city. The plaintiffs had not obtained any permit from that Department.

The legislation of Congress and the action of the Secretary of War upon which the plaintiffs rely are very fully set forth in the bill and are as follows:

In the River and Harbor Appropriation Act of August 2, 1882, c. 375, will be found this provision: "Improving harbor at Calumet, Illinois: Continuing improvement, thirty-five thousand dollars: *Provided*, That with a view to the improvement of the Calumet River, in the State of Illinois, from its mouth to the Fork at Calumet Lake, the Secretary of War shall appoint a board of engineers who shall examine said river and report upon the practicability and the best method of perfecting and maintaining a channel for through navigation to said Fork at Lake Calumet, adapted to the passage of the largest vessels navigating the Northern and Northwestern Lakes, limiting and locating the lines of channel to be improved by the United States, and of docks that may be constructed by private individuals, corporations, or other parties, and clearly defining the same under the direction of the Chief of Engineers, United States Army; and the Secretary of War shall report to Congress the result of said examination, and the estimated cost of the proposed improvement; also what legislation, if any, is necessary, to prevent encroachments being made or maintained within the limits of the channel designated as above provided for." 22 Stat. 194.

Thereafter, the bill alleges, the Secretary of War appointed a board of engineers, who surveyed the river and defined the lines of its channel and of docks to be constructed, under the direction of said Chief of Engineers; and the Secretary of War thereafter reported to Congress the estimated cost of the proposed improvement.

In the River and Harbor Appropriation Act of July 5, 1884, c. 229, this provision was inserted: "Improving Calumet River, Illinois: Continuing improvement, fifty thousand dollars: *Provided, however*, That no part of said sum shall be expended until the right of way shall have been conveyed to the United States, free from expense, and the United States shall be fully

released from all liability for damages to adjacent property-owners, to the satisfaction of the Secretary of War." 23 Stat. 133, 143.

Under these enactments, the bill alleged, the United States caused a plat to be made establishing the channel of the river and its lines, and fixing the dock lines thereof. That plat was approved by the Chief of Engineers of the Army and was duly recorded in the recorder's office of Cook County.

The above legislation was followed by this provision in the River and Harbor Act of August 5, 1886, c. 929: "Improving Calumet River, Illinois: Continuing improvement, thirty thousand dollars; of which eleven thousand two hundred and fifty dollars are to be used between the Forks and one half mile east of Hammond, Indiana, . . . *Provided, however*, That no part of said sum, nor any sum heretofore appropriated, except the said eleven thousand two hundred and fifty dollars, for the river above the Forks, shall be expended until the entire right of way, as set forth in Senate Executive Document Number Nine, second session Forty-seventh Congress, shall have been conveyed to the United States free of expense, and the United States shall be fully released from all liability for damages to adjacent property-owners, to the satisfaction of the Secretary of War; . . ." 24 Stat. 310, 325.

Without going into all the details set forth in the bill, it may be assumed that the deeds of conveyance which the above acts of 1884 and 1886 required to be made to the United States were in fact made and accepted.

The bill alleges that the United States by its duly authorized officials thereafter entered upon the improvement of Calumet River in accordance with the surveys and plans adopted by the Chief of Engineers of the United States Army and "thereby established said dock or channel line on the west line of said river in the manner and form shown by said plat approved by the said Chief of Engineers and filed for record as aforesaid."

By the seventh section of the River and Harbor Act of Congress, approved September 19, 1890, c. 907, it was provided: "That it shall not be lawful to build any wharf, pier, dolphin, boom, dam, weir, breakwater, bulkhead, jetty, or structure of

any kind outside established harbor-lines, or in any navigable waters of the United States where no harbor-lines are or may be established, without the permission of the Secretary of War, in any port, roadstead, haven, harbor, navigable river, or other waters of the United States, in such manner as shall obstruct or impair navigation, commerce, or anchorage of said waters, and it shall not be lawful hereafter to commence the construction of any bridge, bridge-draw, bridge piers and abutments, causeway or other works over or in any port, road, roadstead, haven, harbor, navigable river, or navigable waters of the United States, under any act of the legislative assembly of any State, until the location and plan of such bridge or other works have been submitted to and approved by the Secretary of War, or to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of the channel of said navigable water of the United States, unless approved and authorized by the Secretary of War: *Provided*, That this section shall not apply to any bridge, bridge-draw, bridge piers and abutments the construction of which has been heretofore duly authorized by law, or be so construed as to authorize the construction of any bridge, drawbridge, bridge piers and abutments, or other works, under an act of the legislature of any State, over or in any stream, port, roadstead, haven or harbor, or other navigable water not wholly within the limits of such State." 26 Stat. 426, 454.

Then, by the tenth section of the River and Harbor Act of March 3, 1899, c. 425, it was provided: "That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, con-

dition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same." 30 Stat. 1121, 1151.

Subsequently, the plaintiffs and the Calumet Grain and Elevator Company—the latter also owning land on the Calumet River in front of which the proposed new dock would be built—caused plans of the dock to be prepared and submitted to the Secretary of War and the Chief of Engineers of the Army, and application was made to the former for permission to rebuild the dock along the front of their lands on Calumet River as shown by those plans.

Those plans were approved by the United States Engineer stationed at Chicago, and were subsequently recommended by the Chief of Engineers of the Army. The Secretary thereupon issued and delivered to the plaintiffs and the Grain and Elevator Company the following instrument:

"Whereas, by section 10 of an act of Congress, approved March 3, 1899, entitled 'An act making appropriations for the construction, repair and preservation of certain public works on rivers and harbors, and for other purposes,' it is provided that it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same; and whereas, D. M. Cummings, as executor of the estate of C. R.

Cummings, and the Calumet Grain and Elevator Company have applied to the Secretary of War for permission to rebuild the dock in front of that part of block 108, in sections 5 and 6, T. 37, R. 15, E., fronting on Calumet River, south of 95th street, Chicago, Illinois, along the lines shown on the attached plans, which have been recommended by the Chief of Engineers; now therefore this is to certify that the Secretary of War hereby gives unto said D. M. Cummings, as executor of the estate of C. R. Cummings, and the Calumet Grain and Elevator Company permission to rebuild the dock, at said place, along the lines shown on said plans, subject to the following condition: That the work herein permitted to be done shall be subject to the supervision and approval of the engineer officer of the United States Army in charge of the locality. Witness my hand this 12th day of May, 1900. Elihu Root, *Secretary of War.*"

The bill then alleged—

That after the granting of permission by the Secretary of War, the plaintiffs became entitled, in virtue of that permission and the provisions of the act of March 3, 1899, to build the proposed dock in front of their premises, subject only to the condition that the work should be under the supervision and be approved by the engineer officer of the Army in charge of the locality;

That after the action of the Secretary of War they entered into a contract for the building of the dock and were engaged in the prosecution of the work when, about the 15th of October, 1900, the city of Chicago, by its officers and agents, put a stop to the work by force and threats, asserting that it could not be prosecuted unless a permit therefor be issued by its Department of Public Works;

That this action of the city was taken pursuant to certain ordinances theretofore passed by the city council and which made it the duty of the city's Harbor Master to require all parties engaged in repairing, renewing, altering, or constructing any dock within the city to produce such permit and in default thereof to cause the arrest of any parties engaged in the work and the removal of the dock;

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That the engineer officer in the Department of Public Works of the city, having agreed that the city had no power to interfere with the plaintiffs or prevent the building of said dock by them, agreed that the work should not be interfered with by the city or its agents;

That the plaintiffs thereupon resumed the construction of the dock, but they were again stopped by the city through its police, and plaintiffs' contractors, agents and servants were forced to discontinue the work, being threatened with arrest and violence if they should attempt to continue it further;

That the city by its officers and agents has notified the plaintiffs that they will not be permitted to continue the work or to build the dock in front of their premises, notwithstanding the permission or authority given to them by the Secretary of War, and that, by its police, it would forcibly prevent the building thereof, arrest those engaged in doing the work, and remove any dock built; and,

That the city wholly refuses to recognize the permission and authority given the plaintiffs by the Secretary of War to build said dock, and their right "under the Constitution and laws of the United States, and more particularly under the said act of Congress of March 3, 1889, to build it by virtue of the said authority and permission granted by the Secretary of War and the approval and recommendation of the plans therefor by the Chief of Engineers of the United States Army;"

That in view of the action taken by the city and its police, they fear that attempts to continue their work will necessarily be futile and lead to breaches of the peace and conflicts between the men engaged in the work and the police of the city of Chicago; and that the right to build said dock in front of their premises in accordance with the permission and authority given them by the Secretary of War and on the lines recommended by the Chief of Engineers and within the dock line established by said survey and by the deed to the United States is a property right, which the plaintiffs have as the owners of the premises and of the land upon which the dock is to be built, and that the action of the city in thus preventing the building of the dock is a taking of the property of the plaintiffs "without due

process of law, and a taking thereof for public use without just compensation, in violation of the Fifth Amendment of the Constitution of the United States."

The relief asked was a decree enjoining the city, its agents and officers, from interfering with the building of the dock, and that upon the final hearing of the cause, it be adjudged and decreed that under the acts of Congress the plaintiffs have the right by virtue of the permission granted by the Secretary of War to build the dock on the lines shown by the plans recommended by the Chief of Engineers, and that the city of Chicago has no right, power or authority to interfere therewith.

Mr. S. A. Lynde and *Mr. Warren B. Wilson* for appellants.

I. The United States, in its survey and plat of the channel of this river and in its improvement of the river under the acts of Congress of August 2, 1882, and July 5, 1884, has fixed and established the lines of the channel of the river and of the docks that might be constructed thereon.

II. By the terms and provisions of the deeds which Congress required to be made to the United States by the owners of the land fronting on this river, as a condition for the expenditure of the moneys appropriated for the improvement of the river, the shore and dock lines as established and fixed by the government survey, are to be taken for all purposes as the true meander lines of this stream; and, under the deed which was made to the United States pursuant to this provision of the act of Congress, aforesaid, by Columbus R. Cummings, and under the acts of Congress of August 2, 1882, and of July 5, 1884, referring to the improvement of this river, the appellants are entitled as the owners of these premises to build their proposed dock on the line shown by the plan attached to the permit that issued to them by the Secretary of War, which is within the line which has been established by the United States as the dock line of these premises and which has been fixed and made the meander line of this stream.

As riparian owners the appellants had the right to build their dock, subject only to the public easement for the purpose of navigation. *Yates* v. *Milwaukee*, 10 Wall. 497; *Chicago*

v. *Laflin*, 49 Illinois, 172; *Chicago* v. *McGinn*, 51 Illinois, 266; *Chicago* v. *Van Ingen*, 152 Illinois, 624.

III. Congress has taken jurisdiction over this river as one of the navigable waters of the United States, and has improved it and made it navigable and available for commerce, and has directed and caused the channel and dock lines of the river to be defined and established. Its jurisdiction over this river for the purpose of navigation and the protection thereof, and its power to control the building of docks or other structures in this river is, when exercised, supreme; and neither the State of Illinois nor the city of Chicago, its agent, has any power to interfere with or prevent the erection of any dock or structure which Congress has authorized to be built in this river. *Gibbons* v. *Ogden*, 9 Wheat, 1; *Pennsylvania* v. *Wheeling etc. Bridge Co.*, 13 Howard, 518, 566; *S. C.*, 18 Howard, 421, 460; *Gilman* v. *Philadelphia*, 3 Wall. 713, 724; *Pound* v. *Turck*, 95 U. S. 459; *Wisconsin* v. *Duluth*, 96 U. S. 379, 387; *Bridge Co.* v. *United States*, 105 U. S. 470, 475, 479; *Cardwell* v. *American Bridge Co.*, 113 U. S. 1; *Willamette Iron Bridge Co.* v. *Hatch*, 125 U. S. 1.

As to power of Congress to determine what shall or shall not be deemed in law an obstruction to navigation, *Pennsylvania* v. *Wheeling etc. Bridge Co.*, 18 Howard, 421, 460; *In re Clinton Bridge*, 10 Wall. 454; *South Carolina* v. *Georgia*, 93 U. S. 4; *North Bloomfield Gravel Mining Co.* v. *United States*, 88 Fed. Rep. 675.

A State has no power to interfere with erection of any structure in navigable waters authorized by Congress. *Decker* v. *B. & N. Y. R. Co.*, 30 Fed. Rep. 723; *Stockton* v. *B. & N. Y. R. Co.*, 32 Fed. Rep. 9; *Penn. R. Co.* v. *N. Y. R. Co.*, 37 Fed. Rep. 129.

On question as to police power of State, in addition to authorities above cited, see also *County of Mobile* v. *Kimball*, 102 U. S. 691, 699; *Escanaba Co.* v. *Chicago*, 107 U. S. 678, 683; *Sands* v. *Manistee River Imp. Co.*, 123 U. S. 288.

IV. Under the provisions of section 10 of the act of March 3, 1899, the Secretary of War was empowered by Congress to approve and permit the erection of docks in navigable rivers of

the United States on plans recommended by the Chief of Engineers; and the permit which was issued to the appellants by the Secretary of War to rebuild their dock in front of these premises on the plan attached thereto, which was approved by the Chief of Engineers gave them full right and authority under said act of Congress to build said dock in accordance with said permit, and the city of Chicago had no power or authority to interfere with or prevent them from building this dock, and could not lawfully stop its construction.

The appellants base their claim of right to build this dock without interference from the city of Chicago on two grounds:

1. On the acts of August 2, 1882, and July 5, 1884, and the provision of the deed from Cummings to the United States, that this line, which has been established by the United States, shall be taken as the "true meandered" line of this stream.

2. On the act of March 3, 1899, and the permit, which the Secretary of War has issued to them thereunder.

This authority from the Secretary of War is given by and under the act of March 3, 1899, and is paramount, and excludes any state or municipal control of this same matter. *South Carolina* v. *Georgia*, 93 U. S. 4; *Wisconsin* v. *Duluth*, 96 U. S. 379; *United States* v. *Milwaukee & St. Paul Ry. Co.*, 5 Bissell, 410; Federal Cases No. 15,778; *United States* v. *Milwaukee & St. Paul Ry. Co.*, 5 Bissell, 410; Federal Cases, No. 15,779; *Willamette Bridge Co.* v. *Hatch*, 125 U. S. 1; *United States* v. *Bellingham Bay Boom Co.*, 176 U. S. 211, 217; *United States* v. *Ormsby*, 74 Fed. Rep. 207; *United States* v. *City of Moline*, 82 Fed. Rep. 592.

The delegation of power to the Secretary of War by the act of 1899 to issue this permit is valid.

In addition to authorities last above cited, see *Luther* v. *Borden*, 7 How. 1; *Miller* v. *Mayor of New York*, 109 U. S. 385; *Gibbons* v. *Ogden*, 9 Wheat. 1; *Field* v. *Clark*, 143 U. S. 649; *L. S. & M. S. Ry. Co.* v. *State of Ohio*, 165 U. S. 365.

V. The right to build this structure upon their premises within the dock line established by the United States and under the permit issued to them under the said act of Congress is a property right vested in the appellants which is conceded to be

of greater value than $2000, and the action of the city of Chicago in preventing the building of said dock by the appellants is a taking of their property without due process of law and a taking thereof for public use without just compensation in violation of the provisions of the Constitution of the United States.

Mr. Charles M. Walker and *Mr. Henry Schofield* for appellees.

I. The Circuit Court, as a Federal court, had no jurisdiction.

If the statement of the claim, or demand, in each bill does not, in and of itself, show, that the claim, or demand, arises under the Constitution, or laws, of the United States, the fact that the defendant filed a demurrer cannot aid the statement to that end. *Tennessee* v. *Union & Planters' Bank*, 152 U. S. 454; *Houston & Texas Central Rd. Co.* v. *Texas*, 177 U. S. 66, 78, and cases cited; *New Orleans* v. *Benjamin*, 153 U. S. 411, 424, 431.

The jurisdiction cannot rest on section 629, subdivision "sixteenth," of the Revised Statutes, because said section, if in force, has no application.

II. Even if the Circuit Court, as a Federal court, did have jurisdiction in these cases, this court has no jurisdiction, because section 6 of the Court of Appeals Act vests the appellate jurisdiction in these cases in the Court of Appeals exclusively.

The jurisdiction of the Circuit Court could not rest on the ground that the suits arise under the Constitution of the United States, because the attempt to draw in question the validity of an ordinance of the city of Chicago is wholly abortive, neither the ordinance itself being set forth, nor any statute of the State authorizing the passage of the ordinance being set forth, in any way whatever. The State of Illinois cannot be convicted of violating the Fourteenth Amendment without allegation, or proof, approximating, at least, to a certainty. No reason is perceived why the rule stated in *Yazoo & Mississippi Railroad Co.* v. *Adams*, 180 U. S. 41, 48, on error to a state court, is not applicable. A municipal ordinance is not a state act, unless passed under legislative authority. *Hamilton Gas Light*

Co. v. *Hamilton City*, 146 U. S. 258, 265–266. This court has no jurisdiction under section 5 of the Court of Appeals Act. Curtis' Jurisdiction of U. S. Courts, 2d ed. pp. 67–73.

The cases are "cases other than those provided for" in section 5 of the Court of Appeals Act; and the act of March 3, 1899, under sections 10 and 12 of which these cases arise, being a criminal law, section 6 of the Court of Appeals Act makes the judgment of the Court of Appeals final.

II. The court below, as a court of equity, had no jurisdiction because the remedy at law is entirely adequate. That is, the bills do not show that it is not. And also a court of equity will not generally stop the enforcement of a penal police ordinance. *People* v. *Canal Board of New York*, 55 N. Y. 390; *Davis* v. *American Society for Preventing Cruelty to Animals*, 75 N. Y. 362; *Poyer* v. *Village of Des Plaines*, 123 Illinois, 111; 1 Foster's Fed. Practice, 2d ed. sec. 215; *In re Sawyer*, 124 U. S. 200; *Harkrader* v. *Wadley*, 172 U. S. 166; *Fitts* v. *McGhee*, 172 U. S. 531; *Osborne* v. *Missouri Pacific Ry. Co.*, 147 U. S. 248, 258.

IV. Complainants should have joined in one bill, as, at best, they held a joint permit under section 10 of the act of March 3, 1899. *Minnesota* v. *Northern Securities Co.*, 184 U. S. 199, 234, 238. One is not a party, though named in the pleadings, unless he is brought in by process, or appears. *Terry* v. *Com. Bank*, 92 U. S. 454; *May* v. *Le Claire*, 11 Wall. 217.

V. Complainants do not own the land they intend to build on. It is conceded that it is established law in the State of Illinois, that a conveyance of land *calling for running water as a boundary* carries title to submerged land to the middle of such running water, whether the water be navigable or not. Notwithstanding the decision of the majority of the judges in *Hardin* v. *Jordan*, 140 U. S. 371 (1890), the rule is different where the conveyance calls for *still* water, ponds or lakes, navigable or not, for a boundary. *Fuller* v. *Shedd*, 161 Illinois, 462 (1896). The descriptions in the bill call for a fixed boundary or for a definite extent of land. In *McCormick* v. *Huse*, 78 Illinois, 363, the extent of land, or quantity of land, conveyed controlled. In *Brophy* v. *Richeson*, 137 Indiana, 114, meander

lines and stakes controlled. *Rockwell* v. *Baldwin*, 53 Illinois, 19. In *Handly's Lessees* v. *Anthony*, 5 Wheaton, 374, the words "northwest of the River Ohio," in the Virginia grant of the Northwest Territory, was held to restrict the boundary to the low water mark on the northwest bank of the Ohio River. A plat referred to in a description is part of the description. *Henderson* v. *Hatterman*, 146 Illinois, 555; *Smith* v. *Young*, 160 Illinois, 163, 170. Appellants are asking a court of equity to aid them to commit trespasses. *Braxon* v. *Bressler*, 64 Illinois, 488, a case of taking rocks from bed of a stream, held to be trespass. *Washington Ice Co.* v. *Shortall*, 101 Illinois, 46, taking ice found on stream held to be trespass. *Shively* v. *Bowlby*, 152 U. S. 138.

VI. There is no collision between section 10 of the act of March 3, 1899, and the ordinance of the city of Chicago.

In the absence of any national or state statute, or municipal ordinance regulating the subject, the ownership of the submerged soil, by the law of Illinois, gives only a *license* to such owner to build a *wharf* on such soil. When a State parts with its title to the bed of navigable water, and thereby gives, as in Illinois, an implied license to build wharves in the bed in aid of commerce, it nevertheless retains its power to control and prohibit, in the interest of the public, the building of wharves and other structures in such bed, and does not, and cannot thereby, in any way, impair, or diminish, the power of Congress, under the commerce clause, to regulate and prohibit, in the interest of interstate and foreign commerce, the use of such bed, or the police power of the State. *Prosser* v. *Northern Pacific R. R. Co.*, 152 U. S. 59, 64–65; *Shively* v. *Bowlby*, 152 U. S. 1, 40, VII; *Walker* v. *Marks*, 17 Wall. 648; *Weber* v. *State Harbor Comrs.* 18 Wall. 57; *Com.* v. *Alger*, 7 Cush. 53; *People* v. *New York & Staten Island Ferry Co.*, 68 N. Y. 71; *State* v. *Sargent*, 45 Connecticut, 358; *Hawkins Point Light House*, 39 Fed. Rep. 77, brief for the Government; Gould, Waters, 3d ed. sec. 138 and sec. 179, at p. 349, and cases cited.

In the case of *navigable streams*, the cases in Illinois all recognize, that the *license* of a riparian owner on a navigable stream in Illinois, by virtue of his ownership of the bed in front of his

land, may be regulated and prohibited by the legislature in the interest of the public easements of navigation, etc. *Middleton* v. *Pritchard*, 3 Scam. 510 (1842); *People* v. *St. Louis*, 5 Gilman, 351 (1848); *Canal Trustees* v. *Havan*, 5 Gilman, 548 (1849); *Illinois River Packet Co.* v. *Peoria Bridge Co.*, 38 Illinois, 417 (1865); *Ensminger* v. *People*, 47 Illinois, 384 (1868); *City of Chicago* v. *Laflin*, 49 Illinois, 172 (1868); *City of Chicago* v. *McGinn*, 51 Illinois, 766 (1869); *Rockwell* v. *Baldwin*, 53 Illinois, 19 (1869); *Hubbard* v. *Bell*, 54 Illinois, 110 (1870); *Braxon* v. *Bressler*, 64 Illinois, 488 (1872); *Washington Ice Co.* v. *Shortall*, 101 Illinois, 46 (1881); *Piper* v. *Connolly*, 108 Illinois, 646 (1884).

There can be no doubt that Congress has power to *prevent* the erection of any kind of structures, constituting obstructions to navigation, over, or in, the Calumet River, the same being navigable waters of the United States, even when such structures are authorized by state law.

It is very apparent that the River and Harbor Act of 1899 is preventive legislation, and is not legislation designed to grant authority. The power of the Secretary of War is to prevent the erection of structures, bridges, on, over, and in, navigable waters of the United States, if they will be obstructions, and not to authorize them. The act is preventive and defensive, and it has been so authoritatively decided in regard to the River and Harbor Act of 1890, almost the first of the acts containing these preventive, defensive regulations. *Lake Shore & Michigan Southern R. Co.* v. *Ohio*, 165 U. S. 365. See *Lane* v. *Smith*, 71 Connecticut, 65, 70.

The language of the act of Congress of 1899 is prohibitory, preventive and defensive, and is not apt language to affirmatively give authority. See sections 9 and 10 of act.

There is no material difference between the act of 1890, involved in 165 U. S. 365, and the act of 1899, involved in the case at bar. The construction of the act of 1890, sanctioned by the Supreme Court, had previously been given by Mr. Attorney General Miller. 20 Ops. Atty. Genl. 102, 114.

If the power of the Secretary of War is exclusive of any action by the State, then the United States should bear all the

expense of managing and controlling the Calumet River, and the city of Chicago should abolish its Harbor Department, and use the money spent in maintaining it for some other purpose.

Numerous decisions of the Supreme Court, from *Gibbons* v. *Ogden*, 9 Wheat. 1 (1824), (for a leading case, see *Cooley* v. *The Board of Wardens of the Port of Philadelphia*, 12 How. 299, 1851), conceded to the states power over local matters such as bridges, quarantine, pilots, wharves, etc., in the absence of any legislation on the same subject by Congress, although the exercise of such power by the States might, and often did, incidentally affect, impede and embarrass interstate commerce. The policy of the recent River and Harbor Acts is not to abrogate this state power entirely, but to control its exercise in defence of interstate and foreign commerce. *Sinnot* v. *Davenport*, 22 How. 227; *Ex parte Siebold*, 100 U. S. 371.

We believe that the construction which counsel seek to put upon the power vested in the Secretary of War by the act of Congress of 1899, makes the constitutionality of that act, as applied to the facts in this case, very doubtful. Where does Congress get the power to authorize the Secretary of War to give a private person leave to put a structure of no aid at all, or, at best, of only doubtful and purely private aid, to interstate commerce, in a local harbor, and thus displace the police power of the States, expressly reserved to them and to the people. Constitution, Art. X; Art. X of Amendments; *Yick Wo* v. *Hopkins*, 118 U. S. 356.

At any rate, that the ordinances of the city and the act of Congress are not irreconcilably in conflict would seem to be clear.

Mr. Justice Harlan, after making the foregoing statement, delivered the opinion of the court.

1. We hold that the Circuit Court had jurisdiction in this case. That the parties, plaintiffs and defendant, are citizens of the same State is not sufficient to defeat the jurisdiction; for by the act of March 3, 1887, c. 373, as corrected by the act of

August 13, 1888, c. 866, the Circuit Courts have jurisdiction, without reference to the citizenship of the parties, of suits at common law or in equity arising under the Constitution or laws of the United States. 24 Stat. 552; 25 Stat. 434. The present suit does arise under the Constitution and laws of the United States, because the plaintiffs base their right to construct the dock in question upon the Constitution of the United States, as well as upon certain acts of Congress and the permit (so-called) of the Secretary of War—which legislative enactments and action of the Secretary of War were, it is alleged, in execution of the power of Congress under the Constitution over the navigable waters of the United States. Clearly, such a suit is one arising under the Constitution and laws of the United States. That it is a suit of that character appears from the bill itself. The allegations which set forth a Federal right were necessary in order to set forth the plaintiffs' cause of action.

2. The appeal was properly taken directly to this court, since by the act of March 3, 1891, c. 517, this court has jurisdiction to review the judgment of the Circuit Court in any case involving the construction or application of the Constitution of the United States. 26 Stat. 834. The present case belongs to that class; for, it involves the consideration of questions relating to the power of Congress, under the Constitution, over the navigable waters of the United States.

3. We come now to the merits of the suit as disclosed by the bill. The general proposition upon which the plaintiffs base their right to relief is that the United States, by the acts of Congress referred to and by what has been done under those acts, has taken "possession" of Calumet River, and so far as the erection in that river of structures such as bridges, docks, piers and the like is concerned, no jurisdiction or authority whatever remains with the local authorities. In a sense, but only in a limited sense, the United States has taken possession of Calumet River, by improving it, by causing it to be surveyed, and by establishing lines beyond which no dock or other structure shall be erected in the river without the approval or consent of the Secretary of War, to whom has been

committed the determination of such questions. But Congress has not passed any act under which parties, having simply the consent of the Secretary, may erect structures in Calumet River without reference to the wishes of the State of Illinois on the subject. We say the State of Illinois, because it must be assumed, under the allegations of the bill, that the ordinances of the city of Chicago making the approval of its Department of Public Works a condition precedent to the right of any one to erect structures in navigable waters within its limits, are consistent with the constitution and laws of that State and were passed under authority conferred on the city by the State.

Calumet River, it must be remembered, is entirely within the limits of Illinois, and the authority of the State over it is plenary, subject only to such action as Congress may take in execution of its power under the Constitution to regulate commerce among the several States. That authority has been exercised by the State ever since it was admitted into the Union upon an equal footing with the original States.

In *Escanaba Company* v. *Chicago*, 107 U. S. 678, 683, the question was as to the validity of regulations made by the city of Chicago in reference to the closing, between certain hours of each day, of bridges across the Chicago River. Those regulations were alleged to be inconsistent with the power of Congress over interstate commerce. This court said: "The Chicago River and its branches must, therefore, be deemed navigable waters of the United States, over which Congress under its commercial power may exercise control to the extent necessary to protect, preserve, and improve their free navigation. But the States have full power to regulate within their limits matters of internal police, including in that general designation whatever will promote the peace, comfort, convenience, and prosperity of their people. This power embraces the construction of roads, canals, and bridges, and the establishment of ferries, and it can generally be exercised more wisely by the States than by a distant authority. They are the first to see the importance of such means of internal communication, and are more deeply concerned than others in their wise management. Illinois is more immediately affected by the bridges over the Chicago

River and its branches than any other State, and is more directly concerned for the prosperity of the city of Chicago, for the convenience and comfort of its inhabitants, and the growth of its commerce. And nowhere could the power to control the bridges in that city, their construction, form, and strength, and the size of their draws, and the manner and times of using them, be better vested than with the State, or the authorities of the city upon whom it has devolved that duty. When its power is exercised, so as to unnecessarily obstruct the navigation of the river or its branches, Congress may interfere and remove the obstruction. If the power of the State and that of the Federal Government come in conflict, the latter must control and the former yield. This necessarily follows from the position given by the Constitution to legislation in pursuance of it, as the supreme law of the land. But until Congress acts on the subject, the power of the State over bridges across its navigable streams is plenary. This doctrine has been recognized from the earliest period, and approved in repeated cases, the most notable of which are *Willson* v. *The Blackbird Creek Marsh Co.*, 2 Pet. 245, decided in 1829, and *Gilman* v. *Philadelphia*, 3 Wall. 713, decided in 1865."

To the same effect is the recent decision in *Lake Shore & Michigan Railway* v. *Ohio*, 165 U. S. 365, 366, 368. See also *Cardwell* v. *American Bridge Co.*, 113 U. S. 205, and *Huse* v. *Glover*, 119 U. S. 543.

Did Congress, in the execution of its power under the Constitution to regulate interstate commerce, intend by the legislation in question to supersede, for every purpose, the authority of Illinois over the erection of structures in navigable waters wholly within its limits? Did it intend to declare that the wishes of Illinois in respect of structures to be erected in such waters need not be regarded, and that the assent of the Secretary of War, proceeding under the above acts of Congress, was alone sufficient to authorize such structures?

These questions were substantially answered by this court in *Lake Shore & Michigan Railway* v. *Ohio*, above cited, decided in 1896. That case required a construction of the fifth and seventh sections of the River and Harbor Act of September 19,

1890, upon which sections the plaintiffs in this case partly rely. In that case this court said: "The contention is that the statute in question manifests the purpose of Congress to deprive the several States of all authority to control and regulate any and every structure over all navigable streams, although they be wholly situated within their territory. That full power resides in the States as to the erection of bridges and other works in navigable streams wholly within their jurisdiction, in the absence of the exercise by Congress of authority to the contrary, is conclusively determined. . . . The mere delegation to the Secretary of the right to determine whether a structure authorized by law has been so built as to impede commerce, and to direct, when reasonably necessary, its modification so as to remove such impediment, does not confer upon that officer power to give original authority to build bridges, nor does it presuppose that Congress conceived that it was lodging in the Secretary power to that end. . . . The mere delegation of power to direct a change in lawful structures so as to cause them not to interfere with commerce cannot be construed as conferring on the officer named the right to determine when and where a bridge may be built." Referring to the seventh section of the act of 1890, the court said: "The language of the seventh section makes clearer the error of the interpretation relied on. The provision that it shall not be lawful to thereafter erect any bridge 'in any navigable river or navigable waters of the United States, under any act of the legislative assembly of any State, until the location and plan of such bridge . . . have been submitted to and approved by the Secretary of War,' contemplated that the function of the Secretary should extend only to the form of future structures, since the act would not have provided for the future erection of bridges under state authority if its very purpose was to deny for the future all power in the States on the subject. . . . The construction claimed for the statute is that its purpose was to deprive the States of all power as to every stream, even those wholly within their borders, whilst the very words of the statute, saying that its terms should not be construed as conferring on the States power to give authority to build bridges on streams not wholly within their limits,

by a negative pregnant with an affirmative, demonstrate that the object of the act was not to deprive the several States of the authority to consent to the erection of bridges over navigable waters wholly within their territory."

The decision in *Lake Shore & Michigan Railway* v. *Ohio* was rendered before the passage of the River and Harbor Act of 1899. But the tenth section of that act, upon which the permit of the Secretary of War was based, is not so worded as to compel the conclusion that Congress intended, by that section, to ignore altogether the wishes of Illinois in respect of structures in navigable waters that are wholly within its limits. We may assume that Congress was not unaware of the decision of the above case in 1896 and of the interpretation placed upon existing legislative enactments. If it had intended by the act of 1899 to assert the power to take under national control, for every purpose, and to the fullest possible extent, the erection of structures in the navigable waters of the United States that were wholly within the limits of the respective States, and to supersede entirely the authority which the States, in the absence of any action by Congress, have in such matters, such a radical departure from the previous policy of the Government would have been manifested by clear and explicit language. In the absence of such language it should not be assumed that any such departure was intended.

We do not overlook the long-settled principle that the power of Congress to regulate commerce among the States "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution." *Gibbons* v. *Ogden*, 9 Wheat. 1, 196; *Brown* v. *Maryland*, 12 Wheat. 419, 446; *Brown* v. *Houston*, 114 U. S. 630. But we will not at this time make any declaration of opinion as to the full scope of this power or as to the extent to which Congress may go in the matter of the erection, or authorizing the erection, of docks and like structures in navigable waters that are entirely within the territorial limits of the several States. Whether Congress may, against or without the expressed will of a State, give affirmative authority to private parties to erect structures in such waters, it is not necessary in

this case to decide. It is only necessary to say that the act of 1899 does not manifest the purpose of Congress to go to that extent under the power to regulate foreign and interstate commerce and thereby to supersede the original authority of the States. The effect of that act, reasonably interpreted, is to make the erection of a structure in a navigable river, within the limits of a State, depend upon the concurrent or joint assent of both the National Government and the state government. The Secretary of War, acting under the authority conferred by Congress, may assent to the erection by private parties of such a structure. Without such assent the structure cannot be erected by them. But under existing legislation they must, before proceeding under such an authority, obtain also the assent of the State acting by its constituted agencies.

For the reasons stated, the judgment of the Circuit Court is

Affirmed.

CALUMET GRAIN AND ELEVATOR COMPANY *v.* CHICAGO.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 135. Submitted December 19, 1902.—Decided February 23, 1903.

Same counsel as in No. 136, see p. 410, *ante.*

MR. JUSTICE HARLAN delivered the opinion of the court.

This case relates to the construction of a dock in Calumet River, on or in front of land belonging to the appellant. The facts upon which that company principally bases its claims for relief are those upon which the plaintiffs relied in *Cummings* v. *Chicago*, just decided. Upon the authority of the decision in that case, the judgment in this case is

Affirmed.

UNITED STATES *v.* RICKERT.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 216. Argued January 28, 29, 1903.—Decided February 23, 1903.

By the act of Congress of February 8, 1887, c. 119, known as the Indian General Allotment Act it was provided: "That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare, that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted, as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void." *Held:*

(1) That neither the lands allotted nor the permanent improvements thereon nor the personal property obtained from the United States and used by the Indians on the allotted lands, are subject to state or local taxation during the period of the trust provided by the above act of 1887.

(2) The United States has such an interest in the question as to entitle it to maintain a suit to protect the Indians against local or state taxation.

(3) This suit was properly brought in equity and not at law, the remedy at law not being as adequate and efficacious as was necessary.

THIS suit was instituted under the direction of the Attorney General of the United States, for the purpose of restraining the collection of taxes alleged to be due the county of Roberts, South Dakota, in respect of certain permanent improvements on, and personal property used in the cultivation of, lands in that county occupied by members of the Sisseton Band of Sioux Indians in the State of South Dakota.

Statement of the Case.

The case is here upon questions certified by the judges of the United States Circuit Court of Appeals for the Eighth Circuit.

According to the certificate the bill alleged that Charles R. Crawford, Adam Little Thunder, Solomon Two Stars and Victor Renville are Indians and members of the Sisseton Band of Sioux Indians in the State of South Dakota, wards of the United States and under its guardianship and supervision, and residents of that portion of the Sisseton Agency, situated in the county of Roberts; that the said Indians are holding, and for several years last past have held, allotted lands in that county, and within the former Sisseton Indian Reservation, which lands were allotted to those Indians under the provisions of the agreement of December the 12th, 1889, as ratified by the act of March 3, 1891, 26 Stat. 1035, 1036, and more particularly under section 5 of the General Allotment Act of Congress approved February the 8th, 1887, 24 Stat. 389; and that the lands so allotted by the United States are held in trust by the United States under the provisions of the last named act.

The bill then alleged that during the year 1900 the duly authorized officers of Roberts County listed certain improvements on the allotted lands of Crawford and returned the assessment thereon at the sum of $630, such improvements consisting of a large frame house and barn attached thereto (a fixture and permanent improvement upon the allotted lands), and other improvements of a permanent character attached to these lands; that the amount of taxes extended on the tax roll of such improvements for state and county taxes for the year 1900 was the sum of $21.42; that for that year the officers of Roberts County listed, assessed and returned upon the tax rolls of the county certain personal property against Crawford, consisting of horses, one cow and two wagons, at the aggregate valuation of $129, upon which was assessed and levied a tax of $4.90; and that said personal property was issued to the allottee by the United States pursuant to the acts of Congress and the treaties between the United States and the band of Indians to which Crawford belongs, was branded "I. D.," and was then and there in the possession of the allottee, being kept and used by him upon his allotment.

Counsel for Parties.

Similar allegations were made in reference to the other Indians named in the bill, covering the years 1899 and 1900.

It was also alleged that the defendant was County Treasurer and collector of taxes for the county, and threatened to sell and was about to sell the property just described as that of the Indians named in the bill and assessed for the years above stated and would sell the same unless restrained, whereby the United States would be subjected to and compelled to defend a multitude of actions, suits and proceedings which would greatly embarrass it; that the assessments of said property and the amount of taxes so assessed and returned upon the tax roll of the county are upon the books of the county and of record in the office of the County Auditor and Treasurer, and constitute a cloud upon the title of the lands of the United States above referred to.

It was further alleged that the United States was without any plain, adequate and speedy remedy at law, and could only have relief in a court of equity, and that irreparable injury would be inflicted upon it in case the enforcement, assessment and collection of such taxes were not enjoined.

The defendant demurred to the bill upon the following grounds: That it did not disclose any equity nor entitle the United States to the relief prayed; that the United States had no interest in the subject-matter of the suit; that the property assessed by Roberts County was personal property and the injunction would not lie to restrain the collection of the tax, and that the United States had an adequate remedy at law.

The demurrer to the bill was sustained, and the Government, failing to amend, the bill was dismissed upon the merits. 106 Fed. Rep. 1. Subsequently the case was carried to the Circuit Court of Appeals.

Thereupon that court made a certificate of certain questions in respect to which it desired the instructions of this court. These questions will be referred to in the course of this opinion.

Mr. Assistant Attorney General Van Devanter for appellant. *Mr. Assistant Attorney Webster* was with him on the brief.

Mr. A. B. Kittredge and *Mr. W. D. Lane* for appellee.

MR. JUSTICE HARLAN, after making the foregoing statement, delivered the opinion of the court.

I. *Were the lands held by the allottees, Charles B. Crawford and the other Indians named in the bill, subject to assessment and taxation by the taxing authorities of Roberts County, South Dakota?*

This is the first of the questions certified by the judges of the Circuit Court of Appeals. It is not, in our opinion, difficult of solution.

By the act of Congress of February 8, 1887, c. 119, referred to in the certificate and known as the General Allotment Act, provision was made for the allotment of lands in severalty to Indians on the various reservations, and for extending the protection of the laws of the United States and the Territories over the Indians. To that end the President was authorized, whenever, in his opinion, a reservation or any part thereof was advantageous for agricultural and grazing purposes, to cause it, or any part thereof, to be surveyed or resurveyed if necessary, and to allot the lands in the reservation in severalty to any Indian located thereon in certain quantities specified in the statute—the allotments to be made by special agents appointed for that purpose, and by the agents in charge of the special reservations on which the allotments were made. 24 Stat. 388, 389–90, § 1.

What interest, if any, did the Indian allottee acquire in the land allotted to him? That question is answered by the fifth section of the allotment act, which provides: "That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where

such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided*, That the law of descent and partition in force in the State or Territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided; . . ." 24 Stat. 389, § 5.

The word "patents," where it is first used in this section, was not happily chosen to express the thought which, it is clear, all parts of the section being considered, Congress intended to express. The "patents" here referred to (although that word has various meanings) were, as the statute plainly imports, nothing more than instruments or memoranda in writing, designed to show that for a period of twenty-five years the United States would hold the land allotted, in trust for the sole use and benefit of the allottee, or, in case of his death, of his heirs, and subsequently, at the expiration of that period—unless the time was extended by the President—convey the fee, discharged of the trust and free of all charge or incumbrance. In other words, the United States retained the legal title, giving the Indian allottee a paper or writing, improperly called a patent, showing that at a particular time in the future, unless it was extended by the President, he would be entitled to a regular patent conveying the fee. This interpretation of the statute is in harmony with the explicit declaration that any conveyance of the land, or any contract touching the same, while the United States held the title in trust, should be absolutely null and void. So that the United States retained its hold on the land allotted for the period of twenty-five years after the allotment, and as much longer as the President, in his discretion, should determine.

The bill, as appears from the certificate of the judges, shows

that the lands in question were allotted "under provisions of the agreement of December 12, 1889, as ratified by the act of March 3, 1891, and more particularly under section V of the General Allotment Act approved February 8, 1887." Upon inspection of that agreement we find nothing that indicates any different relation of the United States to the allotted lands from that created or recognized by the act of 1887. On the contrary, the agreement contemplates that patents shall issue for the lands allotted under it "upon the same terms and conditions and limitations as is provided in section five of the act of Congress approved February 8, 1887." 26 Stat. 1035, 1036, art. IV.

If, as is undoubtedly the case, these lands are held by the United States in execution of its plans relating to the Indians —without any right in the Indians to make contracts in reference to them or to do more than to occupy and cultivate them —until a regular patent conveying the fee was issued to the several allottees, it would follow that there was no power in the State of South Dakota, for state or municipal purposes, to assess and tax the lands in question until at least the fee was conveyed to the Indians. These Indians are yet wards of the Nation, in a condition of pupilage or dependency, and have not been discharged from that condition. They occupy these lands with the consent and authority of the United States; and the holding of them by the United States under the act of 1887, and the agreement of 1889, ratified by the act of 1891, is part of the national policy by which the Indians are to be maintained as well as prepared for assuming the habits of civilized life, and ultimately the privileges of citizenship. To tax these lands is to tax an instrumentality employed by the United States for the benefit and control of this dependent race, and to accomplish beneficent objects with reference to a race of which this court has said that "from their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the

question has arisen." *United States* v. *Kagama*, 118 U. S. 375, 384. So that if they may be taxed, then the obligations which the Government has assumed in reference to these Indians may be entirely defeated; for by the act of 1887 the Government has agreed at a named time to convey the land to the allottee in fee, discharged of the trust, "and free of all charge or incumbrances whatsoever." To say that these lands may be assessed and taxed by the county of Roberts under the authority of the State, is to say they may be sold for the taxes, and thus become so burdened that the United States could not discharge its obligations to the Indians without itself paying the taxes imposed from year to year, and thereby keeping the lands free from incumbrances.

In *Van Brocklin* v. *State of Tennessee*, 117 U. S. 151, 155, the court held that property of the United States was exempt by the Constitution of the United States from taxation under the authority of any State. Giving the outlines of the grounds of the judgment delivered by Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316, the court said: "That Constitution and the laws made in pursuance thereof are supreme; they control the constitutions and laws of the respective States, and cannot be controlled by them. The people of a State give to their government a right of taxing themselves and their property at its discretion. But the means employed by the Government of the Union are not given by the people of a particular State, but by the people of all the States; and being given by all, for the benefit of all, should be subjected to that Government only which belongs to all. All subjects over which the sovereign power of a State extends are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation. The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission; but does not extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States. The attempt to use the taxing power of a State on the means employed by the Government of the Union, in pursuance of the Constitution, is itself an abuse, because it is

the usurpation of a power which the people of a single State cannot give. The power to tax involves the power to destroy; the power to destroy may defeat and render useless the power to create; and there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control. The States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the General Government."

These principles were recognized and applied in *Wisconsin Railroad Co.* v. *Price County*, 133 U. S. 496, 504, in which the court said: "The Constitution vests in Congress the power to 'dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.' And this implies an exclusion of all other authority over the property which could interfere with this right or obstruct its exercise."

It was therefore well said by the Attorney General of the United States, in an opinion delivered in 1888, "that the allotment lands provided for in the act of 1887 are exempt from state or territorial taxation upon the ground above stated, . . . namely, that the lands covered by the act are held by the United States for the period of twenty-five years in trust for the Indians, such trust being an agency for the exercise of a Federal power, and therefore outside the province of state or territorial authority." 19 Op. Atty. Gen. 161, 169.

In support of these general views reference may be made to the following cases: *Weston* v. *City of Charleston*, 2 Pet. 467; *McCulloch* v. *Maryland*, 4 Wheat. 316; *Osborn* v. *Bank of the United States*, 9 Wheat. 738; *United States* v. *Rogers*, 4 How. 567; *New York Indians*, 5 Wall. 761; *Choctaw Nation* v. *United States*, 119 U. S. 1, 27; *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 483; *Cherokee Nation* v. *Southern Kansas Railway Co.*, 135 U. S. 641, 653; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294; *Lone Wolf* v. *Hitchcock*, 187 U. S. 553.

Another suggestion by the defendant deserves to be noticed.

It is that there is a "compact" between the United States and the State of South Dakota which, if regarded, determines this case for the State. Let us see what there is of substance in this view.

By the act of February 22, 1889, c. 180, providing among other things for the division of the Territory of Dakota into two States, it was declared that the conventions called to frame constitutions for them should provide, "by ordinances irrevocable without the consent of the United States and the people of said States," as follows:

"Second. That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States; . . . that no taxes shall be imposed by the States on lands or property therein belonging to or which may hereafter be purchased by the United States or reserved for its use. But nothing herein, or in the ordinances herein provided for, shall preclude the said States from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the lands thus granted from taxation; but said ordinances shall provide that all such lands shall be exempt from taxation by said States so long and to such extent as such act of Congress may prescribe." 25 Stat. 677.

That provision was embodied in the constitution of South Dakota—for the purpose no doubt of meeting the views of Congress expressed in the Enabling Act of 1889—and was declared by that instrument to be irrevocable without the consent of the United States and the people of the State expressed by

their legislative assembly; and this action of the United States and of the State constitutes the "compact" referred to, and upon which the appellee relies in support of the taxation in question.

We pass by, as unnecessary to be considered, whether the above provision in the act of Congress of 1889 had any legal efficacy in itself, after the admission of South Dakota into the Union upon an equal footing with the other States; for the same provision, in the state constitution, deliberately adopted by the State, is, without reference to the act of Congress, the law for its legislature and people, until abrogated by the State. Looking at that provision, we find nothing in it sustaining the contention that the county of Roberts has any authority to tax these lands. On the contrary, it is declared in the state constitution that lands within the limits of the State, owned or held by any Indian or Indian tribe, shall, until the title has been extinguished by the United States, remain under the absolute jurisdiction and control of the Congress of the United States. And when the State comes to declare, in its constitution, what taxes it shall not be precluded from imposing, the provision is that it shall not be precluded from taxing, as other lands, "any lands owned or held by any Indian who has severed his tribal relation, *and* has obtained from the United States, or from any person, a title thereto *by patent or other grant.*" Art. XXII. The patent or grant here referred to is the final patent or grant which invests the patentee or grantee with the title in fee, that is, with absolute ownership. No such patent or grant has been issued to these Indians. So that the appellee cannot sustain the taxation in question under the clause of the state constitution to which he refers, and the right to tax these lands must rest upon the general authority of the legislature to impose taxes. But, as already said, no authority exists for the State to tax lands which are held in trust by the United States for the purpose of carrying out its policy in reference to these Indians.

II. *Were the permanent improvements, such as houses and other structures upon the lands held by allotment by Charles R. Crawford and the other Indians named in the bill, subject to*

assessment and taxation by the taxing officers of Roberts County as personal property in 1899 and 1900? This is the second of the questions certified by the Judges of the Circuit Court of Appeals.

Looking at the object to be accomplished by allotting Indian lands in severalty, it is evident that Congress expected that the lands so allotted would be improved and cultivated by the allottee. But that object would be defeated if the improvements could be assessed and sold for taxes. The improvements to which the question refers were of a permanent kind. While the title to the land remained in the United States, the permanent improvements could no more be sold for local taxes than could the land to which they belonged. Every reason that can be urged to show that the land was not subject to local taxation applies to the assessment and taxation of the permanent improvements.

It is true that the statutes of South Dakota, for the purposes of taxation, classify "all improvements made by persons upon lands held by them under the laws of the United States" as personal property. But that classification cannot apply to permanent improvements upon lands allotted to and occupied by Indians, the title to which remains with the United States, the occupants still being wards of the Nation, and as such under its complete authority and protection. The fact remains that the improvements here in question are essentially a part of the lands, and their use by the Indians is necessary to effectuate the policy of the United States.

Counsel for the appellee suggests that the only interest of the United States is to be able at the end of twenty-five years from the date of allotment to convey the *land* free from any charge or encumbrance; that if a house upon Indian land were seized and sold for taxes, that would not prevent the United States from conveying the *land* free from any charge or incumbrance; and that, in such case, the Indians could not claim any breach of contract on the part of the United States. These suggestions entirely ignore the relation existing between the United States and the Indians. It is not a relation simply of contract, each party to which is capable of guarding his own interests, but the

Indians are in a state of dependency and pupilage, entitled to the care and protection of the Government. When they shall be let out of that state is for the United States to determine without interference by the courts or by any State. The Government would not adequately discharge its duty to these people if it placed its engagements with them upon the basis merely of contract and failed to exercise any power it possessed to protect them in the possession of such improvements and personal property as were necessary to the enjoyment of the land held in trust for them. In *Choctaw Nation* v. *United States*, 119 U. S. 1, 28, this court said: "The recognized relation between the parties to this controversy, therefore, is that between a superior and an inferior, whereby the latter is placed under the care and control of the former, and which, while it authorizes the adoption on the part of the United States of such policy as their own public interests may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection. The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons, equally subject to the same laws." See also *Minnesota* v. *Hitchcock*, 185 U. S. 373, 396.

III. *Was the personal property, consisting of cattle, horses and other property of like character, which had been issued to these Indians by the United States, and which they were using upon their allotments, liable to assessments and taxation by the officers of Roberts County in 1899 and 1900?* This is the third one of the certified questions.

The answer to this question is indicated by what has been said in reference to the assessment and taxation of the land and the permanent improvements thereon. The personal property in question was purchased with the money of the Government and was furnished to the Indians in order to maintain them on the land allotted during the period of the trust estate, and to

induce them to adopt the habits of civilized life. It was, in fact, the property of the United States, and was put into the hands of the Indians to be used in execution of the purpose of the Government in reference to them. The assessment and taxation of the personal property would necessarily have the effect to defeat that purpose.

IV. *Has the United States such an interest in this controversy or in its subjects as entitles it to maintain this suit?* This is the fourth one of the certified questions.

In view of the relation of the United States to the real and personal property in question, as well as to these dependent Indians still under national control, and in view of the injurious effect of the assessment and taxation complained of upon the plans of the Government with reference to the Indians, it is clear that the United States is entitled to maintain this suit. No argument to establish that proposition is necessary.

V. *Has the United States a remedy at law so prompt and efficacious that it is deprived of all relief in equity?* This is the last of the certified questions.

We do not perceive that the Government has any remedy at law that could be at all efficacious for the protection of its rights in the property in question and for the attainment of its purposes in reference to these Indians. If the personal property and the structures on the land were sold for taxes and possession taken by the purchaser, then the Indians could not be maintained on the allotted lands and the Government, unless it abandoned its policy to maintain these Indians on the allotted lands, would be compelled to appropriate more money and apply it in the erection of other necessary structures on the land and in the purchase of other stock required for purposes of cultivation. And so on, every year. It is manifest that no proceedings at law can be prompt and efficacious for the protection of the rights of the Government, and that adequate relief can only be had in a court of equity, which, by a comprehensive decree, can finally determine once for all the question of the validity of the assessment and taxation in question, and thus give security against any action upon the part of the local authorities tending to interfere with the complete control, not only of the Indians

by the Government, but of the property supplied to them by the Government and in use on the allotted lands. *Railway Co.* v. *McShane*, 22 Wall. 444; *Coosaw Mining Co.* v. *South Carolina*, 144 U. S. 550, 564–66.

Some observations may be made that are applicable to the whole case. It is said that the State has conferred upon these Indians the right of suffrage and other rights that ordinarily belong only to citizens, and that they ought, therefore, to share the burdens of government like other people who enjoy such rights. These are considerations to be addressed to Congress. It is for the legislative branch of the Government to say when these Indians shall cease to be dependent and assume the responsibilities attaching to citizenship. That is a political question, which the courts may not determine. We can only deal with the case as it exists under the legislation of Congress.

We answer the fourth question in the affirmative, and the first, second, third and fifth questions in the negative. It will be so certified to the Circuit Court of Appeals.

Answers certified.

MR. JUSTICE BREWER took no part in the decision of this case.

UNITED STATES *v.* LYNAH.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

No. 45. Argued January 9, 1903.—Decided February 23, 1903

All private property is held subject to the necessities of government and the right of eminent domain underlies all such rights of property.

When the United States government appropriates property which it does not claim as its own, it does so under an implied contract that it will pay the value of the property it so appropriates.

When it is alleged in an action that the government of the United States in the exercise of its powers of eminent domain and regulation of commerce, through officers and agents duly empowered thereto by acts of

Statement of the Case.

Congress, places dams, training walls and other obstructions in the Savannah River in such manner as to hinder its natural flow and to raise the water so as to overflow the land of plaintiff along the banks to such an extent as to cause a total destruction of its value, and the government does not deny the ownership, admits that the work was done by authority of Congress, and simply denies that the work has produced the alleged injury and destruction, the Circuit Court of the United States has jurisdiction to inquire whether the acts done by the officers of the United States under the direction of Congress have resulted in such an overflow and injury of the land as to render it absolutely valueless and, if thereby the property was, in contemplation of law, taken and appropriated by the government, to render judgment against it for the value of the property so taken and appropriated.

Where the government of the United States by the construction of a dam, or other public works, so floods lands belonging to an individual as to totally destroy its value, there is a taking of private property within the scope of the Fifth Amendment.

The proceeding must be regarded as an actual appropriation of the land, including the possession and the fee and, when the amount awarded as compensation is paid, the title, the fee and whatever rights may attach thereto pass to the government which becomes henceforth the full owner.

Notwithstanding that the work causing the injury was done in improving the navigability of a navigable river and by the Constitution Congress is given full control over such improvements, the injuries cannot be regarded as purely consequential, and the government cannot appropriate property without being liable to the obligation created by the Fifth Amendment of paying just compensation.

On February 4, 1897, defendants in error commenced their action in the Circuit Court of the United States for the District of South Carolina to recover of the United States the sum of $10,000 as compensation for certain real estate (being a part of a plantation known as Verzenobre) taken and appropriated by the defendant.

The petition alleged in the first paragraph the citizenship and residence of the petitioners; in the second, that they had a claim against the United States under an implied contract for compensation for the value of property taken by the United States for public use; third, that they were the owners as tenants in common of the plantation; and in the fourth and seventh paragraphs:

"Fourth. That for several years continuously, and now continuously, the said government of the United States of America,

in the exercise of its power of eminent domain under the Constitution of the United States and by authority of the acts of Congress, duly empowering its officers and agents thereto, in that case made and provided, did erect, build and maintain, and continuously since have been erecting, building and maintaining, and are now building, erecting and maintaining in and across the said Savannah River, in the bed of the said Savannah River, certain dams, training walls and other obstructions, obstructing and hindering the natural flow of the said Savannah River through, in and along the natural bed thereof and raising the said Savannah River —— feet at the point of and above the said obstructions and dams in the bed of the said Savannah River, and causing the said waters of the Savannah River aforesaid to be kept back and to flow back and to be raised and elevated above the natural height of the Savannah River along its natural bed at the points of the said dams, training walls and obstructions, and at points above the said dams, training walls and obstructions in said river."

"Seventh. And your petitioners further show that the said acts of the government of the United States, as aforesaid, have been done and are being done lawfully by the officers and agents of the United States under the authority of the United States in the exercise of its powers of eminent domain and regulation of commerce under the Constitution of the United States and the laws of Congress for the public purpose of the improvement of the harbor of Savannah and deepening the waters of the Savannah River at the port of Savannah, a port of entry of the United States and seaport of the United States of America, situated within the State of Georgia, on the Savannah River, and with the purpose of deepening and enlarging the navigable channel and highway for commerce of the said Savannah River for the public use, purpose and benefit of interstate and foreign and international trade and commerce, and for other public purposes, uses and benefits."

The remaining paragraphs set forth the effect of the placing by the government of the dams, restraining walls and other obstructions in the river, together with the value of the property appropriated by the overflow. The answer of the government averred:

"First. That this defendant has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first and third paragraphs of the said petition and complaint.

"Second. That this defendant denies all of the allegations contained in the second, fourth, fifth, sixth, seventh and eighth paragraphs of the said petition and complaint except so much of the fourth paragraph as alleges that the said United States heretofore erected certain dams in the Savannah River pursuant to power vested in it by law, and except so much of the seventh paragraph as alleges that the said dams heretofore erected by the United States were lawfully erected by its officers and agents."

For a further defence the statute of limitations was pleaded. The case came on for trial before the court without a jury, which made findings of fact, and from them deduced conclusions of law and entered a judgment against the defendant for the sum of $10,000. The findings were to the effect that the plaintiffs were the owners of the plantation, deriving title by proper mesne conveyances from "a grant by the lords proprietors of South Carolina," made in 1736. Other findings pertinent to the questions which must be considered in deciding this case were as follows:

"IV. A certain parcel of these plantations, measuring about 420 acres, had been reclaimed by drainage and had been in actual continued use for seventy years and upwards as a rice plantation, used solely for this purpose. This rice plantation was dependent for its irrigation upon the waters of the Savannah River and its ditches, drains and canals, through and by which the waters of the river were flowed in and upon the lands, and were then drained therefrom, were adapted to the natural level of the said Savannah River, and dependent for their proper drainage and cultivation upon the maintenance of the natural flow of the said river in, through and over its natural channel along its natural bed to the waters of the ocean.

"V. This portion of the plantation fronting on the river and dedicated to the culture of rice, extended almost up to if not quite to low water mark, and a large part of it was between

mean high water and low water mark, protected from the river by an embankment. Through this embankment trunks or waterways were constructed, with flood gates therein. The outer opening of the trunk was about a foot or a little less above the mean low water mark of the river, in which the tide ebbs and flows. When it is desired to flow the lands the flood gates are opened and the water comes in. When it is desired to draw off this water and to effect the drainage of the lands, the flood gates are opened at low water and the water escapes. It is essential that the outlets of the trunks or waterways should always be above the mean low water mark.

* * * * * * * *

"VII. For several years last past and at the present time the government of the United States, under its proper officers, authorized thereto by the act of Congress, have been engaged in the improvement of the navigation of the Savannah River, a navigable water of the United States, this improvement being carried on by virtue of the provisions of section 8, article I, of the Constitution, giving to the Congress the power to regulate commerce.

"VIII. In thus improving navigation of this navigable water the United States has built and maintained and is now building and maintaining in and across the Savannah River, in the bed thereof, certain dams, training walls and other obstructions, obstructing the natural flow of said river in and along its natural bed, and so raising the level of said river above said obstructions, and causing its waters to be kept back and to flow back and to be elevated above its natural height in its natural bed.

"IX. This rice plantation Verzenobre is above these obstructions. The direct effect thereof is to raise the level of the Savannah River at this plantation, and to keep the point of mean low water above its natural point, so that the outlet of the trunks and waterways above spoken of in the bank of said plantation, instead of being above this point of low water mark, is now below this point. Another direct result was that by seepage and percolation the water rose in the plantation until the water level in the land gradually rose to the height

of the increased water level in the river, and the superinduced addition of water in the plantation was about eighteen inches thereby. By reason of this it gradually became difficult, and has now become impossible, to let off the water on this plantation or to drain the same, so that these acres dedicated to the culture of rice have become boggy, unfit for cultivation and impossible to be cultivated in rice.

"X. By the raising of the level of the Savannah River by these dams and obstructions the water thereof has been backed up against the embankment on the river and has been caused to flow back upon and in this plantation above the obstruction, and has actually invaded said plantation, directly raising the water in said plantation about eighteen inches, which it is impossible to remove from said plantation. This flooding is the permanent condition now, and the rice plantation is thereby practically destroyed for the purpose of rice culture or any other known agriculture, and is an irreclaimable bog and has no value.

"XI. By reason of this superinduced addition of water actually invading the said rice plantation and its destruction thereby for all purposes of agriculture, plaintiffs have been compelled to abandon the cultivation of said rice plantation and have been forced to pursue their calling of planting rice on other plantations below the dams. The direct result to plaintiffs is an actual and practical ouster of possession from this rice plantation, cultivated by themselves and family for many years.

"XII. Beyond the backing up of the water on and in the plantation by reason of the dams and obstruction, and the invasion of these lands by this superinduced addition of water at and in the plantation as above described, rendered necessary by the execution of the government's plans, the United States is not in actual possession of these lands.

"XIII. Up to this time no other use has been discovered for these lands than for rice culture, and the direct results above stated have totally destroyed the market value of the lands. They now have no value.

"XIV. The value of these rice lands before the obstructions

aforesaid were put into the river was about thirty dollars per acre, between twenty-five and thirty dollars per acre. The value of the rice plantation, 420 acres, thus destroyed is ten thousand dollars."

Upon these findings of fact the important conclusions of law were thus stated:

"V. The crucial question in this case is, Was there a taking of this land in the sense of the Constitution?

"The facts found show that by reason of the obstruction in the Savannah River the water has been directly backed up against the embankment on the river and the banks on and in this plantation, the superinduced addition of water actually invading it and destroying its drainage and leaving it useless for all practical purposes. The government does not in a sense take this land for the purposes of putting its obstructions on it. But it forces back the water of the river on the land as a result necessary to its purpose, without which its purpose could not be accomplished. For the purpose of the government, that water in the river must be raised. The banks of this plantation materially assist this operation, for by their resistance the water is kept in the channel. The backing up of the water against the banks to create this resistance raises the water in the plantation and destroys the drainage of the plantation. This is a taking. 'It would,' says Mr. Justice Miller, 'be a very curious and unsatisfactory result if, in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the indivividual as against the government, and which had received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent; can, in effect, subject to total destruction without making any compensation, because in the narrowest sense of that word it has not been taken for the public use.' *Pumpelly* v. *Geeen Bay*

Co., 13 Wall. 177, 178. In that case the backing up of water on land was held to be a taking.

"VI. The plantation of plaintiffs being actually invaded by superinduced addition of water directly caused by the government dams and obstructions backing up the water of the Savannah River and raising the water level at and in the rice plantation and making it unfit for rice cultivation or for any other known agriculture, and plaintiffs have been compelled thereby to abandon the plantation, and this actual and practical ouster of possession being continued and permanent by reason of the permanent condition of the flooding of the plantation, and the plantation being thereby now an irreclaimable bog of no value, makes the action of the government a taking of lands for public purposes within the meaning of the Fifth Amendment, for which compensation is due to the plaintiffs. *Pumpelly* v. *Green Bay Co.*, 13 Wall. 182; *Mugler* v. *Kansas*, 123 U. S. 668.

"VII. The government has not gone into actual occupancy of this land, but by reason of these dams and obstructions made necessary by this public work and fulfilling its purpose the water in the Savannah River has been raised at the plaintiffs' plantation and has been backed up on it and remains on it so that the drainage has been destroyed and ditches filled up and superadded water permanently kept on the land and forced up into it, making it wholly unfit for cultivation, and the plaintiffs have thereby been practically and actually ousted of their possession. This is taking of the land for public purposes, for which compensation must be provided. *Pumpelly* v. *Green Bay Co.*, 13 Wall. 181."

The case involving the application of the Constitution of the United States was brought by writ of error directly to this court.

Mr. Robert A. Howard for the plaintiff in error with whom *Mr. Solicitor General Richards* was on the brief.

As the original grantors of the defendants in error obtained grants the boundaries whereof were "on the Savannah River" the grants only extend to high water mark. *United States* v. *Pacheco*, 2 Wall. 587; *State* v. *Pinckney*, 22 S. C. 484, 507;

Martin v. *Waddell*, 16 Peters, 367; *Shively* v. *Bowlby*, 152 U. S. 1; *Morris* v. *United States*, 174 U. S. 196, 226.

An individual may be the owner of a portion of the shore by a grant from the State but he takes the ownership subject to the trust for the people which cannot be destroyed or diminished. Hall, Sea Shore, 15; Hale *de jure Maris* Hay, L. T. c. V.; 5 Co. 107; *Illinois Cent. R. R. Co.* v. *Illinois*, 146 U. S. 387, 435, 452; *Stockton* v. *Balt. & N. Y. R. Co.*, 32 Fed. Rep. 19; 3 Kent, 377; *Commonwealth* v. *Roxbury*, 9 Gray, 451; *State* v. *Pacific Guano Co.*, 22 S. C. 48, 83; *Attorney General* v. *Parmenter*, 10 Price, 378.

The government has not taken possession of these lands by the erection of structures thereon or physical entering upon them, but whatever was done was under the direction of Congress to accomplish the purpose of improving the navigability of the Savannah River which is complete. *Gibbons* v. *Ogden*, 9 Wheat. 196; *Hoboken* v. *Railroad Co.*, 124 U. S. 659; *Mobile* v. *Kimball*, 102 U. S. 691; *Gilman* v. *Philadelphia*, 3 Wall. 724; *South Carolina* v. *Georgia*, 93 U. S. 4; *Telegraph Co.* v. *Telephone Co.*, 96 U. S. 1.

The power in the United States includes "all the powers which existed in the States before the adoption of the Constitution." Whatever consequences follow in its exercise are to be provided for exactly as they had been or would be in the British Isles or in the States of the Union.

One of the primary objects, as has been so often stated, was to regulate commerce, and, in doing so, to reach out and absolutely control navigation and all the navigable waters of the country for the benefit of the people. When this court said, in *Martin* v. *Waddell*, that the sovereign people of each State hold the absolute right to all their navigable waters, and the soils under them, for their own common use subject only to the rights since surrendered by the Constitution to the general government, and that the grants made by their authority must be determined by different principles from those which apply to grants of the British Crown, it was not meant, simply, that the people, through their representatives, could arbitrarily dispose of the trust property. That is not the theory of representative

government. That would not be tolerated long in a fierce democracy.

The court below found, it being a question of law and fact, that there had been such a taking of the land as entitled the parties to compensation. Reliance for this conclusion was had upon the principles laid down by this court in the cases of *Monongahela N. Co.* v. *United States*, 148 U. S. 336–337; *Gibson* v. *United States*, 166 U. S. 269, and explicitly *Pumpelly* v. *Green Bay Co.*, 13 Wall. 181; but these cases do not sustain the contention of the plaintiffs, the defendants in error, and can be distinguished from the cases at bar.

But what private property was taken for which compensation should be made under this guarantee of the Constitution, which is only affirmative of a right to the individual in a free government like this? The Crown had property rights in these lands in trust. The State had property rights to these lands in trust. They were never surrendered. They could not be. And when the United States reached out her hand and took possession of them to execute the trust to which she had succeeded, and which she was *legally* bound to execute, the inferior right had to yield, even to extermination. It is not for the courts to say that the individual has suffered and therefore should be reimbursed or compensated. If he has been, under a mistaken idea of his rights, put to labor and expense and hope, he has a remedy by application to the bounty of a government which will, it is opined, do him justice. But no wrong has been done him. He has enjoyed these lands and their profits without money and without price. They were the common property of the whole people. The accident of adjacent ownership gave him the license and the privilege; for, in the last instance, it was a privilege. *South Carolina* v. *Georgia*, 93 U. S. 1; *Scranton* v. *Wheeler*, 179 U. S. 141; *Webber* v. *Pere Marquette Boom Co.*, 62 Michigan, 626, and cases there cited.

It is equally well settled in that State that the rights of the riparian owner are subject to the public easement or servitude of navigation. *Lorman* v. *Benson*, 8 Michigan, 18, 32; *Ryan* v. *Brown*, 18 Michigan, 196, 207. So that whether the title to the submerged lands of navigable waters is in the State or in the

riparian owners, it was acquired subject to the rights which the public have in the navigation of such waters. The primary use of the waters and the lands under them is for purposes of navigation, and the erection of piers in them to improve navigation for the public is entirely consistent with such use, and infringes no right of the riparian owner. Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bordering on a public navigable water, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water. It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation.

In our opinion, it was not intended that the paramount authority of Congress to improve the navigation of the public navigable waters of the United States to meet the demands of international and interstate commerce should be crippled by compelling the government to make compensation for the injury to a riparian owner's right of access to navigability that might incidentally result from an improvement ordered by Congress. The subject with which Congress dealt was navigation. That which was sought to be accomplished was simply to improve navigation on the waters in question so as to meet the wants of the vast commerce passing and to pass over them. Consequently the agents designated to perform the work ordered or authorized by Congress had the right to proceed in all proper ways without taking into account the injury that might possibly or indirectly result from such work to the right of access by riparian owners to navigability. To conclude: The plaintiff in error claims that, conceding the interest and property which the defendants in error had in these lands, there was not in them a title to "such kind of property as was susceptible of pecuniary compensation, within the meaning of the Constitution." What the government took, and takes under similar circumstances, was the public property. It is not going too far, maybe, to assert that no private property is taken at all. The private property

under the grant is eclipsed when the necessity for public use is properly determined. How could there be a settlement of the value of the private property? By what rule could the measure of damage and injury be arrived at? All the land on all the coasts and tide waters of the country might be affected by the exercise of this necessary and sovereign and paramount power —paramount against States and individuals in exactly the same degree. And it is not extravagant to say that the power might be dangerously hurt and imperiled if it was subject to doubt or cavil or diminution.

In the supplemental and reply briefs additional authorities were cited. On the question of jurisdiction, Keener on Quasi-Contracts, pp. 159 *et seq.*; *National Trust Co.* v. *Gleason*, 77 N. Y. 400; *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 657; *Great Falls Mfg. Co.* v. *Attorney General*, 124 U. S. 597. As to liability of United States, *Shively* v. *Bowlby*, 152 U. S. 1, and authorities reviewed; *Hardin* v. *Jordan*, 140 U. S. 371; cases cited in *Hoboken* v. *Penn. R. R. Co.*, 124 U. S. 688; *People* v. *N. Y. & S. I. Ferry Co.*, 68 N. Y. 71; *Lloyd* v. *Hough*, 1 How. 153; *Langford* v. *United States*, 101 U. S. 341; *Hill* v. *United States*, 149 U. S. 593; *Schillinger* v. *United States*, 155 U. S. 163. The soil under navigable waters being held by the people of the State in trust for the common use, and as a portion of their inherent sovereignty, any act of legislation concerning their use affects the public welfare. *Ill. Cent. R. R. Co.* v. *Illinois*, 146 U. S. 459; *McCready* v. *Virginia*, 94 U. S. 391; *Pollard* v. *Hagan*, 3 How. 212; *Boston* v. *Lecraw*, 17 How. 426; *Commonwealth* v. *Charlestown*, 1 Pickering, 180; *Commonwealth* v. *Alger*, 7 Cushing 53, 78; *Rundle* v. *Del. & Raritan Canal Co.*, 14 How. 186; Phear on Waters, 52, 53.

While it is true that these lands have been reclaimed, yet they have been only temporarily relieved from the action of the ordinary tides; their relation to the Savannah River was only interrupted—not destroyed. *Davidson* v. *Boston & Maine R. R. Co.*, 3 Cush. 91, 105.

These cases cannot be brought within the *Pumpelly* case which was a suit in trespass, as was also *Eaton* v. *Boston &c. R.*

R. Co., 51 N. H. 504; and there cases are also different from *United States* v. *Monongahela Nav. Co.*, 148 U. S. 312, and *Kaukauna Water Power Co.* v. *Green Bay &c. Co.*, 142 U. S. 254.

Mr. J. P. Kennedy Bryan for defendant in error in No. 45. *Mr. Julian Mitchell, Jr.*, with whom *Mr. Julian Mitchell* and *Mr. Henry A. M. Smith* were on the brief for defendants in error in No. 59.

The cause of action accrued within six years. *Saulet* v. *Shepherd*, 4 Wall. 507; *Steel* v. *Bryant*, 49 Iowa, 116; 19 Am. & Eng. Enc. of Law, 2d ed. 195, and cases cited; *Kendall* v. *United States*, 107 U. S. 125; *High Bridge Lumber Co.* v. *United States*, 69 Fed. Rep. 326.

There has been an actual taking of the property. The principle that a permanent flooding was "a taking" thereof as established in *Pumpelly* v. *Green Bay Co.*, 13 Wall. 117, has never been modified. *Mugler* v. *Kansas*, 123 U. S. 667; *Gibson* v. *United States*, 166 U. S. 275; *Meyer* v. *Richmond*, 172 U. S. 96; *Scranton* v. *Wheeler*, 179 U. S. 154; *United States* v. *Alexander*, 148 U. S. 187; *Transportation Co.* v. *Chicago*, 99 U. S. 635. The Fifth Amendment should be construed liberally. 1 Blackstone's Com. 139; *Sinnickson* v. *Johnson*, 17 N. J. L. 129; *Eaton* v. *Boston &c. R. R. Co.*, 51 N. H. 504.

The ownership of the defendants in error was not always subservient to the right of the government to flood the same for the benefit of navigation. The facts found show that they were the owners in fee simple and that a portion of the lands lie between high and low water mark. Under the rule in South Carolina the ownership extends to low water mark. *State* v. *Pacific Guano Co.*, 22 S. C. 50; 24 S. C. 598; *State* v. *Pinckney*, 22 S. C. 492; *Heyward* v. *Farmers Mining Co.*, 42 S. C. 138; *Shively* v. *Bowlby*, 152 U. S. 1, 13, 26; *Lowndes* v. *Board &c.*, 153 U. S. 18; *Hardin* v. *Jordan*, 140 U. S. 371.

The power conferred by the States on Congress by the adoption of the Constitution giving to Congress the control of commerce, and of navigation in furtherance thereof, is limited by the Fifth Amendment.

The national government possesses no greater power over commerce than that possessed by each individual State, and which was ceded by the terms of the Constitution to the general government. The State of South Carolina could not take these lands nor can the United States take them without compensation. *Monongahela Nav. Co.* v. *United States*, 148 U. S. 341.

There was an implied contract on the part of the government to compensate for the taking. Cases cited *supra*, and *Kaukauna Water Co.* v. *Green Bay &c. Canal Co.*, 142 U. S. 254; *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645; *Kohl* v. *United States*, 91 U. S. 367; Parsons on Contracts, vol. 1, 5; 15 Am. & Eng. Enc. of Law. 1078; Cooley on Torts, 109; 2 Austin, Jurisprudence, 5th ed. 912; 2 Harvard Law Review, History of Assumpsit, 64; *Gilliam* v. *United States*, 8 Wall. 274; *Langford* v. *United States*, 101 U. S. 345.

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

There are three principal questions in this case: First, did the Circuit Court have jurisdiction; second, was there a taking of the land within the meaning of the Fifth Amendment; and, third, if there was a taking, was the government subject to the obligation of making compensation therefor?

Did the Circuit Court have jurisdiction? It may be premised that this question was not raised in the Circuit Court, nor was it presented to this court on the first argument but only upon the reargument. This omission on the part of the learned counsel for the government is certainly suggestive. Nevertheless as the question, now for the first time presented, is one of jurisdiction it must be considered and determined. To sustain the challenge of jurisdiction it is insisted by the government that there was no implied contract, but simply tortious acts on the part of its officers, and *Hill* v. *United States*, 149 U. S. 593, and *Schillinger* v. *United States*, 155 U. S. 163, are relied upon. Let us see what those cases were and what they decided. In the former the plaintiff sued to recover from the United States for the use and occupation of land for a lighthouse. The land upon which the lighthouse was built was submerged land in Chesa-

peake Bay. The government pleaded that it had a paramount right to the use of the land, and that plea was demurred to. It was held that the Circuit Court had no jurisdiction, and in the opinion delivered by Mr. Justice Gray it was said, after referring to several cases (pp. 598–9):

"In *Langford* v. *United States*, it was accordingly adjudged that, when an officer of the United States took and held possession of land of a private citizen, under a claim that it belonged to the government, the United States could not be charged upon an implied obligation to pay for its use and occupation.

"It has since been held that if the United States appropriate to a public use land which they admit to be private property, they may be held, as upon an implied contract, to pay its value to the owner. *United States* v. *Great Falls Manufacturing Company*, 112 U. S. 645, and 124 U. S. 581. It has likewise been held that the United States may be sued in the Court of Claims for the use of a patent for an invention, the plaintiff's right in which they have acknowledged. *Hollister* v. *Benedict Manufacturing Company*, 113 U. S. 59; *United States* v. *Palmer*, 128 U. S. 262. But in each of these cases the title of the plaintiff was admitted, and in none of them was any doubt thrown upon the correctness of the decision in *Langford's* case. See *Schillinger* v. *United States*, 24 C. Cl. 278.

"The case at bar is governed by *Langford's* case. It was not alleged in this petition, nor admitted in the plea, that the United States had ever in any way acknowledged any right of property in the plaintiff as against the United States. The plaintiff asserted a title in the land in question, with the exclusive right of building thereon, and claimed damages of the United States for the use and occupation of the land for a lighthouse. The United States positively and precisely pleaded that the land was submerged under the waters of Chesapeake Bay, one of the navigable waters of the United States, and that the United States, 'under the law, for the purpose of a lighthouse, has a paramount right to its use as against the plaintiff or any other person;' and the plaintiff demurred to this plea."

In the other case it appeared that the architect of the Capitol contracted with G. W. Cook for the laying of pavement in the

Capitol grounds. The contractor in laying the pavement infringed, as petitioners claimed, upon rights granted to them by patent. Thereafter this suit was brought, not against the party guilty of the alleged infringement, but against the United States which had accepted the pavement in the construction of which, as petitioners claimed, the contractor had infringed upon their rights. In the opinion it was said (p. 170):

"Here the claimants never authorized the use of the patent right by the government; never consented to, but always protested against it, threatening to interfere by injunction or other proceedings to restrain such use. There was no act of Congress in terms directing, or even by implication suggesting, the use of the patent. No officer of the government directed its use, and the contract which was executed by Cook did not name or describe it. There was no recognition by the government or any of its officers of the fact that in the construction of the pavement there was any use of the patent, or that any appropriation was being made of claimant's property. The government proceeded as though it were acting only in the management of its own property and the exercise of its own rights, and without any trespass upon the rights of the claimants. There was no point in the whole transaction from its commencement to its close where the minds of the parties met or where there was anything in the semblance of an agreement. So not only does the petition count upon a tort, but also the findings show a tort. That is the essential fact underlying the transaction and upon which rests every pretence of a right to recover. There was no suggestion of a waiver of the tort or a pretence of any implied contract until after the decision of the Court of Claims that it had no jurisdiction over an action to recover for the tort."

How different is the case at bar! The government did not deny the title of the plaintiffs. It averred in the answer simply that it had "no knowledge or information sufficient to form a belief," but did not couple such averment with any denial, nor did it pretend that it owned the property or had a paramount proprietary right to its possession. It did not put in issue the question of title, but rested upon a denial that the acts its offi-

cers had done by its direction had overflowed the land and wrought the injury as alleged, or that such overflow and injury created an implied contract, and also upon the bar of the statute of limitations. Nowhere in the record did it set up any title to the property antagonistic to that claimed by the plaintiffs. It simply denied responsibility for what it had caused to be done, and pleaded that if it had ever been liable, the statute of limitations had worked a bar. No officer of the government, as in the *Langford* case, claimed that the property found by the court to be the property of the plaintiffs, belonged to the government. While there was no formal admission of record that the land belonged to the plaintiffs, the case was tried alone upon the theory that the government could not be held responsible for what it had done. It did not repudiate the actions of its officers and agents, but on the contrary in terms admitted that they acted by authority of Congress, and that all that they did was lawfully done. So that if the overflow and destruction of this property was, as we shall presently inquire, a taking and appropriation within the scope of the Fifth Amendment to the Constitution, the jurisdictional question now presented is whether such appropriation directed by Congress created an implied contract on the part of the government to pay for the value of the property so appropriated. Let us see what this court has decided. In *United States* v. *Great Falls Manufacturing Company*, 112 U. S. 645, Congress having made an appropriation therefor, a dam was constructed across the Potomac with the view of supplying the city of Washington with water. In the construction of such dam certain lands belonging to the plaintiff were taken, although such lands were not by the act of Congress specifically ordered to be taken. The property so taken not having been paid for, plaintiff brought this action in the Court of Claims to recover the value thereof, and it was held that the action might be maintained, and in the opinion it was said (p. 656):

"It seems clear that these property rights have been held and used by the agents of the United States, under the sanction of legislative enactments by Congress; for, the appropriation of money specifically for the construction of the dam from the

Maryland shore to Conn's Island was, all the circumstances considered, equivalent to an express direction by the legislative and executive branches of the government to its officers to take this particular property for the public objects contemplated by the scheme for supplying the capital of the nation with wholesome water. The making of the improvements necessarily involves the taking of the property; and if, for the want of formal proceedings for its condemnation to public use, the claimant was entitled, at the beginning of the work, to have the agents of the government enjoined from prosecuting it until provision was made for securing, in some way, payment of the compensation required by the Constitution—upon which question we express no opinion—there is no sound reason why the claimant might not waive that right, and, electing to regard the action of the government as a taking under its sovereign right of eminent domain, demand just compensation. *Kohl* v. *United States*, 91 U. S. 367, 374. In that view we are of opinion that the United States, having by its agents, proceeding under the authority of an act of Congress, taken the property of the claimant for public use, are under an obligation, imposed by the Constitution, to make compensation. The law will imply a promise to make the required compensation, where property to which the government asserts no title, is taken, pursuant to an act of Congress, as private property to be applied for public uses. Such an implication being consistent with the constitutional duty of the government, as well as with common justice, the claimant's cause of action is one that arises out of implied contract, within the meaning of the statute which confers jurisdiction upon the Court of Claims of actions founded 'upon any contract, express or implied, with the government of the United States.'"

In *Great Falls Manufacturing Company* v. *The Attorney General*, 124 U. S. 581, an action, which, like the preceding, grew out of provisions made by Congress to supply water to the city of Washington, and in which the relief sought was the removal of all structures on the premises, or if it should appear that the property had been legally condemned, the framing of an issue, triable by jury, to ascertain the plaintiff's damages, and a judgment for the amount thereof, it was said, referring to the

contention that there were certain defects in the proceedings taken by the government (p. 597):

"Even if the Secretary's survey and map, and the publication of the Attorney General's notice did not, in strict law, justify the former in taking possession of the land and water rights in question, it was competent for the company to waive the tort, and proceed against the United States, as upon an implied contract, it appearing, as it does here, that the government recognizes and retains the possession taken in its behalf for the public purposes indicated in the act under which its officers have proceeded."

In *Hollister* v. *Benedict Manufacturing Company*, 113 U. S. 59, an action by the assignees of a patent against a United States collector for infringement, the law is thus stated (p. 67):

"If the right of the patentee was acknowledged, and, without his consent, an officer of the government, acting under legislative authority, made use of the invention in the discharge of his official duties, it would seem to be a clear case of the exercise of the right of eminent domain, upon which the law would imply a promise of compensation, an action on which would lie within the jurisdiction of the Court of Claims, such as was entertained and sanctioned in the case of *The United States* v. *The Great Falls Manufacturing Company*, 112 U. S. 645."

In *United States* v. *Palmer*, 128 U. S. 262, an action in the Court of Claims by a patentee against the government to recover upon an implied contract for the use of the patented invention, it appeared that the petitioner was the patentee of certain improvements in infantry equipments which were adopted by the Secretary of War as a part of the equipment of the infantry soldiers of the United States, and, sustaining the jurisdiction of the Court of Claims, it was said (p. 269):

"No tort was committed or claimed to have been committed. The government used the claimant's improvements with his consent; and, certainly, with the expectation on his part of receiving a reasonable compensation for the license. This is not a claim for an infringement, but a claim of compensation for an authorized use—two things totally distinct in the law, as

distinct as trespass on lands is from use and occupation under a lease."

In *United States* v. *Berdan Fire-Arms Company*, 156 U. S. 552, a judgment of the Court of Claims against the United States on an implied contract for the use of an improvement in breechloading firearms was sustained, although there was no act of Congress expressly directing the use of such improvement. In the opinion it was said (p. 567):

"While the findings are not so specific and emphatic as to the assent of the government to the terms of any contract, yet we think they are sufficient. There was certainly no denial of the patentee's rights to the invention; no assertion on the part of the government that the patent was wrongfully issued; no claim of a right to use the invention regardless of the patent; no disregard of all claims of the patentee, and no use, in spite of protest or remonstrance. Negatively, at least, the findings are clear. The government used the invention with the consent and express permission of the owner, and it did not, while so using it repudiate the title of such owner."

And then, after quoting from several of the findings, it was added (p. 569):

"The import of these findings is this: That the officers of the government, charged specially with the duty of superintending the manufacture of muskets, regarded Berdan as the inventor of this extractor-ejector; that the difference between the spiral and flat spring was an immaterial difference; that, therefore, they were using in the Springfield musket Berdan's invention; that they used it with his permission as well as that of his assignee, the petitioner, and that they used it with the understanding that the government would pay for such use as for other private property which it might take, and this, although they did not believe themselves to have the authority to agree upon the price."

The rule deducible from these cases is that when the government appropriates property which it does not claim as its own it does so under an implied contract that it will pay the value of the property it so appropriates. It is earnestly contended in argument that the government had a right to appropriate this

property. This may be conceded, but there is a vast difference between a proprietary and a governmental right. When the government owns property, or claims to own it, it deals with it as owner and by virtue of its ownership, and if an officer of the government takes possession of property under the claim that it belongs to the government (when in fact it does not) that may well be considered a tortious act on his part, for there can be no implication of an intent on the part of the government to pay for that which it claims to own. Very different from this proprietary right of the government in respect to property which it owns is its governmental right to appropriate the property of individuals. All private property is held subject to the necessities of government. The right of eminent domain underlies all such rights of property. The government may take personal or real property whenever its necessities or the exigencies of the occasion demand. So the contention that the government had a paramount right to appropriate this property may be conceded, but the Constitution in the Fifth Amendment guarantees that when this governmental right of appropriation—this asserted paramount right—is exercised it shall be attended by compensation.

The government may take real estate for a post office, a court house, a fortification or a highway; or in time of war it may take merchant vessels and make them part of its naval force. But can this be done without an obligation to pay for the value of that which is so taken and appropriated? Whenever in the exercise of its governmental rights it takes property, the ownership of which it concedes to be in an individual, it impliedly promises to pay therefor. Such is the import of the cases cited as well as of many others.

The action which was taken, resulting in the overflow and injury to these plaintiffs, is not to be regarded as the personal act of the officers but as the act of the government. That which the officers did is admitted by the answer to have been done by authority of the government, and although there may have been no specific act of Congress directing the appropriation of this property of the plaintiffs, yet if that which the officers of the government did, acting under its direction, resulted in an ap-

propriation it is to be treated as the act of the government. *South Carolina* v. *Georgia*, 93 U. S. 4, 13; *Wisconsin* v. *Duluth*, 96 U. S. 379; *United States* v. *Great Falls Manufacturing Company*, *supra*.

Congress for many successive terms appropriated money for the improvement of the Savannah River. 21 Stat. 470, 480; 22 Stat. 194, 200; 23 Stat. 140; 24 Stat. 321, 331; 25 Stat. 413; 26 Stat. 442; 27 Stat. 101; 28 Stat. 351. These appropriations were in the river and harbor bills, and were generally of so much money for improving the river, but some deserve special mention. Thus, in 21 Stat. 470, it was provided that "one thousand dollars may be applied to payment of damages for land taken for widening the channel opposite Savannah." In 24 Stat. 331, the Secretary of War was directed to cause a survey to be made of the "Savannah River from cross tides above Savannah to the bar, with a view to obtaining twenty-eight feet of water in the channel." The appropriation in 25 Stat. 413 was for the improvement of the river, "completing the present project and commencing the extended project contained in the report of Engineer for year ending June 30, 1887." And by the same statute, 431, among the matters referred to the Secretary of War for survey and examination was "whether the damage to the Vernezobie Freshet Bank in 1887 was caused by the work at cross tides, and whether the maintenance of said bank is essential to the success of the work at cross tides, and what will be the cost of so constructing said bank as to confine the water of said river to its bed." The report of the engineers for the year 1887, referred to in the section above quoted, shows that part of the work which was being done by the government was in the construction of training walls, and wing dams, by which the width of the waterway was reduced.

Further, the same year, 25 Stat. 94, an act was passed, entitled "An act to facilitate the prosecution of works projected for the improvement of rivers and harbors," which authorized the Secretary of War to commence proceedings "for the acquirement by condemnation of any land, right of way, or material needed to enable him to maintain, operate or prosecute works for the improvement of rivers and harbors for which pro-

vision has been made by law; . . . *Provided, however*, That when the owner of such land, right of way, or material shall fix a price for the same, which in the opinion of the Secretary of War, shall be reasonable, he may purchase the same at such price without further delay."

Thus, beyond the effect of the admission in the answer, and beyond the presumption of knowledge which attends the action of all legislative bodies, it affirmatively appears not only that Congress was making appropriations from year to year for the improvement of the river, but also that it had express notice of damage to the banks along this very plantation; that the works which were being done by the engineers had in view the narrowing of the width of the waterway; that land would be damaged as the result of those works, and that it authorized the Secretary of War to take proceedings in eminent domain to acquire the land, right of way and material which might be necessary for maintaining, operating or prosecuting works of river improvement, or, if the price could be agreed upon, to purchase the same.

This brings the case directly within the scope of the decision in *United States* v. *Great Falls Manufacturing Company*, *supra*, where, as here, there was no direction to take the particular property, but a direction to do that which resulted in a taking, and it was held that the owner might waive the right to insist on condemnation proceedings and sue to recover the value.

It does not appear that the plaintiffs took any action to stop the work done by the government, or protested against it. Their inaction and silence amount to an acquiescence—an assent to the appropriation by the government. In this respect the case is not dissimilar to that of a landowner who, knowing that a railroad company has entered upon his land and is engaged in constructing its road without having complied with the statute in respect to condemnation, is estopped from thereafter maintaining either trespass or ejectment, but is limited to a recovery of compensation. *Roberts* v. *Northern Pacific Railroad*, 158 U. S. 1, 11; *Northern Pacific Railroad* v. *Smith*, 171 U. S. 260, and cases cited in the opinion.

The case, therefore, amounts to this: The plaintiffs alleged

that they were the owners of certain real estate bordering on the Savannah River; that the government, in the exercise of its powers of eminent domain and regulation of commerce, through officers and agents duly empowered thereto by acts of Congress, placed dams, training walls and other obstructions in the river in such manner as to hinder its natural flow and to raise its waters so as to overflow the land of plaintiffs, and overflow it to such an extent as to cause a total destruction of its value. The government, not denying the ownership of plaintiffs, admitted that the work which was done by their officers and agents was done by authority of Congress, but denied that those works had produced the alleged injury and destruction. We are of opinion that under these pleadings and the issues raised thereby the Circuit Court had jurisdiction to inquire whether the acts done by the officers of the United States under the direction of Congress had resulted in such an overflow and injury of the plaintiff's land as to render it absolutely valueless, and if thereby the property was, in contemplation of law, taken and appropriated by the government, to render judgment against it for the value of the property so taken and appropriated.

Was there a taking? There was no proceeding in condemnation instituted by the government, no attempt in terms to take and appropriate the title. There was no adjudication that the fee had passed from the landowner to the government, and if either of these be an essential element in the taking of lands, within the scope of the Fifth Amendment, there was no taking.

Some question is made as to the meaning of the findings. It appears from the fifth finding, as amended, that a large portion of the land flooded was in its natural condition between high-water mark and low water mark, and was subject to overflow as the water passed from one stage to the other; that this natural overflow was stopped by an embankment, and in lieu thereof, by means of flood gates, the land was flooded and drained at the will of the owner. From this it is contended that the only result of the raising of the level of the river by the government works was to take away the possibility of drainage. But findings nine and ten show that, both by seepage and

percolation through the embankment, and an actual flowing upon the plantation above the obstruction, the water has been raised in the plantation about eighteen inches, that it is impossible to remove this overflow of water, and, as a consequence, the property has become an irreclaimable bog, unfit for the purpose of rice culture or any other known agriculture, and deprived of all value. It is clear from these findings that what was a valuable rice plantation has been permanently flooded, wholly destroyed in value, and turned into an irreclaimable bog; and this as the necessary result of the work which the government has undertaken. Does this amount to a taking? The case of *Pumpelly* v. *Green Bay Company*, 13 Wall. 166, answers this question in the affirmative. And on the argument it was conceded by the learned counsel for the government (and properly conceded in view of the findings) that so far as respects the mere matter of overflow and injury there was no substantial distinction between the two cases. In that case the Green Bay Company, as authorized by statute, constructed a dam across Fox River, by means of which the land of Pumpelly was overflowed and rendered practically useless to him. There, as here, no proceedings had been taken to formally condemn the land. Referring to this it was said (p. 177):

"The argument of the defendant is that there is no *taking* of the land within the meaning of the constitutional provision, and that the damage is a consequential result of such use of a navigable stream as the government had a right to for the improvement of its navigation.

"It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to

total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors."

Reference was also made to the case of *Sinnickson* v. *Johnson*, 2 Harr. (17 N. J. Law) 129, in respect to which it was said: "The case is mainly valuable here as showing that overflowing land by backing the water on it was considered as 'taking' it within the meaning of the principle." Again, on page 179, it was said: "But there are numerous authorities to sustain the doctrine that a serious interruption to the common and necessary use of property may be, in the language of Mr. Angell, in his work on Water Courses, equivalent to the taking of it, and that under the constitutional provisions it is not necessary that the land should be absolutely taken." And in a foot-note the following authorities were cited: Angell on Water Courses, sec. 465*a*; *Hooker* v. *New Haven & Northampton Co.*, 14 Connecticut, 146; *Rowe* v. *Granite Bridge Corporation*, 21 Pick. 344; *Canal Appraisers* v. *The People*, 17 Wend. 571, 604; *Lackland* v. *North Missouri Railroad Co.*, 31 Missouri, 180; *Stevens* v. *Proprietors of Middlesex Canal*, 12 Massachusetts, 466.

It is clear from these authorities that where the government by the construction of a dam or other public works so floods lands belonging to an individual as to substantially destroy their value there is a taking within the scope of the Fifth Amendment. While the government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done it is of little consequence in whom the fee may be vested. Of course, it results from this that the proceeding must be regarded as an actual appropriation of the land, including the possession, the right of possession and the fee; and when the amount awarded as compensation is paid the title, the fee, with whatever rights may attach thereto— in this case those at least which belong to a riparian proprie-

tor—pass to the government and it becomes henceforth the full owner.

Passing to the third question, it is contended that what was done by the government was done in improving the navigability of a navigable river, that it is given by the Constitution full control over such improvements, and that if in doing any work therefor injury results to riparian proprietors or others it is an injury which is purely consequential, and for which the government is not liable. But if any one proposition can be considered as settled by the decisions of this court it is that, although in the discharge of its duties the government may appropriate property, it cannot do so without being liable to the obligation cast by the Fifth Amendment of paying just compensation.

In *Monongahela Navigation Company* v. *United States*, 148 U. S. 312, 336, it was said:

"But like the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the Fifth Amendment we have heretofore quoted. Congress has supreme control over the regulation of commerce, but if, in exercising that supreme control, it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this Fifth Amendment, and can take only on payment of just compensation."

In that case Congress had passed an act for condemning what was known as "the upper lock and dam of the Monongahela Navigation Company," and provided "that in estimating the sum to be paid by the United States, the franchise of said corporation to collect tolls should not be considered or estimated," but we held that this proviso was beyond the power of Congress; that it could not appropriate the property of the navigation company without paying its full value, and that a part of that value consisted in the franchise to take tolls. So in the recent case of *Scranton* v. *Wheeler*, 179 U. S. 141, 153, we repeated the proposition in these words:

"Undoubtedly compensation must be made or secured to the owner when that which is done is to be regarded as a taking

of private property for public use within the meaning of the Fifth Amendment of the Constitution; and of course in its exercise of the power to regulate commerce, Congress may not override the provision that just compensation must be made when private property is taken for public use."

It is true that a majority of the court held, in that case, that the destruction of access to land abutting on a navigable river by the construction by Congress of a pier on the submerged lands in front of the upland, was not a taking of private property for public uses, but only an instance of consequential injury to the property of the riparian owner. But the right of compensation in case of a taking was conceded. There have been many cases in which a distinction has been drawn between the taking of property for public uses and a consequential injury to such property, by reason of some public work. In the one class the law implies a contract, a promise to pay for the property taken, which, if the taking was by the general government, will uphold an action in the Court of Claims; while in the other class there is simply a tortious act doing injury, over which the Court of Claims has no jurisdiction. Thus, in *Transportation Company* v. *Chicago*, 99 U. S. 635, the city, duly authorized by statute, constructed a tunnel along the line of La Salle street and under the Chicago River. The company claimed that it was deprived of access to its premises by and during the construction. This deprivation was not permanent, but continued only during the time necessary to complete the tunnel, and it was held that there was no taking of the property, but only an injury, and that a temporary injury thereto. In the course of the opinion, after referring to the *Pumpelly* case, *supra*, and *Eaton* v. *Boston, Concord & Montreal Railroad Company*, 51 N. H. 504, we said (p. 642):

"In those cases, it was held that permanent flooding of private property may be regarded as a 'taking.' In those cases there was physical invasion of real estate of the private owner, and a practical ouster of his possession. But in the present case there was no such invasion. No entry was made upon the plaintiff's lot. All that was done was to render for a time its use more inconvenient."

Opinion of the Court.

Chicago v. *Taylor*, 125 U. S. 161, while recognizing and reaffirming the rule there laid down, was decided upon the ground that a new rule was established by the Illinois constitution of 1870, which provided that "private property shall not be taken or damaged for public use without just compensation." *Montana Company* v. *St. Louis Mining &c. Company*, 152 U. S. 160, held that a mere order for inspection of mining property was not a taking thereof, because all that was done was a temporary and limited interruption of the exclusive use. *Gibson* v. *United States*, 166 U. S. 269, decided that, where by the construction of a dyke by the United States in the improvement of the Ohio River the plaintiff, a riparian owner, was through the greater part of the gardening season deprived of the use of her landing for the shipment of products from and supplies to her farm, whereby the value of her farm was reduced $150 to $200 per acre, there was no taking of the property, but only a consequential injury. See also *Marchant* v. *Pennsylvania Railroad*, 153 U. S. 380; *Meyer* v. *Richmond*, 172 U. S. 82. In this connection *Mills* v. *United States*, 46 Fed. Rep. 738, decided in the District Court for the Southern District of Georgia, is worthy of notice by reason of its similarity in many respects and its clearly marked distinction in an essential matter. It was an action for injuries to a rice plantation on the banks of the Savannah River resulting from works done by the United States in improving the navigability of that river, apparently the very improvement made by the government in the present case. The condition of the claimant's rice plantation prior to the improvement was substantially that of these plaintiffs' property, and the lands were drained by opening the gates when the river was at low water mark. The complaint was that the erection by the government of what was called the "cross tides dam," running from the upper end of Hutchinson's Island to the lower end of Argyle Island, cut off all the flow of water from the stream connecting the front and back rivers, raised both the high and low water levels in the front river, and not only destroyed the facilities for draining these lands into the front river, but rendered it necessary to raise the levees around the rice fields, to prevent flooding the fields at high

water. This, it was alleged, unfitted the lands for rice culture and made it necessary that new drainage into back river be provided where the water levels were suitable. Obviously, there was no taking of the plaintiff's lands, but simply an injury which could be remedied at an expense as alleged of $10,000, and the action was one to recover the amount of this consequential injury. The court rightfully held that it could not be sustained. Here there is no finding, no suggestion, that by any expense the flooding could be averted. We may, of course, know that there is theoretically no limit to that which engineering skill may accomplish. We know that vast tracts have in different parts of the world been reclaimed by levees and other works, and so we may believe that this flooding may be prevented, that some day all these submerged lands may be reclaimed. But as a practical matter, and for the purposes of this case, we must under the findings regard the lands in controversy as irreclaimable and their value wholly and finally destroyed.

Therefore, following the settled law of this court, we hold that there has been a taking of the lands for public uses and that the government is under an implied contract to make just compensation therefor.

The judgment is

Affirmed.

MR. JUSTICE BROWN concurring.

I concur in the opinion of the court both with respect to its jurisdiction and the merits of the case, but I am unable to assent to the ground upon which our jurisdiction is rested. While I think the overflowing of the lands in controversy constitutes a taking within the meaning of the Fifth Amendment to the Constitution, I see no reason for holding that there was an implied contract to pay for them within the meaning of the Tucker act. The taking appears to me an ordinary case of trespass to real estate, containing no element whatever of contract. In such case there can be no waiver of the tort. *Jones* v. *Hoar*, 5 Pick. 285; *Smith* v. *Hatch*, 46 N. H. 146.

JUSTICE BROWN, concurring.

But I think our jurisdiction may be supported, irrespective of the question of contract or tort, under that clause of the Tucker act which vests the Court of Claims with jurisdiction of "all claims founded upon the Constitution of the United States or any law of Congress."

As we had occasion to remark in *Dooley* v. *United States*, 182 U. S. 222–224, the first section of the Tucker act evidently contemplates four distinct classes of cases: (1) those founded upon the Constitution or any law of Congress, with an exception of pension cases; (2) cases founded upon a regulation of an Executive Department; (3) cases of contract, express or implied, with the government; (4) actions for damages, liquidated or unliquidated, in cases *not sounding in tort*. The words "not sounding in tort" are in terms referable only to the fourth class of cases.

In my view, claims founded upon the Constitution may be prosecuted in the Court of Claims, whether sounding in contract or in tort; and wherever the United States may take proceedings in eminent domain for the condemnation of lands for public use, the owner of such lands may seek relief in the Court of Claims if his lands be taken without such proceedings, whether such taking be tortious or by virtue of some contract, express or implied, to that effect. That the case under consideration is one of that class is made clear by the act of April 24, 1888, 25 Stat. 94, which enacts "that the Secretary of War may cause proceedings to be instituted, in the name of the United States, in any court having jurisdiction of such proceedings, for the acquirement by condemnation of any land, right of way, or material needed to enable him to maintain, operate or prosecute works for the improvement of rivers and harbors for which provision has been made by law; such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted."

I fully concur in the opinion of the court that "the government may take real estate for a post office, a court house, a fortification or highway, or in time of war it may take merchant vessels and made them part of its naval force," but this cannot

be "done without an obligation to pay for the value of that which is so taken and appropriated." I am also of opinion that whenever in the exercise of its governmental rights it takes property, the ownership of which it concedes to be in an individual, it is bound to pay therefor, but I do not think that there is any distinction between cases where the government impliedly promises to pay by taking property with the assent of the owner, and those where it takes property forcibly and against the will of the owner. It does not seem reasonable to hold that, where the invasion of the owner's right to property is the greater, his remedy for the recovery of its value should be less, and that he should be compelled to resort to the tedious and unsatisfactory method of appealing to the bounty of Congress for relief.

Suppose, for instance, in time of war and under threat of invasion it seizes upon vessels without the consent of the owner and against his protest. There is certainly the same moral obligation to pay for them as if they had been appropriated with his consent, and I see no reason why an action for their value may not be maintained in the Court of Claims. Yet, as I understand the opinion of the court in this case, it holds indirectly, if not directly, that no such action would lie unless the property were taken with the consent of the owner and under an implied contract to pay for it. The consequences of recognizing such distinctions seem to me so serious that nothing short of clear language in the statute will justify it.

None such is even hinted at in *United States* v. *Russell*, 13 Wall. 623, one of the earliest cases, wherein the owner of three steamers seized under "imperative military necessity" sought to recover compensation for their services. These steamers were impressed into the public service and employed as transports for carrying government freight for a certain length of time, when they were returned to the owner. He was held entitled to recover, the court holding that "extraordinary and unforeseen occasons arise, however, beyond all doubt, in cases of extreme necessity, in time of war or of immediate and impending public danger, in which private property may be impressed into the public service, or may be seized and appropriated to the public

use, or may be even destroyed without the consent of the owner." The case followed that of *Mitchell* v. *Harmony*, 13 How. 115, and was distinguished from that of *Filor* v. *United States*, 9 Wall. 45.

While the cases reported prior to 131 U. S. are based upon the original Court of Claims act, which limited the jurisdiction of that court to "claims founded upon any law of Congress, or upon any regulation of an Executive Department, or upon any contract, express or implied, with the government of the United States," and are therefore not strictly pertinent under the Tucker act, that of the *Great Falls Manufacturing Co.*, 112 U. S. 645, is almost exactly in point, and is strongly corroborative of the position here taken. This was a claim for land taken at the Great Falls of the Potomac in the construction of an aqueduct for bringing water to Washington. Proceedings were taken in Maryland for condemnation, which were discontinued, and the government took possession of the land. Whether such possession was taken with or without the consent of the owner does not appear, although there had been negotiations between the parties. The claimant was held to be entitled to recover upon the ground that the appropriation of the money for the construction of the improvements was equivalent to an express direction by Congress to take this particular property for the objects contemplated by the scheme, and that there was no sound reason why the claimant might not waive any right he might have to an injunction, and elect to regard the action as a taking by the government under its sovereign right of eminent domain, and therefore demand compensation. The case was not put upon the ground that the owner had consented to the taking.

In *Langford's* case, 101 U. S. 341, the action was brought to recover for the use and occupation of certain lands and buildings to which the claimant asserted title, which were seized for the use of the government under claim that they were public property. It was admitted that if the government takes property for public use, acknowledging its ownership to be private or individual, there arises an implied obligation to pay the owner its value; but that it was a different matter when the govern-

ment claimed the property as its own and recognized no superior title. This was also the case in *Hill* v. *United States*, 149 U. S. 593, where the government erected a lighthouse upon submerged land which it claimed as its own. The case was held to be governed by that of *Langford*.

None of the more recent cases under the Tucker act conflicts with the position here taken: That wherever the United States may proceed to condemn property under its sovereign right of eminent domain, the owner may maintain a petition in the Court of Claims to recover its value, in case no such proceedings are taken. That act, 24 Stat. 505, first introduced among the cognizable claims all such as were founded upon the Constitution of the United States, and also introduced, after the words "for damages, liquidated or unliquidated," the words "in cases not sounding in tort." Construing this statute, it was held in the *Jones* case, 131 U. S. 1, that it did not confer jurisdiction in equity to compel the issue and delivery of a patent for public land; and in *Schillinger's* case, 155 U. S. 163, that the owner of a patent which had been infringed by the United States could not recover damages for such infringement in the Court of Claims, though it would be otherwise if the property had been appropriated with the consent of the patentee and in view of compensation therefor. Although there was in *Schillinger's* case an appropriation of the right of a patentee to the monopoly of his invention, the case was nothing more in its essence than the infringement of a patent, and so the action was really one for damages sounding in tort. While it is possible an individual might be able to condemn the patentee's right by proceedings in eminent domain, that remedy would be at least doubtful, when the government sought merely to appropriate so much of it as was necessary for its own use. It would be an unprecedented exercise of the right of eminent domain, and could scarcely be held to be a claim arising under the Constitution. The case was not put upon the ground that it was such a case, but that it was merely an action to recover damages for infringement. Said the court: "It was plainly and solely an action for infringement and one sounding in tort." The question whether it was a claim arising under the Constitution was not

considered, except in the dissenting opinion of Mr. Justice Harlan, who said: "The constitutional obligation cannot be evaded by showing that the original appropriation was without the express direction of the government, nor by simply interposing a denial of the title of the claimant to the property or property rights alleged to have been appropriated." If there were any doubt in that case of the power of the government to condemn the right of the patentee by proceedings in eminent domain, there is certainly none such in this case, where the land was taken by the government with no pretence of consent by the owner.

I think it is going too far to hold that the words of the Tucker act, "not sounding in tort," must be referred back to the first class of cases, namely, "those founded upon the Constitution," and that they should be limited to actions for damages, liquidated or unliquidated, and, hence, the consent of the owner cuts no figure in this case. I freely admit that, if property were seized or taken by officers of the government without authority of law, or subsequent ratification, by taking possession or occupying property for public use, there could be no recovery, since neither the government nor any other principal is bound by the unauthorized acts of its agents. But in endeavoring to raise an implied contract to pay for an ordinary trespass to real estate I think the opinion of the court misconceives the true source of our jurisdiction.

MR. JUSTICE SHIRAS and MR. JUSTICE PECKHAM concurred in the above opinion in so far as it holds that the court had jurisdiction on the ground stated therein, as well as upon the ground stated in the opinion of the court.

MR. JUSTICE MCKENNA took no part in the decision of this case.

MR. JUSTICE WHITE, with whom concur MR. CHIEF JUSTICE FULLER and MR. JUSTICE HARLAN, dissenting.

The court now holds that it has jurisdiction, because as a

legal conclusion from the findings of fact it is held that the property of the appellee has been taken for public use by the United States, and the judgment below is affirmed on the merits for the same reason. As, in my opinion, the findings of fact do not support the conclusion that the property has been taken by the United States, I dissent both on the subject of jurisdiction and on the merits.

The findings of fact are in most respects sufficiently reproduced in the opinion of the court, and need not here be set out in full. It results from the findings that the land is situated on the Savannah River; that it is between high and low water mark, and naturally subject to be overflowed, but that it is protected in some measure from overflow by an embankment, and that through this embankment sluices or waterways were placed, by means of which water was let in on the land for irrigation in the cultivation of rice, and was drawn off when the land was required to be drained in order to carry on the same culture. This was done by gates in the sluices, which were opened to allow the water to flow through the waterways to the inner side of the embankment and thus flood the land when it was requisite to do so, and by opening the gates at low tide to allow the water to flow off when it was required to drain the land. As the exact situation of the waterways through the embankment is important, I reproduce the statement on the subject contained in the findings:

"Through this embankment trunks or waterways were constructed, with flood gates therein. The outer opening of the trunk was about a foot or a little less above the mean low water mark of the river, in which the tide ebbs and flows. When it is desired to flow the lands the flood gates are opened and the water comes in. When it is desired to draw off this water and to effect the drainage of the lands, the flood gates are opened at low water and the water escapes. It is essential that the outlets of the trunks or waterways should be above the mean low watermark."

It is now decided that there has been a taking of the property by the United States, because it is thought that the findings establish that the obstructions placed by the government

in the bed of the river at a point lower down the stream, than is the plantation, for the purpose of improving the navigation of the river, have so raised the water as to cause it to flow over the embankment at the plantation and flood the same, thus destroying its value. On this subject the court says: "Findings nine and ten show that, both by seepage and percolation through the embankment, and *an actual flowing upon the plantation* above the obstruction, the water has been raised in the plantation about eighteen inches," etc. Whilst it is not disputable that the findings show a percolation through the embankment I can discover nothing in them supporting the conclusion that the obstructions placed by the government in the bed of the river below the point where the plantation is situated have caused the water in the river to go over the embankment at the plantation and flood the land. On the contrary, to me it seems that the findings necessitate the conclusion that the permanent damage which the property has suffered arises solely from the fact that the drainage of the plantation into the river has been rendered impossible. And this because the work done by the government has resulted in raising the mean low tide about twelve to fifteen inches, so as to cause the water in the river at mean low tide to be above the point of discharge of the waterways, thus rendering drainage through them no longer possible. There may be a wide legal difference arising from damage consequent on an interference with the drainage of property situated, as this is, by work done by the government in the improvement of navigation, and damage caused by the actual flooding of such property resulting from such work. To determine whether the findings show an actual flowing, or a mere injury to drainage, findings VIII, IX and X need to be considered. Let us see whether they give support to the claim of actual flooding by an overflow of the embankment at the plantation. Finding VIII says:

"VIII. In thus improving navigation of this navigable water the United States has built and maintained and is now building and maintaining in and across the Savannah River, in the bed thereof, certain dams, training walls and other obstructions, obstructing the natural flow of said river in and along its nat-

ural bed, and so raising the level of said river above said obstructions, and causing its waters to be kept back and to flow back, and to be elevated above its natural height in its natural bed."

Certainly there is nothing in this finding supporting the inference that the government work has caused the river to overflow the plantation embankment. Finding IX says:

"This rice plantation Vernezobre is above these obstructions. The direct effect thereof is to raise the level of the Savannah River at this plantation, and to keep the point of mean low water above its natural point, so that the outlet of the trunks and waterways above spoken of in the bank of said plantation, instead of being above this point of low water mark, is now below this point."

Here, then, is the statement that the effect resulting from the government work was simply to raise the mean low water mark as previously existing, so as to cause it to cover the waterways which were—as declared by the previous finding—a little less than a foot above the former low water mark. The finding continues:

"Another direct result was that by seepage and percolation the water rose in the plantation until the water level in the land gradually rose to the height of the increased water level in the river, and the superinduced addition of water in the plantation was about eighteen inches thereby. By reason of this it gradually became difficult, and has now become impossible, to let off the water on this plantation, or to drain the same, so that these acres dedicated to the culture of rice have become boggy, unfit for cultivation, and impossible to be cultivated in rice."

This but declares that because the mean low stage of the water had been raised by the government work so as to cause it to be about eight inches above the mouth of the waterways and to rest against the embankment about eighteen inches, that percolation took place and the drainage was destroyed, the result of the loss of drainage being to render the plantation a bog and no longer suitable for the cultivation of rice. It is submitted nothing in the findings hitherto referred to even in-

timate that the effect of the work of the government caused the water to flow over the embankment and flood the plantation. On the contrary, the very opposite is the result of the findings.

Let me next consider the tenth finding. It reads as follows:

"By the raising of the level of the Savannah River by these dams and obstructions the water thereof has been backed up against the embankment on the river and has been caused to flow back upon and in this plantation above the obstruction, and has actually invaded said plantation, directly raising the water in said plantation about eighteen inches, which it is impossible to remove from said plantation."

Now, the flowing described here can only relate to the seepage and percolation referred to in the previous finding. The words "above the obstructions" relate not to the embankment on the plantation, but to the obstructions put in the bed of the river by the government below the point where the plantation is situated; and, therefore, what the finding means is that above this obstruction the water is caused to flow back against, not over the embankment, as described in the previous finding. And this finding shows besides that it was the impossibility of removing the water which percolated or was the result of rain fall—in other words, the injury to the drainage—which was the cause of the damage.

Thus eliminating all question of the flooding of the land by the overflow of the embankment, the question for decision is this: When a plantation or a portion thereof is situated on the bank of a navigable river, below high water mark, and because of such situation is dependent for its profitable operation upon drainage into the river at mean low tide, does the United States appropriate the property by the simple fact that in improving the navigation of the river it raises the mean low tide slightly above the height where it was wont theretofore to be, and by reason of which the drainage of the land below high water mark is destroyed. It seems to me to state this question is to answer it in the negative. The owner of the land situated below high water mark acquired no easement or servitude in the bed of the river by the construction of an embankment along

the margin of his land at the river below high water, by which he could forever exact that the level of the water within the natural banks of the river could never be changed without his consent, and thus deprive the United States of its control over the improvement of navigable rivers conferred by the Constitution. If damage, by the loss of drainage, into the river at mean low tide of land so situated was caused by the lawful exercise by the United States of its power to improve navigation it was *damnum absque injuria*, and redress must be sought at the hands of Congress and cannot be judicially afforded by a ruling that a damage so resulting constitutes a taking of the property by the United States and creates an implied contract to pay the value of the property. Such a doctrine is directly—as I see it—in conflict with the decisions of this court in *Gibson* v. *United States*, 166 U. S. 269, and *Scranton* v. *Wheeler*, 179 U. S. 141. The far-reaching consequence of the doctrine now announced cannot be overestimated.

But even under the hypothesis that the government work caused the land to be overflowed by raising the water above the embankment, I do not conceive that there would be a taking, even in that case, of the property, for a remedy would be easily afforded for any permanent injury to the land by raising the embankment. The quantum of damages would thus not be the value of the property, but the mere cost of increasing the height of the embankment so as to prevent the water from flowing over it. The fact then that a taking is now held to exist, and therefore the United States is compelled to pay the value of the entire property, submits the United States, in the exercise of a power conferred upon it by the Constitution, to a rule which no individual would be subjected to in a controversy between private parties. Nor is this answered by the suggestion that there is a taking because the paying by the United States of the sum of money necessary to raise the level of the embankment so as to prevent the overflow would not compensate the owner, as the property would still be worthless because of the want of drainage. To so suggest is but to admit that the damage complained of results from the inability to drain the land, which, for the reasons already pointed out does not in my opinion constitute a taking.

WHITE, J., FULLER, C. J., and HARLAN, J., dissenting.

Indeed, the reasoning hitherto indicated as to the assumed overflow of the embankment is equally apposite to the damage by loss of drainage. For injury to the drainage the remedy would be readily afforded by, if possible, draining the plantation elsewhere than into the river, or by resort to the pumping appliances necessary to lift out the water accumulating from rainfall or percolation. The cost of doing these things would then be the measure of damages. That a resort to these simple expedients is unavailing as to this particular property because of its being situated below high water mark does not, I submit, show that the government has taken the property for public use, but simply establishes that the property is so situated that it is subjected to a loss necessarily arising from the fact that it is below high water mark and therefore absolutely dependent for its drainage on the right of the owner to exact that the mean low tide of the river should be forever unchanged. As the right to so exact does not exist, the loss of drainage does not constitute an appropriation of the property by the United States, and is but the result of the natural situation of the land. If equities exist Congress is alone capable of providing for them.

I am authorized to say that the CHIEF JUSTICE and MR. JUSTICE HARLAN concur in this dissent.

UNITED STATES *v.* WILLIAMS. No. 59. Error to the Circuit Court of the United States for the District of South Carolina.

This case is in all substantial respects similar to the one just decided, and for the reasons given in the opinion therein the judgment is

Affirmed.

For the reasons stated in their dissenting opinion in the prior case, the CHIEF JUSTICE, MR. JUSTICE HARLAN and MR. JUSTICE WHITE dissent also in this case.

MR. JUSTICE MCKENNA took no part in the decision of this case.

CLARKE *v.* LARREMORE.

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

No. 51. Submitted December 15, 1902.—Decided February 23, 1903.

Where a sheriff after selling under an execution and before paying over to the judgment creditor, is enjoined in a state court by another creditor from so doing, and immediately after the state court has set the restraining order aside, and while the money is still in the hands of the sheriff, and within the time allowed for the return of the execution, and before it is returned, a petition in bankruptcy is filed against the judgment debtor, the money does not belong to the judgment creditor but goes, under section 67*f* of the Bankrupt Act of 1898, to the trustee in bankruptcy.

On January 23, 1899, the petitioner, the owner of certain notes of Raymond W. Kenney, commenced an action thereon in the Supreme Court of the State of New York. On March 6, 1899, he recovered judgment for the sum of $20,906.66. An execution, issued thereon, was by the sheriff of the county of New York levied upon a stock of goods and fixtures belonging to Kenney. A sheriff's sale thereof, had on March 15, 1899, realized $12,451.09. Shortly after the levy of the execution Leon Abbett sued out in the same court a writ of attachment against the property of Kenney, and caused it to be levied upon the same stock and fixtures. Immediately thereafter, claiming that the debt in judgment was a fraudulent one, he commenced in aid of his attachment an injunction suit to prevent the further enforcement of the judgment, and obtained a temporary order restraining the sheriff from paying petitioner the money received upon the execution sale. Upon a hearing the Supreme Court decided that the debt was just and honest, and on April 13, 1899, set aside the restraining order. On the same day, and before the sheriff had returned the execution or paid the money collected on it, a petition in involuntary bankruptcy against Kenney was filed in the United States District Court for the Southern District of New York, and an order made by

the district judge restraining the sheriff from paying the money to Clarke, the execution creditor. 95 Fed. Rep. 427. Kenney was thereafter adjudged a bankrupt, and on November 25, 1899, the plaintiff having been appointed trustee in bankruptcy, the district judge entered a further order directing the sheriff to pay the money to the trustee. 97 Fed. Rep. 555. On review the United States Circuit Court of Appeals for the Second Circuit affirmed these orders of the district judge, 105 Fed. Rep. 897, and thereupon a certiorari was granted by this court. 180 U. S. 640. Section 67, subdivision "f" of the bankrupt act of 1898, 30 Stat. 544, 565, reads:

"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, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: *Provided*, That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien of a *bona fide* purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

Mr. S. Livingston Samuels for appellant.

Mr. Nelson S. Spencer for appellee.

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

The contention of the petitioner is that—

"The sheriff having sold the goods levied on before the filing of the petition in bankruptcy, the proceeds of the sale were the property of the plaintiff in execution, and not of the bankrupt, at the time of the adjudication, and the trustee, therefore, has no title to the same."

This contention cannot be sustained. The judgment in favor of petitioner against Kenney was not like that in *Metcalf* v. *Barker*, 187 U. S. 165, one giving effect to a lien theretofore existing, but one which with the levy of an execution issued thereon created the lien; and as judgment, execution and levy were all within four months prior to the filing of the petition in bankruptcy, the lien created thereby became null and void on the adjudication of bankruptcy. This nullity and invalidity relate back to the time of the entry of the judgment and affect that and all subsequent proceedings. The language of the statute is not "when" but "in case he is adjudged a bankrupt," and the lien obtained through these legal proceedings was by the adjudication rendered null and void from its inception. Further, the statute provides that "the property affected by"—not the property subject to—the lien is wholly discharged and released therefrom. It is true that the stock and fixtures, the property originally belonging to the bankrupt, had been sold, but having, so far as the record shows, passed to a "*bona fide* purchaser for value," it remained by virtue of the last clause of the section the property of the purchaser, unaffected by the bankruptcy proceedings. But the money received by the sheriff took the place of that property.

It is said that that money was not the property of the bankrupt but of the creditor in the execution. Doubtless as between the judgment creditor and debtor, and while the execution remained in force, the money could not be considered the property of the debtor, and could not be appropriated to the payment of his debts as against the rights of the judgment creditor, but it had not become the property absolutely of the creditor. The writ of execution had not been fully executed. Its command to the sheriff was to seize the property of the judgment debtor, sell it and pay the proceeds over to the creditor. The time within which that was to be done had not elapsed, and

the execution was still in his hands not fully executed. The rights of the creditor were still subject to interception. Suppose, for instance, there being no bankruptcy proceedings, the judgment had been reversed by an appellate court and the mandate of reversal filed in the trial court, could it for a moment be claimed that, notwithstanding the reversal of the judgment the money in the hands of the sheriff belonged to the judgment creditor, and could be recovered by him, or that it was the duty of the sheriff to pay it to him? The purchaser at the sheriff's sale might keep possession of the property which he had purchased, but the money received as the proceeds of such sale would undoubtedly belong and be paid over to the judgment debtor. The bankruptcy proceedings operated in the same way. They took away the foundation upon which the rights of the creditor, obtained by judgment, execution, levy and sale, rested. The duty of the sheriff to pay the money over to the judgment creditor was gone and that money became the property of the bankrupt, and was subject to the control of his representative in bankruptcy.

It was held in *Turner* v. *Fendall*, 1 Cranch, 117, that money collected by a sheriff on an execution could not be levied upon under execution placed in his hands against the judgment creditor, and that the latter could maintain an action against the sheriff for a failure to pay the money thus collected. A similar ruling was made in New York, *Baker* v. *Kenworthy*, 41 N. Y. 215, in which it appeared that a sheriff had collected money on an execution in favor of one Brooks; that he returned the execution without paying the money to Brooks, but on the contrary levied upon it under an execution against Brooks, and it was held that such levy did not release him from liability to Brooks. It was said in the opinion (p. 216):

"The money paid into the hands of the sheriff on the execution in favor of Brooks did not become the property of Brooks until it had been paid over to him. Until that was done, the sheriff could not levy upon it by virtue of the execution against Brooks then in his hands."

The rule in that State in respect to a levy upon money in the hands of a sheriff may have been changed—at least

so far as an attachment is concerned. See *Wehle* v. *Conner*, 83 N. Y. 231.

In *Nelson* v. *Kerr*, 59 N. Y. 224, it is said: "The money collected by the sheriff belongs to the plaintiff." But in that case the execution had been returned, and yet the officer had not paid the money to the execution creditor. See also *Kingston Bank* v. *Eltinge*, 40 N. Y. 391.

In none of those cases had anything been done to affect the validity or force of the writ of execution. Whatever was done was done under a writ whose validity and potency were unchallenged and undisturbed, while here, before the writ of execution had been fully executed, its power was taken away. Its command had ceased to be obligatory upon the sheriff, and the execution creditor had no right to insist that the sheriff should further execute its commands.

A different question might have arisen if the writ had been fully executed by payment to the execution creditor. Whether the bankruptcy proceedings would then so far affect the judgment and execution, and that which was done under them, as to justify a recovery by the trustee in bankruptcy from the execution creditor, is a question not before us, and may depend on many other considerations. It is enough now to hold that the bankruptcy proceedings seized upon the writ of execution while it was still unexecuted and released the property which was held under it from the claim of the execution creditor.

The judgment of the Court of Appeals is

Affirmed.

Mr. Justice White and Mr. Justice Peckham dissented.

WILLIAMS *v.* PARKER.

ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.

No. 116. Argued December 5, 1902.—Decided February 23, 1903.

So far as the Federal Constitution is concerned a State may authorize the taking of possession of property for a public use prior to any payment therefor, or even the determination of the amount of compensation, providing adequate provision is made for such compensation.

The statute of Massachusetts of May 23, 1898, providing that no building should be erected within certain limits in the city of Boston of over a certain height, and also providing that any person owning or interested in any building then in course of construction who was damaged thereby, might recover damages in an action commenced within two years from the passage of the act, against the city of Boston for the actual damages sustained by them in the cost of materials and re-arrangement of the design or construction of the buildings, provides a direct and appropriate means of ascertaining and enforcing the amount of such damages, and for their payment by the city of Boston in regard to the solvency whereof no question is raised, and such statute is not in conflict with the Federal Constitution.

On May 23, 1898, the legislature of Massachusetts passed the following act:

"Sec. 1. Any building now being built or hereafter to be built, rebuilt or altered in the city of Boston, upon any land abutting on St. James avenue, between Clarendon street and Dartmouth street, or upon land at the corner of Dartmouth street and Huntington avenue, now occupied by the Pierce building, so-called, or upon land abutting on Dartmouth street, now occupied by the Boston Public Library building, or upon land at the corner of Dartmouth street and Boylston street, now occupied by the New Old South Church building, may be completed, built, rebuilt or altered to the height of ninety feet, and no more; and upon any land or lands abutting on Boylston street, between Dartmouth street and Clarendon street, may be completed, built, rebuilt or altered to the height of one hundred feet, and no more: *Provided, however,* That there may be

erected on any such building, above the limits hereinbefore prescribed, such steeples, towers, domes, sculptured ornaments and chimneys as the board of park commissioners of said city may approve.

"SEC. 2. The provisions of chapter three hundred and thirteen of the acts of the year eighteen hundred and ninety-six, and of chapter three hundred and seventy-nine of the acts of the year eighteen hundred and ninety-seven, so far as they limit the height of buildings, shall not be construed to apply to the territory specified and restricted in section one of this act.

"SEC. 3. The owner of or any person having an interest in any building upon any land described in section one of this act, the construction whereof was begun but not completed before the fourteenth day of January in the current year, who suffers damage under the provisions of this act by reason or in consequence of having planned and begun such construction, or made contracts therefor, for a height exceeding that limited by section one of this act for the locality where said construction has been begun, may recover damages from the city of Boston for material bought or actually contracted for, and the use of which is prevented by the provisions of this act, for the excess of cost of material bought or actually contracted for over that which would be necessary for such building if not exceeding in height the limit prescribed for that locality by section one of this act, less the value of such materials as are not required on account of the limitations resulting from the provisions of this act, and the actual cost or expense of any rearrangement of the design or construction of such building made necessary by this act, by proceedings begun within two years of the passage of this act, and in the manner prescribed by law for obtaining payment for damages sustained by any person whose land is taken in the laying out of a highway in said city.

"SEC. 4. Any person sustaining damage or loss in his property by reason of the limit of the height of buildings provided for in this act, may recover such damage or loss from the city of Boston, by proceedings begun within three years of the passage of this act, and in the manner prescribed by law for obtaining payment for damages sustained by any person whose

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land is taken in the laying out of a highway in said city." Acts and Resolves of Massachusetts, 1898, chap. 452.

The building of plaintiff in error comes within the scope of this statute, and on September 17, 1898, the attorney general of Massachusetts filed an information in the Supreme Judicial Court of that State to enjoin the maintenance of that part of the building above the ninety-feet line. To this information the defendants pleaded, among other things, that "the statute, . . . in its application to the defendants, . . . is in violation of the second clause of section 1 of the Fourteenth Amendment and of other provisions of the Constitution of the United States." Pending this proceeding the defendants commenced actions against the city of Boston for damages, as provided in sections 3 and 4 of the statute. The city filed a general denial. The defendants then moved that the attorney general be required to join the city as a party defendant, in order that the question of the city's liability to damages might be conclusively determined in this proceeding, or, in default of such joinder, that it be stayed until the city's liability could be conclusively determined. This motion was denied and the defendants appealed from the denial thereof. The facts were agreed upon and the case reserved by the presiding justice for the consideration of the full court. Upon March 13, 1901, a decree was entered, sustaining the contention of the attorney general, and directing a removal of those parts of the building above the height of ninety feet, without prejudice, however, to the right of defendants under the statute to maintain such steeples, towers, etc., as the board of park commissioners of the city of Boston should approve. 174 Massachusetts, 476. To review such judgment this writ of error was sued out.

Mr. Albert E. Pillsbury and *Mr. Grant M. Palmer* for plaintiffs in error.

The Massachusetts court holds the statute to be an exercise of the power of eminent domain, taking property rights in the nature of an easement in the estate of the plaintiffs in error. As the statute purports to provide compensation, and as it has no relation to the public health, morals, or safety, this is prac-

tically a necessary construction. *Talbot* v. *Hudson*, 16 Gray, 417; *Dorgan* v. *Boston*, 12 Allen, 223; *Parker* v. *Commonwealth*, 178 Massachusetts, 199; *Sweet* v. *Rechel*, 159 U. S. 380, 396. This construction will be accepted by this court and the statute dealt with accordingly. *W. W. Cargill Co.* v. *Minnesota*, 180 U. S. 452, 466, and cases cited.

1. It is elementary that due provision for just compensation for private property taken for public uses is essential to the validity of an act of eminent domain. Without it, such an act is a nullity, incapable of warranting any interference with the property sought to be taken. Declaration of Rights, art. XXII; *Perry* v. *Wilson*, 7 Massachusetts, 393; *Stevens* v. *Props. of Middlesex Canal*, 12 Massachusetts, 466; *Brickett* v. *Haverhill Aqueduct Co.*, 142 Massachussets, 394; *Attorney General* v. *Old Colony R. R.*, 160 Massachusetts, 62, 90; *Bent* v. *Emery*, 173 Massachusetts, 495. Without such provision the statute "is unconstitutional and void, and does not justify an entry upon the land of the owner without his consent." *Conn. River R. R.* v. *County Comm'rs*, 127 Massachussetts, 50, and cases cited.

2. It is not enough that the statute *purports* to make provision for compensation. The provision must be certain, amounting to assurance of it, without risk of failure in any event. It is beyond legislative power to cast upon the property owner any hazard of loss of his property without compensation. *Drury* v. *Midland Railroad*, 127 Massachusetts, 571; *Haverhill Bridge* v. *Essex Comm'rs*, 103 Massachusetts, 120, 124; *Attorney General* v. *Old Colony R. R.*, 160 Massachusetts, 62, 90; *Conn. River R. R.* v. *County Comm'rs*, 127 Massachusetts, 50; *Brewster* v. *Rogers Co.*, 169 N. Y. 73; *Bent* v. *Emery*, 173 Massachusetts, 495; *Kennedy* v. *Indianapolis*, 103 U. S. 599; *Cherokee Nation* v. *Kansas Railway Co.*, 135 U. S. 641, 659; *Bauman* v. *Ross*, 167 U. S. 548, 598; *United States* v. *Gettysburg Railway*, 160 U. S. 668. *Sweet* v. *Rechel*, 159 U. S. 404, distinguished.

3. Due provision securing just compensation to the owner of property taken in the exercise of the power of eminent domain by or under the States is required by the due process clause of

the Fourteenth Amendment. *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 324 *et seq.*; *Chicago, Burlington &c. Rd.* v. *Chicago*, 166 U. S. 226, 235, 241; *Long Island Water Co* v. *Brooklyn*, 166 U. S. 685, 695; *Smyth* v. *Ames*, 169 U. S. 466, 526; *Backus* v. *Fort St. Depot Co.*, 169 U. S. 557, 565; *Norwood* v. *Baker*, 172 U. S. 269, 277.

4. The Federal requirement of due process of law extends to judicial as well as to legislative action of the States. The decree of a court may invade the requirement, no less than a statute. *Chicago, B. & Q. Rd.* v. *Chicago*, 166 U. S. 226, 241; *Virginia* v. *Rives*, 100 U. S. 313; *Ex parte Virginia*, 100 U. S. 339, 346; *Civil Rights Cases*, 109 U. S. 311; *Logan* v. *United States*, 144 U. S. 263, 290; *Scott* v. *McNeal*, 154 U. S. 34, 45; *Gibson* v. *Mississippi*, 162 U. S. 565, 581; *Williams* v. *Mississippi*, 170 U. S. 213, 220; *Blake* v. *McClung*, 172 U. S. 239, 260.

If it is not consistent with due process of law for the court to order the actual destruction of the property while the question whether there is any valid taking or provision for compensation remains in dispute and undetermined, the decree should be reversed, notwithstanding the possibility that in the other proceeding for damages against the city, the statute may eventually be held constitutional and the provision for compensation valid. If assurance of just compensation is, as held by this court, a condition precedent to the exercise of eminent domain, without which the title does not pass in advance of payment, *a fortiori* is it a condition precedent to actual dispossession and destruction of the property.

The case is peculiar, as the statute out of which it arises is unprecedented. Ordinarily, in the direct taking of property by the State, the State expressly assumes the damages. If the power to take is delegated, the agency authorized to make the taking is expressly made liable. In either case, the act of taking estops the taker to deny its validity or its own liability to make compensation. *Gloucester Water Co.* v. *Gloucester*, 179 Massachusetts, 365, 377, and cases cited; *Daniels* v. *Tierney*, 102 U. S. 415, 421; *Electric Co.* v. *Dow*, 166 U. S. 489.

It is open to the city, in the proceeding for damages, to as-

sail the statute on grounds not open to the plaintiffs in error in this case. In that case, the court must be governed by other considerations, and may find itself constrained to hold that the city is not liable. The State has never undertaken this liability for damages; and it cannot be held liable for the acts of its public officers, whether merely tortious or in course of judicial procedure, under a void statute. *Conn. River Rd.* v. *County Comm'rs*, 127 Massachusetts, 50, 56; *Murdock Grate Co.* v. *Commonwealth*, 152 Massachusetts, 28; *Bent* v. *Emery*, 173 Massachusetts, 495, 498.

In fine, in event of the provision for damages being held non-enforceable as against the city, which is possible in law and not wholly improbable in fact, the plaintiffs in error are arbitrarily despoiled of their property.

Unless the legislature has power to compel a city to establish public parks, it has no power to compel a city to take or pay for property for improving them when established. In the States in which the direct question whether the legislature may compel a city or town to establish public parks has been judicially raised, under constitutional provisions substantially like those of Massachusetts, it has uniformly been determined in the negative. *People* v. *Hurlbut*, 24 Michigan, 44, 93; *People* v. *Detroit*, 28 Michigan, 228, 233 *et seq.*; *Park Comm'rs* v. *Mayor*, 29 Michigan, 343; *Thompson* v. *Moran*, 44 Michigan, 602; *Webb* v. *Mayor of New York*, 64 How. Pr. 10; Dillon, Munic. Corp. (4th ed.) secs. 71–74*a*; *Atkins* v. *Randolph*, 31 Vermont, 226; *State ex rel. McCurdy* v. *Tappan*, 29 Wisconsin, 664, 680, 687; *Louisville* v. *University*, 15 B. Mon. 642; *State* v. *Fox*, 63 N. E. Rep. 19, 21 (Indiana).

Until the present case, the Massachusetts court had never gone so far as to hold that the legislature may *compel* a city to tax its inhabitants for a system of public parks, nor is there believed to be authority for this proposition in any State. It had gone no farther than to hold that the legislature may *authorize* taxation for this purpose. *Holt* v. *Somerville*, 127 Massachusetts, 408, 413; *Foster* v. *Park Commissioners*, 133 Massachusetts, 321, 326; *Props. of Mt. Hope Cemetery* v. *Boston*, 158 Massachusetts, 509, 519.

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The city of Boston never had any moneys appropriated, nor any specific power to appropriate moneys, to meet the liability cast upon it by the statute of 1898; and its power to raise and appropriate money for any purpose is limited by statute.

It was formerly understood in Massachusetts that the property of the inhabitants is liable to seizure on execution for a debt of a city or town. *Conn. River R. R.* v. *County Comm'rs*, 127 Massachusetts, 50. Apparently this can no longer be regarded as the law. *Rees* v. *Watertown*, 19 Wall. 107, 122; *Merriwether* v. *Garrett*, 102 U. S. 472, 501, 519, 526.

It is inconsistent with the inherent substance of due process of law, as universally understood and applied, to enforce such a statute against the owner of the property, by actual dispossession and demolition, at least until the validity of the provision for damages, upon which the validity of the taking depends, is established as against the party made liable. The statute, construed to authorize such enforcement, is in conflict with the due process clause of the Fourteenth Amendment. If the statute does not authorize it, the decree is itself an invasion of the Federal right.

The judgment cannot be sustained on the police power.

The current of authority is strongly against legislative power to declare or deal with such a building as this as a nuisance, or to apply such legislation under such conditions in the exercise of the police power, or, upon any ground, to cut down private rights to such an extent as that here disclosed, without compensation as for a taking of property. A judicial view of the subject which comes near being universal might well be deemed conclusive in determining, if it were presented, the question of what degree of respect and security for property rights in this regard is essential to the Federal requirement of due process of law. In addition to cases before cited see *Yates* v. *Milwaukee*, 10 Wall. 497; *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166, 177 *et seq.*; *Sweet* v. *Rechel*, 159 U. S. 396 *et seq.*; Mass. Decl'n of Rights, XII, XXX; *Baker* v. *Boston*, 12 Pick. 184, 194; *Commonwealth* v. *Alger*, 7 Cush. 53, 103–4; *Morse* v. *Stocker*, 1 Allen, 150, 157–8; *Watertown* v. *Mayo*, 109 Massachusetts, 315, 319; *Lowell* v. *Boston*, 111 Massachusetts,

454; *Sawyer* v. *Davis*, 136 Massachusetts, 239; *Wilkins* v. *Jewett*, 139 Massachusetts, 29; *Newton* v. *Belger*, 143 Massachusetts, 598; *Rideout* v. *Knox*, 148 Massachusetts, 368, 374; *Miller* v. *Horton*, 152 Massachusetts, 540; *Commonwealth* v. *Parks*, 155 Massachusetts, 531; *Langmaid* v. *Reed*, 159 Massachusetts, 409; *Bent* v. *Emery*, 173 Massachusetts, 495; *Quintini* v. *Bay St. Louis*, 64 Mississippi, 483; *Waupen* v. *Moore*, 34 Wisconsin, 450; *Janesville* v. *Carpenter*, 77 Wisconsin, 288; *Priewe* v. *Wisconsin &c. Co.*, 93 Wisconsin, 534; *Priewe* v. *Wisconsin &c. Co.*, 103 Wisconsin, 537; *Ex parte Whitwell*, 98 California, 73; *People* v. *Elk River Co.*, 107 California, 221; *State* v. *Railway Co.*, 68 Minnesota, 381; *Platt* v. *Waterbury*, 72 Connecticut, 531, 551; *Ruhstrat* v. *People*, 185 Illinois, 133, 141; *Williamson* v. *Liverpool Ins. Co.*, 105 Fed. Rep. 31, and cases cited; *Mayor of Hudson* v. *Thorne*, 7 Paige, 261; *Evansville* v. *Miller*, 146 Indiana, 613; *Des Plaines* v. *Poyer*, 123 Illinois, 348.

The information and decree stand solely upon the statute of 1898. The construction put by the state court upon that statute as an act of eminent domain is the necessary construction. There is no question of the police power in the case. The statute must be dealt with as an act of eminent domain, and the decree as an attempt to enforce an act of eminent domain, subject to all the constitutional restraints which affect the exercise of that power.

Mr. Samuel J. Elder and *Mr. Edmund A. Whitman* for defendant in error.

I. The statute provides for ample compensation for any injury to property due to its enactment and also gives a sweeping remedy to any person injured by the passage of the act. The two provisions together cover every possible element of loss which has been suffered by these plaintiffs in error, if indeed there is any loss for which they can recover.

II. The act was passed under the police power of the legislature, and compensation was unnecessary. The competency of the legislature to pass such acts has never been doubted. *People ex rel. Kemp* v. *D'Oench*, 111 New York, 359. Such

enactments are for the safety, comfort and convenience of the people, and for the benefit of property owners generally. *Knowlton* v. *Williams et al.*, 174 Massachusetts, 476; *Commonwealth* v. *Colton*, 8 Gray, 488. It is not essential that such a regulation should apply to all parts of the community, but the legislature may, if it sees fit, select a limited portion of some city or town to which such regulation shall apply. *Watertown* v. *Mayo*, 109 Massachusetts, 315; *Salem* v. *Maynes*, 123 Massachusetts, 372. Such a legislative limitation is both "wholesome" and "reasonable," which is the only limitation put by the courts upon the exercise of the police power. *Commonwealth* v. *Alger*, 7 Cush. 53; *Sawyer* v. *Davis*, 136 Massachusetts, 239. The test which has been laid down by this court has been the maxim *sic utere tuo ut alienum non lædas*, and the legislature always has the power to prevent an individual from doing any act upon his property which will be to the injury of the public. *Munn* v. *Illinois*, 94 U. S. 113; *Mugler* v. *Kansas*, 123 U. S. 623; *Crowley* v. *Christensen*, 137 U. S. 86.

It is clear from the allegations of the information as admitted in the agreed statement of facts, that this case comes within the limitations expressed in *Lawton* v. *Steele*, 152 U. S. 133. We have here a public square surrounded by public buildings, in themselves of great value, filled with treasures of literature and art of practically priceless value. The danger from fire to these public buildings was an entirely sufficient basis for passing this statute. Furthermore, the importance of an adequate supply of light to the Art Museum and Public Library, as well as to the public square and adjacent streets, was, in itself, an entirely adequate basis for the passage of this statute.

It is entirely immaterial that the legislature in its generosity chose to make compensation to the owners of property injured by the passage of this act, because the making of compensation is not incident to the exercise of police power, and the fact that compensation is given does not, and cannot, change the particular power under which the legislature acted.

III. The statute regarded as an exercise of the power of taking by eminent domain. It is true that this provision for com-

pensation does conform to the constitutional requirement for the taking of property by the right of eminent domain, and if the court looking at all the circumstances should think that it was the intention of the legislature to take certain rights in light and air and in the view over adjacent land, above the line to which buildings may be erected, in the nature of an easement annexed to the streets and public squares adjoining, the statute is in all respects in accordance with the rules regulating the taking of property by right of eminent domain. Copley Square is clearly a public park within the definitions in the adjudicated cases. *Perrin* v. *N. Y. Central R. R. Co.*, 36 N. Y. 120, 124; *Price* v. *Inhabitants of Plainfield*, 40 N. J. L. 608, 613; *Archer* v. *Salina City*, 93 California, 43; *Foster* v. *Park Commissioners*, 133 Massachusetts, 334, 335.

IV. The statute provides fully for due process of law for any injured party. While this court has never been willing to define with precision the limits of what may be construed to be due process of law, it has over and over again repeated that due process means only such process as recognizes the right of the owner to be compensated if his property be taken from him and transferred to the public. All that is essential is that a proper inquiry should be made as to the amount of compensation, and this constitutes "due process." There can be no question that this statute falls fully within these limitations. *C., B. & Q. R. R.* v. *Chicago*, 166 U. S. 226; *Sweet* v. *Rechel*, 159 U. S. 380; *Cass Farm Co.* v. *Detroit*, 181 U. S. 396; *Simons* v. *Craft*, 182 U. S. 427; *Iowa Central Ry.* v. *Iowa*, 160 U. S. 389; *Holden* v. *Hardy*, 169 U. S. 366; *Backus* v. *Fort St. Union Depot Co.*, 169 U. S. 557. Due process of law is process according to the law of the land. This process is regulated by the law of the State. *French* v. *Barber Asphalt Co.*, 181 U. S. 324.

If this statute in question can be construed as an exercise of the power of taxation, the rule is still the same. *Davidson* v. *New Orleans*, 96 U. S. 97; *Mobile* v. *Kimball*, 102 U. S. 691; *Hagar* v. *Reclamation District*, 111 U. S. 701; *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112.

V. The burden of making compensation was legally imposed

on the city of Boston. Nor does it make any difference with the constitutionality of the statute that the legislature of Massachusetts has imposed the entire burden of this public improvement upon the city of Boston. *Sweet* v. *Rechel*, 159 U. S. 380; *Willard* v. *Presbury*, 14 Wall. 676; *Bauman* v. *Ross*, 167 U. S. 548; *Webster* v. *Fargo*, 181 U. S. 394; *Williams* v. *Eggleston*, 170 U. S. 304; *Freeland* v. *Hastings*, 10 Allen, 570; *Kingman, Petr.*, 153 Massachusetts, 566; *Old Colony Railroad* v. *Framingham Co.*, 153 Massachusetts, 561. It is familiar law, of course, that the decision of a Supreme Court of a State in construing its own constitution is binding on this court. *Iowa Central R. R. Co.* v. *Iowa*, 160 U. S. 389; *Orr* v. *Gilman*, 183 U. S. 278. This court is bound to give the same meaning to a state statute as was given it by the Supreme Court of the State. *Stockard* v. *Morgan*, 185 U. S. 27; *Missouri Pacific Ry.* v. *Nebraska*, 164 U. S. 403.

Massachusetts has a provision in its constitution in the fourth article, section 1, chap. 1, conferring upon the general court full power and authority to make "all manner of wholesome and reasonable orders, the same to be not repugnant or contrary to the constitution," and the Supreme Court of Massachusetts has said that this provision gives the legislature a wide authority, and one more comprehensive than that found in the constitutions of other States. *Opinion of the Justices*, 163 Massachusetts, 589; *Turner* v. *Nye*, 154 Massachusetts, 579; *Kingman, Petr., supra; Norwood* v. *New York etc. R. R.*, 161 Massachusetts, 259; *Commissioners* v. *Holyoke Water Power*, 104 Massachusetts, 446.

The legislature, apart from these considerations, had the entire right to promote the beauty and attractiveness of a public park in the capital of the Commonwealth, and to prevent unreasonable encroachments upon the light and air which it had previously received. *Knowlton* v. *Williams*, 174 Massachusetts, 476.

The legislature of Massachusetts has imposed at various times a sewerage system, a water system, and a park system upon the city of Boston and the adjoining cities and towns, constituting what the legislature has called a Metropolitan District,

and the constitutionality of such statutes has been affirmed after careful consideration. *Kingman, Petr.*, 153 Massachusetts, 570 (sewers); *Adams, Petr.*, 165 Massachusetts, 497 (parks); *De Las Casas, Petr.*, 178 Massachusetts, 213 (parks).

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

Counsel for plaintiffs in error state in their brief that "the single question in the case is, substantially, whether it is consistent with due process of law for a court to decree the actual destruction of property under a statute of eminent domain by which the State takes certain rights in it, making provision for compensation only by giving the owners a right of action against a city for their damages, while the city, which had no part in the taking, denies the validity of the provision for compensation, upon which the validity of the taking depends, and refuses to pay any damages unless and until it is held liable therefor in another proceeding, which is yet undetermined."

That the statute does not conflict with the constitution of the State is for this court settled by the decision of the state court. *Merchants' Bank* v. *Pennsylvania*, 167 U. S. 461, and cases cited; *Rasmussen* v. *Idaho*, 181 U. S. 198. The constitutional provision of the State and that found in the Fifth Amendment to the Federal Constitution are substantially alike. The Massachusetts provision reads: "Whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor." Declaration of Rights, Art. X. And the Fifth Amendment says: "Nor shall private property be taken for public use, without just compensation."

So far as the Federal Constitution is concerned, it is settled by repeated decisions that a State may authorize the taking of possession prior to any payment, or even final determination of the amount of compensation. In *Backus* v. *Fort Street Union Depot Company*, 169 U. S. 557, 568, we said:

"Is it beyond the power of a State to authorize in condemnation cases the taking of possession prior to the final deter-

mination of the amount of compensation and payment thereof? This question is fully answered by the opinions of this court in *Cherokee Nation* v. *Southern Kansas Railway*, 135 U. S. 641, and *Sweet* v. *Rechel*, 159 U. S. 380. There can be no doubt that if adequate provision for compensation is made authority may be granted for taking possession pending inquiry as to the amount which must be paid and before any final determination thereof."

We pass, therefore, to inquire as to the adequacy of the provision for compensation. No question is made as to the general solvency of the city of Boston. Although in the agreed facts it is stated that the city has no "moneys specially appropriated to any such purpose as that prescribed by the damage clauses of this statute, nor any express statutory power or authority to raise, appropriate or pay money for such a purpose," yet as this statute provides that "any person sustaining damage . . . may recover such damage . . . in the manner prescribed by law for obtaining payment for damages by any person whose land is taken in the laying out of a highway;" and as there is a general statute making suitable provision for such a recovery, the question of solvency does not seem to be material.

It is true that the city is not a party to the proceedings, and therefore not estopped to deny its liability by reason of having sought and obtained the condemnation. In that respect the statute differs from ordinary statutes giving to corporations, municipal or private, the right to condemn. While there is no technical estoppel by judicial proceeding, yet the state Supreme Court adjudged the validity of the statute, not merely in respect to the taking, but also in respect to the liability of the city. In its opinion it said (p. 481):

"It may be contended that if the legislature could take this right for the use of the public, it could not require the city of Boston to make compensation for it, but should have provided for the payment of damages from the treasury of the Commonwealth. This contention would limit too strictly the power of the legislature in the distribution of public burdens. Very wide discretion is left with the lawmaking power in this particular. The legislature may change the political subdivisions

of the Commonwealth by creating, changing, or abolishing particular cities, towns or counties. It may require any of them to bear such share of the public burdens as it deems just and equitable. This right has been exercised in a great variety of ways. *Kingman, Petitioner*, 153 Massachusetts, 566, and cases and statutes there cited."

And this decision is in harmony with prior adjudications of that court.

It is also true that the proceeding here taken is in many respects novel. Perhaps no case like it has arisen in this country. But as the court of last resort of Massachusetts has treated it as a condemnation, a taking for the public use, it is a taking for the use primarily of the citizens of Boston, and comes within the repeated rulings of the state court in respect to the competency of the legislature to cast the burden thereof upon the city. And while, as stated, there may be no technical estoppel by judgment, yet in view of these rulings it would be going too far to hold that it is essential that there be a judgment establishing the liability of the city before it can be affirmed that adequate provision for compensation has been made.

That there may be novel questions in respect to the measure of damage, the value of the property that is taken, does not avoid the fact that a solvent debtor, one whose solvency is not liable to go up or down like that of an individual, but is of substantial permanence, is provided, as well as a direct and appropriate means of ascertaining and enforcing the amount of all such damage. In view therefore of the prior decisions of the Supreme Court of the State as well as that in this case, we are of opinion that it cannot be held that there was a failure to make adequate provision for the payment of the damages sustained by the taking.

We have not considered any question of purely state cognizance, nor have we stopped to comment on the suggestion made by the Supreme Court of the State, that this statute might be sustained as an exercise of the police power, or if it could be so sustained, that it could be enforced without any provision for compensation. Considering simply the distinct

proposition so ably presented by the counsel for plaintiffs in error, we are of opinion that the statute in question cannot be adjudged in conflict with the Federal Constitution, and therefore the judgment of the Supreme Judicial Court of Massachusetts is

Affirmed.

REETZ *v.* MICHIGAN.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

No. 143. Argued January 21, 1903.—Decided February 23, 1903.

A State has power to make reasonable provisions for determining the qualifications of those engaged in the practice of medicine and for punishing those who attempt to engage therein in defiance of such statutory provisions.

Act No. 237 of Michigan of 1889 creating a board of registration in medicine is not in conflict with the provisions of the Fourteenth Amendment.

There is no provision in the Federal Constitution forbidding the State from granting to a tribunal, whether called a court or a board of registration, the final determination of a legal question. Due process of law is not necessarily judicial process, nor is the right of appeal essential to due process of law.

When a statute fixes the time and place of meeting of any board or tribunal no special notice to parties interested is required to constitute due process of law as the statute itself is sufficient notice.

A state statute requiring the registration of physicians and prohibiting those who are not so registered from practicing thereafter is not an *ex post facto* law as to a physician who had once engaged in practice, but who was held not to be qualified and whose registration was refused by the board of registration appointed under the statute, such statute not providing any punishment for his having practiced prior to the enactment thereof.

Act No. 237 of the public acts of the State of Michigan (1899) directed the appointment of "a board of registration in medicine," to hold two regular meetings at specified times in each year at the state capitol, and additional meetings at such times and places as it might determine; required all persons engaging in the practice of medicine and surgery to obtain from such board a certificate of registration; prescribed the conditions

upon which such certificate should be granted, and forbade, under penalty, the practice of medicine or surgery without such certificate. The conditions above referred to were either a satisfactory examination, or the possession of "a diploma from any legally incorporated, regularly established and reputable college of medicine, . . . having at least a three years' course of eight months in each year, or a course of four years of six months in each year, . . . as shall be approved and designated by the board of registration," with a proviso that "the board of registration shall not register any person by reason of a diploma from any college which sells, or advertises to sell, diplomas 'without attendance,' nor from any other than a regularly established and reputable college." Another provision was that an applicant should be given a certificate of registration if he should "present sufficient proof within six months after the passage of this act of his having already been legally registered under Act No. 167 of 1883, as amended in 1887, entitled 'An act to promote public health.'" The plaintiff in error was prosecuted and convicted in the Circuit Court for the county of Muskegon of a violation of this statute, which conviction was affirmed by the Supreme Court of the State, 127 Michigan, 87, to reverse which ruling this writ of error was sued out.

Mr. William B. Belden for plaintiff in error. *Mr. Edwin A. Burlingame* and *Mr. Jesse F. Orton* were on the brief.

Mr. Charles B. Cross and *Mr. Charles A. Blair* for defendant in error. *Mr. Horace M. Oren* and *Mr. George S. Lovelace* were on the brief.

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

The power of a State to make reasonable provisions for determining the qualifications of those engaging in the practice of medicine and punishing those who attempt to engage therein in defiance of such statutory provisions, is not open to question. *Dent* v. *West Virginia*, 129 U. S. 114; *Hawker* v. *New York*, 170 U. S. 189, and cases cited in the opinion; *The State ex rel. Burroughs* v. *Webster*, 150 Indiana, 607, and cases cited.

Opinion of the Court.

It is objected in the present case that the board of registration is given authority to exercise judicial powers without any appeal from its decision, inasmuch as it may refuse a certificate of registration if it shall find that no sufficient proof is presented that the applicant had been "legally registered under act No. 167 of 1883." That, it is contended, is the determination of a legal question which no tribunal other than a regularly organized court can be empowered to decide. The decision of the state Supreme Court is conclusive that the act does not conflict with the state constitution, and we know of no provision in the Federal Constitution which forbids a State from granting to a tribunal, whether called a court or a board of registration, the final determination of a legal question. Indeed, it not infrequently happens that a full discharge of their duties compels boards, or officers of a purely ministerial character, to consider and determine questions of a legal nature. Due process is not necessarily judicial process. *Murray's Lessee* v. *Hoboken Land & Improvement Company*, 18 How. 272; *Davidson* v. *New Orleans*, 96 U. S. 97; *Ex parte Wall*, 107 U. S. 265, 289; *Dreyer* v. *Illinois*, 187 U. S. 71, 83; *People* v. *Hasbrouck*, 11 Utah, 291. In the last case this very question was presented, and in the opinion, on page 305, it was said:

"The objection that the statute attempts to confer judicial power on the board is not well founded. Many executive officers, even those who are spoken of as purely ministerial officers, act judicially in the determination of facts in the performance of their official duties; and in so doing they do not exercise 'judicial power,' as that phrase is commonly used, and as it is used in the organic act, in conferring judicial power upon specified courts. The powers conferred on the board of medical examiners are nowise different in character in this respect from those exercised by the examiners of candidates to teach in our public schools, or by tax assessors or boards of equalization in determining, for purposes of taxation, the value of property. The ascertainment and determination of qualifications to practice medicine by a board of competent experts, appointed for that purpose, is not the exercise of a power which appropriately belongs to the judicial department of the government."

In *Hurtado* v. *California*, 110 U. S. 516, Mr. Justice Matthews, speaking for the court, discussed at some length and with citation of many authorities the essential elements of due process of law, and summed up the conclusions in these words (p. 537):

"It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law."

Neither is the right of appeal essential to due process of law. In nearly every State are statutes giving, in criminal cases of a minor nature, a single trial, without any right of review. For nearly a century trials under the Federal practice for even the gravest offences ended in the trial court, except in cases where two judges were present and certified a question of law to this court. In civil cases a common rule is that the amount in controversy limits the entire litigation to one court, yet there was never any serious question that in these cases due process of law was granted.

In *Pittsburgh &c. Railway Company* v. *Backus*, 154 U. S. 421, upon the question whether the right of appeal was essential to the validity of a taxing statute, we said (p. 427):

"Equally fallacious is the contention that, because to the ordinary taxpayer there is allowed not merely one hearing before the county officials, but also a right of appeal with a second hearing before the state board, while only the one hearing before the latter board is given to railroad companies in respect to their property, therefore the latter are denied the equal protection of the laws. If a single hearing is not due process, doubling it will not make it so."

In *McKane* v. *Durston*, 153 U. S. 684, 687, this court declared that "a review by an appellate court of the final judgment in a criminal case, however grave the offence of which the accused is convicted, was not at common law and is not now a necessary element of due process of law." See also *Andrews* v. *Swartz*, 156 U. S. 272.

But while the statute makes in terms no provision for a re-

view of the proceedings of the board, yet it is not true that such proceedings are beyond investigation in the courts. In *Metcalfe* v. *State Board of Registration*, 123 Michigan, 661, an application for mandamus to compel this board to register the petitioner was entertained, and although the application was denied, yet the denial was based not upon a want of jurisdiction in the court but upon the merits.

It is further insisted that it is essential to a judicial or quasi-judicial proceeding that it should give a person accused or interested the benefit of a hearing, and that there is in this statute no special provision for notice, or hearing, or authority to summon witnesses or to compel them to testify. The statute provides for semi-annual meetings at specified times at the state capital, but the plaintiff in error did not appear at any of these meetings or there present an application for registration or showing of his right thereto; he simply sent to the secretary of the board a certified copy of his registration under the prior statute, and his diploma from the Independent Medical College of Chicago, Illinois. The latter was returned with a notice from the board that it had denied the application for registration. When a statute fixes the time and place of meeting of any board or tribunal, no special notice to parties interested is required. The statute is itself sufficient notice. If plaintiff in error had applied at any meeting for a hearing the board would have been compelled to grant it, and if on such hearing his offer of or demand for testimony had been refused, the question might have been fairly presented to the state courts to what extent the action of the board had deprived him of his rights.

He seems to assume that the proceedings before the board were in themselves of a criminal nature, and that the State by such proceedings was endeavoring to convict him of an offence in the practice of his profession. But this is a mistake. The State was simply seeking to ascertain who ought to be permitted to practice medicine or surgery, and criminality arises only when one assumes to practice without having his right so to do established by the action of the board. The proceedings of the board to determine his qualifications are no more criminal than examinations of applicants to teach or practice law, and if the

provisions for testing such qualifications are reasonable in their nature, a party must comply with them, and has no right to practice his profession in defiance thereof.

It is further insisted that having once engaged in the practice and having been licensed so to do, he had a right to continue in such practice, and that this statute was in the nature of an *ex post facto* law. The case of *Hawker* v. *New York*, *supra*, is decisive upon this question. This statute does not attempt to punish him for any past offence, and in the most extreme view can only be considered as requiring continuing evidence of his qualifications as a physician or surgeon. As shown in *Dent* v. *West Virginia*, *supra*, there is no similarity between statutes like this and the proceedings which were adjudged void in *Cummings* v. *Missouri*, 4 Wall. 277, and *Ex parte Garland*, 4 Wall. 333.

We fail to see anything in the statute which brings it within the inhibitions of the Federal Constitution, and therefore the judgment of the Supreme Court of Michigan is

Affirmed.

MR. JUSTICE HARLAN concurs in the result.

LEACH *v.* BURR.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 145. Argued January 27, 1903.—Decided February 23, 1903.

Where an order is made on Friday by the Supreme Court of the District of Columbia in pursuance of the act of June 8, 1898, 30 Stat. 434, which requires publication of a notice at least twice a week for a period of not less than four weeks, two publications in each successive seven days, commencing on the day of the entry of the order, is sufficient. Such an order does not require two publications for four weeks, each of which commences Sunday and ends Saturday.

A party who in response to a published notice appears and goes to trial without objection or seeking further time cannot thereafter be heard to question the sufficiency of the notice.

Opinion of the Court.

On a proceeding to probate a will in the Supreme Court of the District of Columbia the burden of proof is on the caveators and if they fail to sustain this burden and but one conclusion can be drawn from the testimony, the trial court has power to direct a verdict. When that court has done so and its action has been approved by the unanimous judgment of the Court of Appeals, this court will rightfully pay deference to such action and opinion.

THE case is stated in the opinion of the court.

Mr. George F. Hoar and *Mr. William A. Meloy* for plaintiffs in error.

Mr. J. J. Darlington for defendant in error. *Mr. R. B. Behrend* was on the brief.

MR. JUSTICE BREWER delivered the opinion of the court.

Plaintiffs in error, caveators in the trial court, seek a review of the order of the Supreme Court of the District, holding a special term for orphans' court business, in admitting to probate the will of Ezra W. Leach. The order was entered March 17, 1900, and on appeal was sustained by the Court of Appeals of the District, November 6, 1900. 17 D. C. App. 128. Thereupon this writ of error was sued out.

Whatever may have been the fact theretofore, it is not seriously questioned that by the act of June 8, 1898, 30 Stat. 434, the trial court had jurisdiction to entertain the application for probate, for by section 2 of that act it is provided that "plenary jurisdiction is hereby given to the said court holding the said special term to hear and determine all questions relating to the execution and to the validity of any and all wills devising any real estate within the District of Columbia and of any and all wills and testaments properly presented for probate therein, and to admit the same to probate and record in said special term." The specific objection to its action is an alleged defect in the publication required in case any party in interest is not found, the statute (sec. 6) providing that the court "shall order publication at least twice a week for a period of not less than four weeks of a copy of the issues and notification of trial in some newspaper of general circulation in

the District of Columbia, and may order such other publication as the case may require." The order was made on January 26, 1900, setting the hearing for February 26, 1900, and was "that this order and a copy of said issues heretofore framed shall be published twice a week for four weeks in The Evening Star." Publication was made January 26 and 30, February 2, 6, 9, 13, 16 and 20. There were, therefore, two publications in each successive seven days from the date of the order. January 26 was on Friday. The contention is that the work "week" means that series of days called a week commencing Sunday and ending Saturday, and that under this construction there was only one publication in the last week. *Ronkendorff* v. *Taylor's Lessee*, 4 Pet. 349, is cited as authority. In that case notice of a tax sale was required "by advertising, once a week, in some newspaper printed in the city of Washington, for three months," and it was held that this did not require a publication on the same day in each week, the court saying (p. 361):

"A week is a definite period of time, commencing on Sunday and ending on Saturday. By this construction, the notice in this case must be held sufficient. It was published Monday, January the 6th, and omitted until Saturday, January the 18th, leaving an interval of eleven days; still, the publication on Saturday was within the week succeeding the notice of the 6th."

But the language of this statute is not "for four weeks," but "for a period of not less than four weeks," and the words of the order must be construed in the light of the statute. A like difference was called to the attention of the court in *Early* v. *Homans*, 16 How. 610, where the publication was to be "once in each week, for at least twelve successive weeks," and commenting thereon it was said (p. 617):

"The preposition, for, means of itself duration when it is put in connection with time, and as all of us use it in that way, in our everyday conversation, it cannot be presumed that the legislator, in making this statute, did not mean to use it in the same way. Twelve successive weeks is as definite a designation of time, according to our division of it, as can be made. When we say that anything may be done in twelve weeks, or that it shall not be done for twelve weeks, after the happening of a

fact which is to precede it, we mean that it may be done in twelve weeks or eighty-four days, or, as the case may be, that it shall not be done before."

Further, the object of a notice is to enable the parties affected thereby to be present and obtain a hearing. The caveators appeared and without seeking further time, for the purpose of securing additional testimony or preparing for the hearing, went to trial on the issues submitted to the jury. They at least cannot claim to be prejudiced by any defect in the notice.

But the substantial question is whether the court erred in taking the case from the jury and directing a verdict sustaining the will. The questions submitted for consideration were whether the testator was at the time of executing the will "of sound mind, capable of executing a valid deed or contract;" whether the will was "procured by the threats, menaces and duress exercised over him (the testator) by Samuel H. Lucas or any other person or persons," and whether it was "procured by the fraud of Samuel H. Lucas or any other person or persons."

Although jurors are the recognized triers of questions of fact, the power of a court to direct a verdict for one party or the other is undoubted, and when a court has done so and its action has been approved by the unanimous judgment of the direct appellate court, we rightfully pay deference to their concurring opinions. *Patton* v. *Texas & Pacific Railway Company*, 179 U. S. 658, and cases cited. An examination of the testimony satisfies us that there was no error in directing the verdict. The testator was seventy-three years old, white, childless, unmarried, his nearest relatives being cousins, the plaintiffs in error. He had lived in this District for at least twenty years. He was a man positive in his opinions, not easily influenced, of strong religious convictions and much attached to his church. His business was that of a florist. He owned two or three parcels of real estate of the value of about $8000, and also a little personal property worth something like $300. The devisee was Samuel H. Lucas, a young colored man, with whom alone he had kept house for ten or a dozen years, such relation commencing at his invitation and continuing by his wish. For some years Lucas had the general management of the business. Testator's illness

was brief, lasting only eight days. He died on December 21, 1896, between 12 and 1 o'clock. Early in the morning of that day, between 9 and 10 o'clock, the pastor of the church to which he belonged called, and to him he said:

"Pastor, I did not expect to go so early; there are some things which I wanted to perform and have neglected. I wanted to give the church a parsonage. I cannot do it now; it is too late. I will be unable on account of the laws of Maryland, which apply to the District of Columbia, to do anything of that sort, for they will not allow a man to do anything of that sort within thirty days of the time of his death. I want you to prepare the papers and turn everything over to Sam."

Thereupon the pastor sent for a notary and prepared a deed conveying the real estate to Lucas. After that had been executed the pastor, who had never before prepared a deed, suggested that possibly he had not got everything in just right, and that if the testator wanted to make sure he could make a will. The testator then asked the notary to draw up a will, and it was drawn up and executed. At the time he directed the preparation of the deed he told Lucas what he would like to have done in reference to the parsonage, and Lucas replied that he would carry out his wishes. There was not a syllable of testimony, not a hint, that Lucas, or any other person, requested or suggested any disposition of the property. All that was done was done at the instance and upon the request of the testator. The caveators called four witnesses as to his mental condition, only one of whom was present at any time during his sickness, and that the pastor above referred to. So far from their testimony tending to show mental weakness, it was abundant and emphatic that he was a man of positive convictions, clear-headed, though perhaps eccentric in some views, but at all times fully capable of making his own contracts and attending to his own affairs. The testimony of the pastor who, as stated, was present on the morning of his death and detailed the circumstances of that interview, shows that his mind was then clear, that he knew what he was doing, and was simply attempting to carry out by the deed and the will that which had been for a long time his intention. Neither his attending

physician, the notary, the executor, nor Lucas were called as witnesses, although all were present that morning. Evidently the caveators were content to rest their case in this respect upon the evidence of the pastor. Seven physicians were called who, upon a hypothetical question, substantially concurred that it was contrary to their experience and reading that a man seventy-three years of age, dying of acute pneumonia, should have testamentary capacity between three and four hours before death. The only evidence of the cause of his death was the certificate from the health department, which named as such cause broncho-pneumonia. One of these seven physicians testified (and he alone gave evidence in that respect) that the unconsciousness preceding death from acute pneumonia was not characteristic of death from bronchial pneumonia, and that the circumstances disclosed by the pastor would tend to show that there was not mental inability to make a valid deed or contract. That acute pneumonia, especially in one of his age, would ordinarily cloud the intellect for hours before death would be irrelevant to the question of his mental condition that morning, unless it was shown that he was suffering from such disease, and that does not appear.

From this direct testimony but one conclusion could be drawn, and that in favor of the mental soundness of the testator at the time he made the will. Nor is the caveators' case strengthened by that which counsel so forcibly presented to our attention, to wit, the right of a jury to take into consideration that which is common knowledge and springs from the ordinary experiences and relations of life. The testator was a white man, the devisee colored, and race prejudice we all know exists. But this testator, eccentric in his views and of positive convictions, is shown to have made this colored man his business and household companion for years. Such continued intimacy, excluding other parties therefrom, is satisfactory evidence that he at least was not moved by such prejudice. The potency of blood relationship is also appealed to, but affection between cousins is often not very strong. The testator lived in this District while the caveators lived in New England, and the testimony fails to show that he visited them or they him;

that they ever even corresponded, or that the caveators ever manifested any interest in him or his until after his death, when they asserted a right to inherit his property.

Upon questions of this kind submitted to a jury the burden of proof, in this District at least, is on the caveators. *Dunlop* v. *Peter*, 1 Cranch C. C. 403. See also *Higgins* v. *Carlton*, 28 Maryland, 115, 143; *Tyson* v. *Tyson's Executors*, 37 Maryland, 567. The caveators in the present case failed to sustain this burden, and we are of the opinion that the trial court did not err in directing a verdict against them.

The judgment is

Affirmed.

SCHAEFER *v.* WERLING.

ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

No. 151. Argued January 27, 28, 1903.—Decided February 23, 1903.

The construction placed by the highest courts of the State upon a statute providing for paving streets and distributing the assessment therefor is conclusive upon this court.

Where a person attacking the validity of an assessment claims that the city is estopped from proceeding to collect the benefits assessed upon lots, the owner whereof objected in writing, and which objections were placed on file by the common council, the question, so far as such estoppel is concerned, is purely state, and not Federal.

Within repeated decisions of this court the statute in question in this case is not in conflict with the Constitution of the United States.

THE case is stated in the opinion of the court.

Mr. S. M. Sayler and *Mr. W. W. Dudley* for plaintiff in error.

Mr. John C. Chaney for defendant in error. *Mr. Alphonso Hart*, *Mr. William H. Hart*, *Mr. John G. Cline* and *Mr. Clifford F. Jackman* were on the brief.

MR. JUSTICE BREWER delivered the opinion of the court.

In September, 1892, the plaintiff in error, the owner of five

lots on Williams street, in Schaefer's addition to the city of Huntington, Indiana, with other lot owners, petitioned the city council to have the street graded and graveled. On July 10, 1893, the petition was granted and the street ordered to be so improved. After this improvement had been ordered some of the lot owners petitioned the city council to order the street paved with brick. This petition was presented on August 14, 1893. A remonstrance was at the same time presented, the plaintiff in error being one of the parties thereto. Notwithstanding the remonstrance the city council ordered that the street be paved with brick, and let a contract therefor to the defendants in error. They completed the work according to the contract, and the lots abutting on Williams street were assessed for the cost thereof—the assessment being made by the front foot—and a precept to collect the amount due on the lots of the plaintiff in error issued to the city treasurer. Further proceedings were had on appeal, in accordance with the provisions of the statute, which ended in a decision of the Supreme Court, 156 Indiana, 704, affirming the validity of the assessment, on the authority of *Adams* v. *City of Shelbyville*, 154 Indiana, 467, and thereupon the case was brought here on writ of error.

The case involves the validity of a statute of Indiana known as the "Barrett law," enacted in 1889. Sections 4288 to 4298, Burns Rev. Stat. 1894. We deem it sufficient to refer to the opinion in *Adams* v. *City of Shelbyville*, *supra*, in which the Supreme Court of Indiana closed an elaborate discussion of the various provisions of the law in these words:

"We therefore conclude that section 3, acts 1889, § 4290, Burns 1894, must be construed as providing a rule of *prima facie* assessments in street and alley improvements, which allotments by the city or town engineer, under section 6 of said act of 1889, § 4293, Burns 1894, are subject to review and alteration by the common council and board of trustees, under section 7 of said act of 1889, as amended, acts of 1891, p. 324; acts 1899, p. 64; § 4294, Burns 1894, upon the basis of actual special benefits received by the improvement; and that under said section 7, the common council of a city, or board of trustees of

an incorporated town, have not only the power, but it is their imperative duty, to adjust the assessments for street and alley improvements, under said act, to conform to the actual special benefits accruing to each of the abutting property owners."

Of course, the construction placed by the Supreme Court of a State upon its statutes is, in a case of this kind, conclusive upon this court. *Forsyth* v. *Hammond*, 166 U. S. 506, 518, and cases cited. And with that construction the following recently decided cases, in which the matter of street assessment was fully considered, sustain the decision of the state court upholding the validity of the law: *Barber Asphalt Paving Company* v. *French*, 181 U. S. 324; *Wight* v. *Davidson*, 181 U. S. 371; *Tonawanda* v. *Lyon*, 181 U. S. 389; *Webster* v. *Fargo*, 181 U. S. 394; *Cass Farm Company* v. *Detroit*, 181 U. S. 396; *Detroit* v. *Parker*, 181 U. S. 399; *Wormley* v. *District of Columbia*, 181 U. S. 402; *Shumate* v. *Heman*, 181 U. S. 402; *Farrell* v. *West Chicago Park Commissioners*, 181 U. S. 404; *King* v. *Portland City*, 184 U. S. 61; *Voigt* v. *Detroit City*, 184 U. S. 115; *Goodrich* v. *Detroit*, 184 U. S. 432.

Another question presented is this: The plaintiff in error appeared by counsel before the city council and filed written objections to the brick pavement "because the cost of said improvement will greatly exceed the benefit of said improvement; second, said proposed improvement is not necessary to said real estate, and is not of public utility to said real estate." The record of the city council shows that "after some discussion on the matter Mr. Levy moved to place the communication on file, which motion was concurred in." In her answer filed in the Circuit Court plaintiff in error alleged that she appeared before the common council, "and offered to present her objections to the necessity of said improvement, but that the said common council refused to hear her objections to the improvement of said street with brick, treating her said objections as a mere communication, and ordering the same placed on file." She further averred that she could and would have shown by witnesses that the improvement was not necessary, and also "that by reason of the refusal of the said action thereon the said city of Huntington, Indiana, is estopped from proceeding to collect any benefits as-

sessed on the lots herein described." The Circuit Court sustained a demurrer to this answer. It may be observed that, so far as the question was one of estoppel, it was a purely state and not a Federal question. *Gillis* v. *Stinchfield*, 159 U. S. 658; *Phœnix Insurance Company* v. *Tennessee*, 161 U. S. 174; *Beals* v. *Cone*, *ante*, p. 184. Further, the matter was not noticed by the Supreme Court, and its judgment is the one before us for review.

We see no error in the record, and the judgment is

Affirmed.

TARRANCE *v.* FLORIDA.

ERROR TO THE SUPREME COURT OF THE STATE OF FLORIDA.

No. 202. Argued April 17, 1902.—Decided February 23, 1903.

An actual discrimination by the officers charged with the administration of statutes unobjectionable in themselves against the race of a negro on trial for a crime by purposely excluding negroes from the grand and petit juries of the county, will not be presumed but must be proved. An affidavit of the persons under indictment, annexed to a motion to quash the indictment on the ground of such discrimination, stating that the facts set up in the motion are true "to their best knowledge, information and belief" is not evidence of the facts stated. *Smith* v. *Mississippi*, 162 U. S. 592, followed; *Carter* v. *Texas*, 177 U. S. 442, distinguished.

Under the decisions of the Supreme Court of Florida objections to the panels of grand juries not appearing of record must be taken by plea in abatement of, and not by motion to quash, the indictment.

THE case is stated in the opinion of the court.

Mr. Isaac L. Purcell for plaintiffs in error.

Mr. W. B. Lamar, attorney general of the State of Florida, for defendant in error.

MR. JUSTICE BREWER delivered the opinion of the court.

Plaintiffs in error were convicted in the Circuit Court of Es-

cambia County, Florida, of the crime of murder and sentenced to fifteen years in prison. The Supreme Court of the State having affirmed this sentence, 30 So. Rep. 685, the case was brought here on writ of error.

The contention of plaintiffs in error is that they were denied the equal protection of the laws by reason of an actual discrimination against their race. The law of the State is not challenged but its administration is complained of. As said by their counsel:

"We do not contend that the colored men are discriminated against by any law of this State in the selection of names for jury duty, nor do we contend that a negro being tried for a criminal offence is entitled to a jury composed wholly or in part of members of his race; but do claim that when a negro is tried for a criminal offence he is entitled to a jury selected without any discrimination against his race on account of race, color or previous condition of servitude; and when this is not the case, he is denied the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States."

Such an actual discrimination is as potential in creating a denial of equality of rights as a discrimination made by law. But such an actual discrimination is not presumed. It must be proved or admitted. The record discloses these facts: On December 3, 1900, a grand jury was empanelled, and on December 5 returned an indictment charging the defendants with the crime of murder. On December 5 they filed a motion to quash the venire and the panels of the grand and petit jurors. In the motion it was stated that there were in the county as many colored citizens of sound judgment, approved integrity, fair character and fully qualified for jury duty as white, and stated as grounds for the motions "that the county commissioners, in selecting the lists of names for jury duty for and during the present year, discriminated against all colored men of African descent, on account of their race, color and previous condition of servitude, and from said lists were drawn the grand jury which found the indictment against these defendants and the petit jury which is to try them." And that "for many years

all colored men of African descent have been discriminated against, and none have been selected or drawn or summoned as grand or petit jurors in this or in any of the courts of this county, although there are more than fourteen hundred colored men in said county, a large number of whom are taxpayers, and of approved integrity, fair character, sound judgment and intelligence, well known to the county commissioners to be such, and this discrimination is based entirely on race, color and previous condition of servitude."

On December 6 the State's attorney moved the court to strike out the defendants' motion on the grounds that it was impertinent, submitted nothing for the court's determination or consideration, was not such a motion as the court could consider, and set up no state of facts which, if true, would justify the quashing of the venire. On the same day this motion of the State's attorney was sustained, and the motion of the defendants to quash was stricken out. On the same day they filed a motion to quash the indictment on substantially the same grounds. This motion was overruled. Special venires were issued before the trial jury was finally empanelled, and as one by one these venires were returned the defendants challenged the array of jurors on the ground that the sheriff in the selection of jurors knowingly discriminated against all colored men, and refused and failed to select any to serve on the jury, although knowing that there were more than five hundred colored men in the county fully qualified to serve. No evidence was received or offered in support of any of these several motions except an affidavit of the defendants attached to the motion to quash the indictment, stating that the facts set up in the motion were true "to their best knowledge, information and belief."

In respect to all these motions, except the one to quash the venire and panels of the grand and petit jurors, it is sufficient to refer to *Smith* v. *Mississippi*, 162 U. S. 592, 600; *Carter* v. *Texas*, 177 U. S. 442. In the first case the motion to quash was supported by an affidavit similar to the one here presented, and it was held no evidence of the facts stated, and that therefore the denial of the motion was not erroneous. In the second case the bill of exceptions showed that the defendant asked

leave to introduce witnesses and offered to introduce witnesses to prove the allegations in his motion, but that the court refused to hear any evidence in support of the motion, but overruled it without investigating into the truth or falsity of the allegations therein, and this was adjudged error.

We pass, therefore, to a consideration of the ruling on the first motion. No evidence was received or offered in its support, but the motion itself was stricken out, and it is contended that the motion to strike out was equivalent to a demurrer which admitted the truth of the allegations challenged thereby, and in support thereof *Neal* v. *Delaware*, 103 U. S. 370, and *Mitchell* v. *Clark*, 110 U. S. 633, are cited. But in the former case the court held that an agreement by the attorney general, appearing for the State, was to be regarded as an admission of the truth of the facts stated in the motion and therefore waived the necessity for further evidence; and in the second case there was only a distinct ruling upon a demurrer to a plea.

In reference to the action of the trial court in this matter the Supreme Court of the State said:

"The first motion filed by defendants was to quash the venire drawn for the term, and the panels of grand and petit jurors. The venire drawn for the term at that time consisted only of the grand and petit jurors then in attendance. In so far as the panel of petit jurors was concerned, the defendants had no right to move to quash that. It was summoned for the first week of the term only, and had and could have no connection whatever with defendants' case, because their case was not to be tried until a subsequent week, when another and different panel of petit jurors would be in attendance. The petit jury objected to had not been called to try defendants' case, and would not be, as their term of service would, under the law, expire long before defendants' case would be called for trial. The defendants had no right to challenge the array of petit jurors until their case was called for trial, and it was proposed to empanel upon the jury to try them some member of the objectionable panel.

"As to the grand jury, the defendants had no right at that time to move to quash the panel. If defendants could properly

move to quash the panel or challenge the array of grand jurors for the reasons stated in this motion, it could only be done before the grand jury was empanelled, or at least before the indictment was found. Whether it could be done in that way, we do not now decide. We are clear, however, that a motion to quash the panel of grand jurors by one who has been indicted by such jurors is not proper practice. *Gladden* v. *State*, 13 Florida, 623. As we shall show further on, a plea in abatement of the indictment is the proper remedy. We regard the ruling sustaining the motion to strike as equivalent to holding that the motion to quash was not the proper method of raising the question sought to be raised; and, while we do not approve of the practice of moving to strike a motion, we do not see that the defendants have been injured by the form of the ruling complained of.

* * * * * * * *

"We are of opinion that the proper method of presenting the question sought to be presented by this motion is by plea in abatement of the indictment, and not by motion to quash, and that the ruling upon the motion can be sustained upon that ground. It has for many years been the practice in this State, sanctioned by repeated rulings of this court, that all objections to the competency of, and to irregularities in selecting, drawing and empanelling grand jurors, not appearing of record, must be taken advantage of by plea in abatement of the indictment, and not by motion to quash it. *Woodward* v. *State*, 33 Florida, 508; *Kitrol* v. *State*, 9 Florida, 9; *Gladden* v. *State*, *supra*; *Tervin* v. *State*, 37 Florida, 396. See also *State* v. *Foster*, 9 Texas, 65."

The authorities cited in this opinion sustain the propositions laid down. In *Kitrol* v. *The State*, 9 Florida, 9, 13, it was said:

"We are, therefore, of the opinion that the incompetency of the grand jurors by whom indictment is preferred may be pleaded by the defendant in abatement."

In *Gladden* v. *The State*, 13 Florida, 623, 630, the court uses this language:

"In Massachusetts, New York and other States, it has been held that objections to the legality of the returns of grand

jurors cannot affect an indictment found by them after it has been received by the court and filed; that such objection must be interposed before indictment found, and even before the grand jury is sworn. But it seems to be now settled that such objection may be made by plea in abatement to the indictment at any time before pleading in bar. This is substantially the rule announced by the Supreme Court of this State in *Kitrol* v. *The State*, 9 Florida, 9. The opinion of the Supreme Court of Mississippi in *McQuillen* v. *The State*, 8 S. & M. 587, delivered by Chief Justice Sharkey, announces what we consider the true and correct practice in such a case. Such matters are reached by plea in abatement only, (though in some States a challenge to the array is treated, we do not say properly so, as a substitute for a plea in abatement) and matters in abatement in criminal as well as in civil cases must be pleaded before pleading in bar."

In *Burroughs* v. *The State*, 17 Florida, 643, 661, where the validity of the composition of the jury was sought to be challenged on a motion in arrest of judgment, the court said:

"Aside from the fact that there is no such bill of exceptions as is required to present any question of that character to this court, if it had been properly raised, we are of the opinion, that all objections to the legality of grand jurors must be made by plea in abatement to the indictment before pleading in bar. Such is the rule as announced by this court in *Gladden* v. *The State*, 13 Florida, 623."

The force of this decision is not weakened by what was said by the same court in *Potsdamer* v. *The State*, 17 Florida, 895, 897:

"The rule is that such objections must be taken by motion or plea in abatement before pleading to the indictment. It is not proper ground of a motion for a new trial;" for *Gladden* v. *The State*, and *Burroughs* v. *The State*, are both cited as authority. What kind of a motion the Chief Justice had in mind when he spoke of "motion or plea in abatement" is not disclosed. At any rate, such a general statement cannot be considered as overruling prior decisions.

In *Tervin* v. *The State*, 37 Florida, 396, the ruling of the court was expressed in these words (p. 403):

"On the 25th of October, 1895, the defendant moved to quash the indictment and for his discharge upon the ground that 'there is nothing upon the records of this court to show that the grand jurors who found the indictment were drawn in accordance with chapter 1015 of the acts of the legislature of A. D., 1891.' This motion was overruled, and such ruling constitutes the fourth assignment of error. There is no merit in this assignment. If there was any such irregularity in the drawing or empanelling of the grand jury that found the indictment as would render such indictment void or illegal, the proper way to make it appear was by plea in abatement, instead of by motion to quash."

Neither is there anything in the cases referred to by counsel for plaintiff in error against this ruling. So we have not merely the declaration of the court in this particular case as to the practice to be observed, but a declaration supported by many prior decisions. Obviously it is the settled rule in the State.

These are all the matters called to our attention by counsel, and in them appearing no error, the judgment of the Supreme Court of Florida is

Affirmed.

MR. JUSTICE HARLAN did not hear the argument or take part in the decision of this case.

NORTHERN PACIFIC RAILWAY COMPANY *v.* SODERBERG.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 61. Argued December 12, 1902.—Decided February 23, 1903.

1. Although the jurisdiction of the United States Circuit Court be originally invoked on the ground of diverse citizenship, the attribute of finality cannot be impressed upon the judgment of the Circuit Court of Appeals unless it appear that the original jurisdiction was dependent *entirely* upon such diversity of citizenship, and where the case made by the plaintiff depends upon the proper construction of an act of Congress with the contingency of being sustained by one construction, and defeated by another, it is one arising under the laws of the United States, and this court has jurisdiction thereof under section 1 of the act of 1888.
2. Lands valuable solely or chiefly for granite quarries are mineral lands within the exception and the meaning of the provisions of the act of Congress of July 2, 1864, granting, under conditions therein stated, every alternate odd-numbered section of public land *not mineral* to the amount of twenty alternate sections per mile on each side of its line to the Northern Pacific Railroad Company. The word mineral need not be construed as synonymous with metalliferous.

Land grant statutes should receive a strict construction, and one which supports the contention of the government rather than that of the individual—the sovereign rather than the grantee. Nothing passes by implication.

THIS was a bill filed by the Railway Company in the Circuit Court for the District of Washington to enjoin the defendant Soderberg from taking, removing or disposing of granite from a quarter section of land of which he had taken possession under a mineral location, and for an account of the granite quarried or removed.

The bill alleged the incorporation of the Northern Pacific Rail*road* Company under an act of Congress of July 2, 1864, with power to construct a railroad from Lake Superior to Puget Sound, with a branch line via Columbia River to Portland; the grant of every alternate odd-numbered section of public

Counsel for Appellant.

land, *not mineral*, to the amount of twenty alternate sections per mile, on each side of the line when passing through the Territories; acceptance of the act by the Railroad Company; a joint resolution of Congress approved May 31, 1870, authorizing the company to issue bonds for the construction of the road, with a privilege to the company of building its main road by the valley of the Columbia River, with a branch across the Cascade Mountains to Puget Sound; the definite location on March 26, 1884, of the Cascade branch of the road; the completion and acceptance of the road coterminus with its public lands; the conveyance on August 3, 1896, of all its property to the Northern Pacific Rail*way* Company, which has since continuously operated such road.

The bill further alleged that the quarter section in dispute was rough, mountainous land, the principal value of which consisted in the existence of a ledge of granite of good merchantable quality, and valuable for building stone; that the defendant in 1898 entered upon this quarter section and began to quarry, remove and dispose of such granite under a mineral location of the land in question, contending that such land is excepted from the general land grant, and that the question whether this land is mineral or non-mineral has not yet been determined by the department. Wherefore an injunction was prayed.

The answer raised no issue of fact, but averred that the lands were mineral in character and as such excepted from the grant, and that defendant having complied with the rules and regulations of the Land Department and made the proper proof, it was assumed and decided that the defendant was entitled to a patent. That he paid the proper fees to the receiver, who forwarded the proofs and records to the Land Department with a recommendation that a patent issue. The patent, however, does not seem to have been actually issued until after the beginning of this suit. The court heard the case upon a stipulation of facts and entered a decree dismissing the bill, and quieting the title of the defendant to the lands in question. 99 Fed. Rep. 506. On appeal to the Circuit Court of Appeals this decree was affirmed. 104 Fed. Rep. 425.

Mr. C. W. Bunn and *Mr. James B. Kerr* for appellant.

Mr. R. A. Ballinger and *Mr. J. T. Roland* for appellee.

Mr. Assistant Attorney General Van Devanter for the United States. *Mr. Assistant Attorney Pugh* was on the brief.

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

1. Motion was made to dismiss this appeal for the reason that, as the jurisdiction of the Circuit Court was invoked upon the ground of diverse citizenship, the decree of the Circuit Court of Appeals is final, under section 6 of the Court of Appeals act of 1891, as interpreted by the decisions of this court in *Colorado Central Mining Co.* v. *Turck*, 150 U. S. 138; *Borgmeyer* v. *Idler*, 159 U. S. 408, and *Press Publishing Co.* v. *Monroe*, 164 U. S. 105. But, to impress the attribute of finality upon a judgment of the Circuit Court of Appeals, it must appear that the original jurisdiction of the Circuit Court was dependent "entirely" upon diverse citizenship. That is not the case here. Plaintiff's bill does indeed set up a diversity of citizenship as one ground of jurisdiction, but as it appears that its title rests upon a proper interpretation of the land grant act of 1864 as to the exception of non-mineral lands, there is another ground wholly independent of citizenship under that clause of section 1 of the act of 1888, 25 Stat. 433, clothing the Circuit Court with jurisdiction of all civil suits involving over $2000, "and arising under the Constitution or laws of the United States." If the case made by the plaintiff be one which depends upon the proper construction of an act of Congress, with the contingency of being sustained by one construction and defeated by another, it is one arising under the laws of the United States. *Doolan* v. *Carr*, 125 U. S. 618; *Cooke* v. *Avery*, 147 U. S. 375. Under the allegations of the bill the fact that the Land Department had not determined whether the land in question was mineral or non-mineral, does not involve a question of fact, as the facts are admitted, but solely a question of law whether land valuable for its granite is mineral or non-mineral under the terms of the grant. *Morton* v. *Nebraska*, 21 Wall. 660. The fact that a patent issued pending suit is neither set up in the pleadings nor

noticed in the opinion of either court. The motion to dismiss must therefore be denied.

2. We are thus brought to the main question in the case, viz.: Whether lands valuable solely or chiefly for granite quarries are mineral lands within the exception of the grant of 1864? The third section of the act containing the granting clause of land "not mineral" also contains the following provisos: "*Provided further*, That all mineral lands be, and the same are hereby, excluded from the operations of this act. . . . *And provided, further*, That the word 'mineral,' when it occurs in this act, shall not be held to include iron or coal." The inference from this proviso is that in the absence of a special provision both iron and coal would be considered as minerals, and thus to repel the idea that only metals were included in the word mineral. This inference is strengthened by the fact that the day before this act was passed, July 1, 1864, 13 Stat. 343, another act was approved authorizing the public sale to the highest bidder of "any tracts embracing coal beds or coal fields," and providing that any lands not thus disposed of shall thereafter be liable to private entry. Relying largely upon this act as a "legislative declaration" this court held in *Mullan* v. *United States*, 118 U. S. 271, that coal lands are mineral lands within the meaning of that term as used in the statutes regulating the disposition of the public domain. This effectually disposes of the argument that the word "mineral" must be construed as synonymous with metalliferous.

Upon the other hand, section 2 declares that "the right, power, and authority is hereby given to said corporation to take from the public lands, adjacent to the line of said road, material of earth, stone, timber, and so forth, for the construction thereof." There is a possible inference from this that stone was not to be regarded as mineral, although it is more likely that a grant was intended of all material serviceable in the construction of the road, even though it might otherwise be excepted from the grant as a mineral. Taking these two sections together, it would seem that the reason for providing in the third section that iron and coal lands should not be deemed mineral was the same as the liberty given by the second section to take

materials of earth, stone and timber, namely, to facilitate the construction and operation of the railroad, in which large quantities of coal and iron would be required.

The word "mineral" is used in so many senses, dependent upon the context, that the ordinary definitions of the dictionary throw but little light upon its signification in a given case. Thus the scientific division of all matter into the animal, vegetable or mineral kingdom would be absurd as applied to a grant of lands, since all lands belong to the mineral kingdom, and therefore could not be excepted from the grant without being destructive of it. Upon the other hand, a definition which would confine it to the precious metals, gold and silver, would so limit its application as to destroy at once half the value of the exception. Equally subversive of the grant would be the definition of minerals found in the Century Dictionary: as "any constituent of the earth's crust;" and that of Bainbridge on Mines: "All the substances that now form, or which once formed, a part of the solid body of the earth." Nor do we approximate much more closely to the meaning of the word by treating minerals as substances which are "mined," as distinguished from those which are "quarried," since many valuable deposits of gold, copper, iron and coal lie upon or near the surface of the earth, and some of the most valuable building stone, such, for instance, as the Caen stone in France, is excavated from mines running far beneath the surface. This distinction between underground mines and open workings was expressly repudiated in *Midland Ry. Co.* v. *Haunchwood Co.*, L. R. 20 Ch. Div. 552, and in *Hext* v. *Gill*, L. R. 7 Ch. App. 699.

The ordinance of May 20, 1785, authorizing the sale of lands in the western territory, with a reservation of "one third part of all gold, silver, lead and copper mines, to be sold or otherwise disposed of, as Congress shall hereafter direct," was evidently intended as an assertion of the right of the government to a royalty upon the more valuable metals—a prerogative which had belonged to the English Crown for centuries, though there confined to gold and silver, which were only considered as royal metals, and having its origin in the king's prerogative of coinage. 1 Black. Com. 394. While intrinsically the precious

metals are the more valuable, in the aggregate, the non-precious metals have probably contributed as much or more to the general wealth of the country.

A division of land into agricultural and mineral would also be a most uncertain guide to a proper construction of the word "mineral," since most of the lands included in the limits of this grant are neither one nor the other, but desert or rocky land, of no present value for agriculture, and of little value for their mineral deposits. So, too, the general reservations in the earlier acts of Congress of lead mines and saline springs seem to have been dictated by the fact that those were the only valuable minerals known to exist in the States to which the acts were applied, while in Michigan and Wisconsin there was a similar reservation of copper, lead and other valuable ores, which were just then being discovered and made available. In the earlier grants of Congress in aid of railroads there was generally no reservation of mineral lands, but in the grants subsequent to 1860, to the Lake Superior and Pacific roads, through unsurveyed and almost unknown territories, a reservation was invariably made of lands suspected of being rich in metals. It is quite true that, had it not been for the actual or suspected presence of these metals, Congress might not have deemed it worth while to reserve the non-metallic mineral lands; but when its attention was called to the fact that valuable mines might exist along the line of these roads, as it appears to have been about 1860, its policy was changed, and not only metalliferous but all mineral lands were reserved. Subsequent to that, it was only in States which had already received grants without reservation, or in known agricultural States, that such grants continued to be made.

Considerable light is thrown upon the Congressional definition of the word "minerals" by the acts subsequent to the Northern Pacific grant of 1864, and prior to the definite location of the line in 1884. The first of these acts, that of July 26, 1866, 14 Stat. 251, declares that the "mineral lands" of the public domain shall be free and open to exploration and occupation, subject to such rules as may be prescribed by law, and subject also to the local customs or rules of miners in the sev-

eral mining districts. The second section provides that whenever any person, or association of persons claim a vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar or copper, he shall be entitled to enter such tract and receive a patent therefor, upon complying with certain preliminaries, and with a right to follow such vein, etc., into adjoining lands. The argument made in this connection by the Railway Company would confine the term "mineral lands" to lands bearing gold, silver, cinnabar or copper, which would exclude all other metalliferous lands, such as contain iron, lead, tin, nickel, platinum, aluminum, etc.—a limitation wholly inconsistent with the use of the word "mineral" in the first section.

This act was amended July 9, 1870, 16 Stat. 217, to allow the entry of "placer" claims, "including all forms of deposit, excepting veins of quartz, or other rock in place," and declaring that they shall be subject to patent under the same provisions as vein or lode claims. As placers are merely superficial deposits, occupying the beds of ancient rivers or valleys, washed down from some vein or lode, *United States* v. *Iron Silver Mining Co.*, 128 U. S. 673, this act has little bearing upon the present case, though in *Freezer* v. *Sweeney*, 8 Montana, 508, it was held by the Supreme Court of Montana to authorize the locating and patenting of a stone quarry.

Another act having a more important bearing is that of May 10, 1872, 17 Stat. 91, "to promote the development of the mining resources of the United States," and providing in the first section that "all valuable mineral deposits" in public lands should be open to exploration and purchase, according to the local customs or rules of miners. This section is an obvious extension of section 1 of the act of 1866, above cited, by substituting the words "valuable mineral deposits in lands" for the words "mineral lands," as used in the prior act. The second section is also in line with the second section of the act of 1866, and provides that "mining claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits heretofore located, shall be governed as to length along the vein or lode by the customs, regulations, and laws in force at the date of their

location." This section, like section 2 of the act of 1866, is susceptible of two interpretations, either that the words "valuable mineral deposits" of the first section are limited to the particular metals described in the second section, or that those metals stood in particular need of regulation as to the length and breadth of vein, and power to pursue such veins downward vertically, and even beyond the vertical side line of the locations. This appears to us the more reasonable interpretation. The fact that no such limits were imposed on veins of coal or other minerals or metals indicates, not that the act was intended to be confined to the minerals enumerated in section 2, since that would be a clear restriction upon the words "valuable mineral deposits" in the first section, but that these particular metals stood in special need of limitation and protection.

Equally pregnant with meaning is the act of June 3, 1878, 20 Stat. 89, for the sale of timber lands in California, Oregon, Nevada and Washington, which provides that "lands valuable chiefly for timber, but unfit for cultivation," as well as lands "valuable chiefly for stone," may be sold in quantities not exceeding 160 acres, with a proviso excluding mining claims, or lands containing gold, silver, cinnabar or coal. This was followed by another act, August 4, 1892, 27 Stat. 348, authorizing the entry of lands "chiefly valuable for building stone," under the placer mining laws, and extending the previous act to all public land States. This act was passed after the line of the road had been definitely located, and consequently has no direct bearing upon the case, and can only be regarded as explaining to some extent the previous reservation of all lands valuable for mineral deposits.

Conceding that in 1864 Congress may not have had a definite idea with respect to the scope of the word "mineral," it is clear that in 1884, when the line of this road was definitely located, it had come to be understood as including all lands containing "valuable mineral deposits," as well as lands "chiefly valuable for stone," and that when the grant of 1864 first attached to particular lands by the definite location of the road in 1884, the railway found itself confronted with the fact that the word "mineral" had by successive declarations of Congress

been extended to include all valuable mineral deposits. As no vested rights had been acquired by the Railroad Company prior to the definite location of its line, it took the lands in question encumbered by such definitions as Congress had seen fit to impose upon the word "mineral," subsequent to 1864.

Indeed, by the very terms of the granting act of July 2, 1864, not only are mineral lands excluded, but the grant is limited to those lands to which "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 definitely fixed*, and a plat thereof filed in the office of the Commissioner of the General Land Office." It results from this that if, before the definite location of the road, Congress had withdrawn certain of these lands from the grant, the company was bound by such withdrawal and compelled to accept other lands in lieu thereof within the indemnity limits of the grant.

In construing this grant we must not overlook the general principle announced in many cases in this court, that grants for the sovereign should receive a strict construction—a construction which shall support the claim of the government rather than that of the individual. Nothing passes by implication, and unless the language of the grant be clear and explicit as to the property conveyed, that construction will be adopted which favors the sovereign rather than the grantee.

The rulings of the Land Department, to which we are to look for the contemporaneous construction of these statutes, have been subject to very little fluctuation, and almost uniformly, particularly of late years, have lent strong support to the theory of the patentee, that the words "valuable mineral deposits" should be construed as including all lands chiefly valuable for other than agricultural purposes, and particularly as including non-metallic substances, among which are held to be alum, asphaltum, borax, guano, diamonds, gypsum, resin, marble, mica, slate, amber, petroleum, limestone, building stone and coal. The cases are far too numerous for citation, and there is practically no conflict in them.

The decisions of the state courts have also favored the same

interpretation. Thus in *Gibson* v. *Tyson*, 5 Watts, 34, chromate of iron was held to be included in a reservation of all mineral. In *Hartwell* v. *Camman*, 10 N. J. Eq. 128, a grant of "all mines, minerals open or to be opened," was held to include paint stone, on the ground that it was valuable for its mineral properties—the court distinctly repudiating the idea that the term should be confined to metals or metallic ores. In *Funk* v. *Haldeman*, 53 Pa. St. 229, and in *Gill* v. *Weston*, 110 Pa. St. 313, petroleum was held to be mineral, although the act authorizing the lease of mining lands was passed before petroleum was discovered. See also *Gird* v. *California Oil Company*, 60 Fed. Rep. 531. The same principle was extended in *W. & C. Natural Gas Company* v. *De Witt*, 130 Pa. St. 235, to natural gas, which was said to be a mineral *ferœ naturœ*. In *Armstrong* v. *Lake Champlain Granite Company*, 147 N. Y. 495, a conveyance of "all minerals, *and* ores," was held to include granite subsequently discovered on the premises, though it would not pass under the name of "mineral ores." In *Johnston* v. *Harrington*, 5 Washington, 73, 78, the Supreme Court of that State thought it would hardly be disputed that stone was a mineral, though it seems inconsistent with the subsequent case, in the same volume, of *Wheeler* v. *Smith*, 5 Washington, 704, holding that the term mineral was only intended to embrace deposits of ore.

The rulings of the English courts have, with a possible exception in some earlier cases, adopted the construction that valuable stone passed under the definition of minerals. Said Baron Parke in *The Earl of Rosse* v. *Wainman*, 14 M. & W. 859, 872: "The term 'minerals,' [used in an act of Parliament, reserving to the lord all mines and minerals,] though more frequently applied to substances containing metals, in its proper sense includes all fossil bodies or matters dug out of mines; and Dr. Johnson says that 'all metals are minerals, but all minerals are not metals;' and mines, according to Jacob's Law Dictionary, are 'quarries or places where anything is digged;' and in the year book, 17 Edw. 3, c. 7, "mineræ de pierre' and 'de charbon' are spoken of. Beds of stone, which may be dug by winning or quarrying, are therefore properly minerals, and so

we think they must be held to be in the clause in question, bearing in mind that the object of the act was to give the surface for cultivation to the commoners and to leave in the lord what it did not take away for that purpose." This case was followed in *Micklethwait* v. *Winter*, 6 Exch. 644, in which the same act of Parliament was held to include stone dug from quarries. In *Midland Ry.* v. *Checkley*, L. R. 4 Eq. 19, stone for road making or paving was held to be a mineral, the Master of the Rolls observing: "Stone is, in my opinion, clearly a mineral; and in fact everything except the mere surface, which is used for agricultural purposes; anything beyond that which is useful for any purpose whatever, whether it is gravel, marble, fire clay, or the like, comes within the word 'mineral' when there is a reservation of the mines and minerals from a grant of land." In *Midland Ry. Co.* v. *Haunchwood*, L. R. 20 Chan. Div. 552, brick clay was held to be a mineral; and in *Hext* v. *Gill*, L. R. 7 Chan. App. 699, the House of Lords held that china clay, and "every substance which can be got from underneath the surface of the earth for the purpose of profit," was a mineral, "unless there is something in the context or in the nature of the transaction to induce the court to give it a more limited meaning." The same rule was applied in several analogous cases of granite, sandstone, flintstone and in other similar circumstances. *Attorney General* v. *Welsh Granite Co.*, 35 W. R. 617 (granite); *Bell* v. *Wilson*, 2 Drew. & S. 395 (sandstone); *Tucker* v. *Linger*, L. R. 8 App. Cas. 508 (flintstone), and a dozen other cases to the same effect.

We do not deem it necessary to attempt an exact definition of the words "mineral lands" as used in the act of July 2, 1864. With our present light upon the subject it might be difficult to do so. It is sufficient to say that we see nothing in that act, or in the legislation of Congress up to the time this road was definitely located, which can be construed as putting a different definition upon these words from that generally accepted by the text writers upon the subject. Indeed, we are of opinion that this legislation consists with, rather than opposes, the overwhelming weight of authority to the effect that mineral lands include not merely metalliferous lands, but all such as are chiefly

valuable for their deposits of a mineral character, which are useful in the arts or valuable for purposes of manufacture.

The decree of the Court of Appeals is therefore

Affirmed.

MR. JUSTICE BREWER and MR. JUSTICE PECKHAM dissented.

PROUT *v.* STARR.

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

No. 150. Argued January 26, 27, 1903.—Decided February 23, 1903.

It is competent and proper for all the parties to an action to agree to dispense with taking evidence, to accept the evidence taken in other cases in which the allegations of fact and the contentions of law are the same, and to abide by decrees to be entered therein. And, where the decrees entered in such other cases have been affirmed by this court, the Circuit Court in which the cases are pending should enter a similar decree in the case in which the agreement is made.

Such agreement when made by the attorney general of the State as a party to any action is binding upon his successors in office who have been properly substituted as parties to the action in his place.

The Constitution of the United States, with the several amendments thereof, must be regarded as one instrument, all of whose provisions are to be deemed of equal validity. And in an action properly instituted against a state official the Eleventh Amendment is not a barrier to a judicial inquiry as to whether the provisions of the Fourteenth Amendment have been disregarded by state enactments.

The contentions of law in this case were considered and determined by this court in *Smyth* v. *Ames*, 169 U. S. 466, which is now followed.

ON August 3, 1893, James C. Starr and Samuel W. Allerton, citizens of the State of Illinois, on their own behalf and on behalf of others similarly situated, filed a bill of complaint in the Circuit Court of the United States for the District of Nebraska, against the Chicago, Rock Island and Pacific Railway Company; George H. Hastings, Attorney General; John C. Allen,

Secretary of State; Eugene Moore, Auditor of Public Accounts; Joseph F. Bartley, State Treasurer, and A. R. Humphrey, Commissioner of Public Lands, all of whom were officers of the State of Nebraska, and as such constituted its board of transportation, and William A. Dilworth, J. M. Rountz and J. W. Johnson, secretaries of said board, and all citizens of Nebraska.

The bill brought into question, under the Constitution and laws of the United States, the validity of a certain act of the legislature of Nebraska, approved April 12, 1893, entitled "An act to regulate railroads, to classify freights, to fix reasonable maximum rates to be charged for the transportation of freights upon each of the railroads in the State of Nebraska and to provide penalties for the violation of this act." It was alleged that if the provisions of the act were put into effect, the earnings of the said railroad company from its business in the State would be materially lessened and would not pay the operating expenses thereof, nor yield any money from which the railroad property could be maintained, and would in effect work a confiscation thereof; that if the penalties imposed in the said act were enforced the entire property of the company would be taken away; that the plaintiffs were stockholders of the company, and had requested the officers and directors thereof to take proceedings to contest the validity of said act, but they had refused to do so. The principal prayers of the bill were that the company, its officers, agents and employés, should be restrained by injunction from adopting a schedule of rates to be charged for the transportation of freight on its road, according to the terms and provisions of the said act; and that the said board of transportation, and its members and secretaries, should be enjoined from entertaining or determining any complaint, and from instituting or prosecuting any proceeding or action to enforce the observance of the provisions of said act; and that the attorney general should in like manner be enjoined from bringing any proceedings by way of injunction or by other process or civil action or indictment against said company for or on account of the non-observance by it of the provisions of said act.

Thereupon a restraining order of the Circuit Court was is-

sued, enjoining the railroad company, the board of transportation and its members and the said attorney general, as prayed for in the bill; said order was to remain in force until a formal motion for injunction or to set aside the order be made, heard and decided; and a bond was to be given in the sum of $10,000. This order was duly served upon each and every of the said defendants, together with process of subpœna.

Afterwards, on the 2d day of September, 1893, a joint and several answer was filed by the said board of transportation, its members and secretaries. Therein it was averred that the said defendants were all agents and officers of the State of Nebraska, and had no personal or pecuniary interest whatever in the event of the suit, and were not proper parties thereto, but that said bill of complaint should have been brought against the State of Nebraska; that the said State was the real party in interest, and that the State had not and did not in any way whatever consent to the bringing of the action, and had not and did not submit in any way to the jurisdiction of the said Circuit Court to hear and determine the matters complained of in said bill; and the defendants submitted that, under the Eleventh Amendment of the Constitution of the United States, the courts of the United States were wholly without jurisdiction to try, hear and determine the several matters in difference charged and set forth in the bill of complaint; and that, under the Constitution of the United States and the constitution and laws of the State of Nebraska, the complainants had a full and adequate remedy at law. The defendants further denied that the state legislation in question violated the provisions of the Constitution of the United States which forbid any State to deprive any person of his property without due process of law, or to deny any person within its jurisdiction the equal protection of the laws, or to pass a law impairing the obligation of a contract, or which interferes with commerce between the States.

On October 3, 1893, the complainants filed their replication to the answer.

At and about the same time, and in the same court, certain stockholders of the Chicago, Burlington and Quincy Railroad

Company, of the Chicago and Northwestern Railway Company, and of the Union Pacific Railway Company, filed three other bills of complaint, in which the said railroad companies and the said persons comprising the board of transportation were defendants, and in which bills the same facts and circumstances were alleged and the same relief was prayed for as in the bill in the present case. All of the state officers appeared and answered by the same counsel, and alleged the same defences and contentions as were alleged in their answer in this suit. Those cases were put at issue, and after a large amount of evidence was put in, final decrees were rendered against the defendants, and, on March 7, 1898, the decrees of the Circuit Court were affirmed by this court. *Smyth* v. *Ames*, 169 U. S. 466. No testimony was taken by either party in the present case, but it was agreed, while the other cases were pending, that the proofs taken in them should be accepted with the same force and effect as if taken in this case; that the case should not be further particularly proceeded in until the Supreme Court should have rendered its decree in the other cases, when a decree should be entered conformable to those entered by the Supreme Court in the other three cases.

Meanwhile, Hastings, the attorney general when the bills were filed, was succeeded in his office by Smyth, who by proper order was substituted as defendant and appellant. Overlooking or disregarding the existing preliminary injunction of the Circuit Court, and the agreement that this case should abide the result in the other cases, Smyth, as attorney general, brought an action in the Supreme Court of the State of Nebraska against the said Chicago, Rock Island and Pacific Railway Company, alleging that the company, in violation of the act of April 12, 1893, at divers times had charged for the transportation of freight between points on its road in Nebraska rates in excess of those fixed by the act, and claiming judgment for $310,000, the amount of penalties alleged to have accrued. The attention of Attorney General Smyth was then called to the injunction order of the Circuit Court, and he thereupon gave the counsel of the company to understand that before the expiration of his term of office he would dismiss said action. Relying upon the under-

standing and agreement aforesaid, the company took no proceedings to enforce the said injunction and agreement.

On or about January 1, 1901, the said defendant Frank N. Prout succeeded the said Smyth in his office of attorney general, who declined to dismiss the said action in the Supreme Court of Nebraska. Whereupon the company filed its answer in the said action in due form, alleging the prior pendency of the action in the Circuit Court of the United States, and the existence, in full force and effect, of the injunction order of that court. No reply to this answer appears to have ever been filed, and thereupon, on or about February 15, 1901, the company moved the said court for judgment upon the pleadings, but the court denied said motion, upon grounds set out in its opinion. *State* v. *Chicago, Rock Island & Pacific Railway Company*, 61 Nebraska, 545. No further proceedings have been taken in said action, and the injunction order of the Circuit Court remains unmodified and in full force and effect.

On April 6, 1901, Starr and Allerton filed, in the Circuit Court of the United States, their supplemental bill, alleging the foregoing facts, and praying that the order and injunction previously issued upon their original bill be extended to and against the said Frank N. Prout, as attorney general, and that he be enjoined and restrained from further prosecuting the action brought in the name of the State of Nebraska against the railway company.

To this supplemental bill Frank N. Prout filed a demurrer on the ground that the bill was against the defendant in his official capacity as attorney general of the State, and was against the State, and that therefore the court was, under the Eleventh Amendment of the Constitution, without jurisdiction.

Upon argument the demurrer was overruled, and the injunction prayed for was issued. The order directing the injunction provided that if the defendant elected to stand by his demurrer and declined further to plead, a final decree should go as in the case of *Smyth* v. *Ames*, and the defendant having elected in open court to stand upon his demurrer, a final decree was entered comformable to that in *Smyth* v. *Ames*. From that decree the defendant Frank N. Prout appealed to this court.

Mr. F. N. Prout, attorney general of the State of Nebraska, in person for appellant.

Mr. J. M. Woolworth for appellees. *Mr. W. D. McHugh* was with him on the brief.

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

As the appellant demurred to the supplemental bill, and elected to stand on his demurrer when the final decree of the Circuit Court was entered, we have now only to consider the questions of law presented by the demurrer.

That it was competent for the parties, plaintiffs and defendants, to agree to dispense with taking evidence, to accept the evidence taken in the other cases, and to abide by the decrees therein to be entered, we have no reason to doubt, *Pacific R. R.* v. *Ketchum*, 101 U. S. 289, and that such an agreement was entered into is conceded. The allegations of fact and the contentions of law being the same in all the cases, such an arrangement was convenient and proper. The decrees in the other cases having been affirmed by this court, it was in accordance with that agreement that the Circuit Court should enter a similar decree in the present case. In so far, then, as the substantial merits of the case are concerned, we are not called upon to consider them. They have been concluded by the reasoning and opinion of this court in the other cases. *Smyth* v. *Ames*, 169 U. S. 466.

But by this appeal we are asked to declare that the Circuit Court had no jurisdiction because it appears, on the face of the bill, that the complaint is essentially against the State of Nebraska, and is in contravention of the Eleventh Amendment of the Constitution of the United States.

It is a sufficient answer to this contention that it was made, considered and determined in *Smyth* v. *Ames*. In the opinion in that case it was said:

"Within the meaning of the Eleventh Amendment of the Constitution, these suits are not against the State, but against certain individuals charged with the administration of a state

enactment, which, it is alleged, cannot be enforced without violating the constitutional rights of the plaintiffs. It is the settled doctrine of this court that a suit against individuals, for the purpose of preventing them as officers of a State from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the State within the meaning of that amendment. *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 10; *In re Tyler*, 149 U. S. 164, 190; *Scott* v. *Donald*, 165 U. S. 58, 68; *Tindal* v. *Wesley*, 167 U. S. 204, 220."

The Constitution of the United States, with the several amendments thereof, must be regarded as one instrument, all of whose provisions are to be deemed of equal validity. It would, indeed, be most unfortunate if the immunity of the individual States from suits by citizens of other States, provided for in the Eleventh Amendment, were to be interpreted as nullifying those other provisions which confer power on Congress to regulate commerce among the several States, which forbid the States from entering into any treaty, alliance or confederation, from passing any bill of attainder, *ex post facto* law or law impairing the obligation of contracts, or, without the consent of Congress, from laying any duty of tonnage, entering into any agreement or compact with other States, or from engaging in war—all of which provisions existed before the adoption of the Eleventh Amendment, which still exist, and which would be nullified and made of no effect, if the judicial power of the United States could not be invoked to protect citizens affected by the passage of state laws disregarding these constitutional limitations. Much less can the Eleventh Amendment be successfully pleaded as an invincible barrier to judicial inquiry whether the salutary provisions of the Fourteenth Amendment have been disregarded by state enactments. On the other hand, the judicial power of the United States has not infrequently been exercised in securing to the several States, in proper cases, the immunity intended by the Eleventh Amendment. *Hans* v. *Louisiana*, 134 U. S. 1, 10; *North Carolina* v. *Semple*, 134 U. S. 22; *Harkrader* v. *Wadley*, 172 U. S. 148; *Fitts* v. *McGhee*, 172 U. S. 516.

It is one of the important functions of this court to so interpret the various provisions and limitations contained in the organic law of the Union that each and all of them shall be respected and observed.

It is further argued by the appellant, as one of the grounds of his demurrer, that he was complained against in his official capacity as attorney general of the State of Nebraska, and not in his individual capacity as a citizen thereof, and that the attorney general of a State cannot be restrained by an injunction of a United States court from enforcing the criminal laws of the State.

This, we think, is only another phase of the same question.

It is true that the defendant was included in the bill as the attorney general of the State, but that was because he was one of the board of transportation, which was directed to enforce the provisions of the act. The bill did not seek to interfere with the acts of the attorney general in prosecuting offenders against the valid criminal laws of the State, but its object was to prevent him from collecting penalties that had accrued under the provisions of a statute judicially determined to be void. The injunction must be so read and understood.

Several changes of incumbents in the office of attorney general took place while the cases were proceeded in, but that did not deprive the court of jurisdiction. The successors in office were duly substituted, and thus became subjected to the preliminary and final decrees of the court. The object of the supplemental bill was to restrain the present appellant, as successor to Smyth, from attempting to transfer the very matters that stood for judgment in the Federal court to the state court by filing a bill in the latter. Such a course might bring about a conflict between those courts, and create the confusion so often deprecated by this court. *Peck* v. *Jenness*, 7 How. 612, 625; *Chittenden* v. *Brewster*, 2 Wall. 191; *Orton* v. *Smith*, 18 How. 263.

The jurisdiction of the Circuit Court could not be defeated or impaired by the institution, by one of the parties, of subsequent proceedings, whether civil or criminal, involving the

same legal questions, in the state court. *Harkrader* v. *Wadley*, 172 U. S. 148, 166.

The decree of the Circuit Court is

Affirmed.

MR. JUSTICE HARLAN concurring. I am in favor of modifying the judgment in some particulars and then affirming it, but I do not concur in all the reasoning of the opinion.

GUTIERRES *v.* ALBUQUERQUE LAND AND IRRIGATION COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

No. 16. Argued January 9, 1902—Decided February 23, 1903.

1. The provisions of the corporation laws of the Territory of New Mexico relating to the formation and rights of irrigation companies are not invalid because they assume to dispose of property of the United States without its consent. By the act of July 26, 1866, 14 Stat. 253; Rev. Stat. § 2339, and the act of March 3, 1877, 19 Stat. 377, Congress recognized as respects the public domain and so far as the United States is concerned, the validity of the local customs, laws and decisions in respect to the appropriation of water, and granted the right to appropriate such amount of water as might be necessarily used for the purpose of irrigation and reclamation of desert land, part of the public domain, and as to the surplus, the right of the public to use the same for irrigation, mining and manufacturing purposes subject to existing rights. The purpose of Congress to recognize the legislation of Territories as well as of States in respect to the regulation of the use of public water is evidenced by the act of March 3, 1891, 26 Stat. 1095. The statute of New Mexico is not inconsistent with the legislation of Congress on this subject.
2. The act of March 3, 1877, is not to be construed as an expression of Congress that the surplus public waters on the public domain, and which are within the control of Congress or of a legislative body created by it, must be directly appropriated by the owners of lands upon which a beneficial use of the water is to be made and that consequently a territorial legislature cannot lawfully empower a corporation to become an intermediary for furnishing water to irrigate the lands of third parties.

Statement of the Case.

The question whether the appropriation of water interferes with the rights of other appropriators below the mouth of a proposed new irrigation canal cannot be raised by parties who are strangers to such other appropriators not parties to the action.

THIS litigation was begun by the appellee, in the District Court for the Second Judicial District of the Territory of New Mexico, within and for the county of Bernalillo. In the bill of complaint equitable relief was sought against the now appellants. It was alleged, in substance, that plaintiff, on December 31, 1897, became a body corporate, pursuant to the provisions of an act of the general assembly of the Territory of New Mexico, approved February 24, 1887, for the purpose of constructing a canal, ditch and pipe line between named points in the county of Bernalillo, in the Territory of New Mexico; that, as preliminary to the construction of such canal, ditch and pipe line, a survey of lands along the proposed route thereof was necessary, and such survey was authorized by law; and that the defendants, asserting ownership of lands along such proposed route, had forcibly prevented the employés of the plaintiff from entering on said lands to make survey thereof. It was prayed that temporarily, pending the suit, and perpetually by the final decree, the defendants might be enjoined from further interference with the making of the survey, and there was also a prayer for general relief. In their answer the defendants admitted their interferences with the proposed survey, as complained of in the bill, but asserted their right to do so. Reiterating the allegations of the answer, by cross complaint, a perpetual injunction was asked restraining entry by the plaintiff upon the lands. An order was issued temporarily restraining the defendants, as prayed, and thereafter a demurrer to the answer and cross complaint of the defendant was filed and overruled. After replication by the respective parties the cause was transferred to the District Court of the First Judicial District for the Territory of New Mexico, within and for the county of Santa Fé. In that court trial was had and judgment was entered in favor of the plaintiff perpetuating the preliminary injunction and dismissing the cross complaint of the defendants.

Statement of the Case.

The following findings of fact and conclusions of law were embodied in the judgment:

"*Findings of Fact.*

"I. That the plaintiff is a corporation and has complied with the provisions of the laws of the Territory of New Mexico. It is organized for the purpose of constructing a canal from a point on the Rio Grande about twenty-eight miles above the city of Albuquerque to the railroad bridge across said Rio Grande, at Isleta, the initial and terminal points of said canal being within the county of Bernalillo.

"II. That the headgate of plaintiff's proposed canal is to be at a point on the Rio Grande three eighths ($\frac{3}{8}$) of a mile below or south of the Indian village of San Felipe, about twenty-eight miles above the city of Albuquerque; that the ultimate terminus or point of discharge into the river is at the railroad bridge near Isleta, the entire length of the canal to be about thirty-five (35) miles. The present proposed terminus is at the city of Albuquerque.

"III. That the engineer of the company was proceeding with a survey of the line between Albuquerque and the headgate when defendants interfered with and obstructed the said engineer in the making of said survey.

"IV. That the capacity of the said proposed canal is two hundred and ten (210) cubic feet of water per second.

"V. That there are at present thirteen ditches taking water from the river between the proposed headgate of plaintiff's canal and the Albuquerque, and seven between Albuquerque and the Indian town of Isleta.

"VI. That the aggregate capacity of all the said old ditches is four hundred and ninety-eight (498) cubic feet per second, and the court finds that there has been a valid prior appropriation by the owners of said old ditches of the said four hundred and ninety-eight (498) feet per second of water.

"VII. That during a few months or parts of the summer months of the years 1894, 1895, 1896 and 1897 there was no surplus water flowing in the river at the proposed headgate, but during a large majority of the months of each of these years

there was a large amount of surplus water flowing past that point, and that those years were the only years within ten or twenty years in which the river was dry at or above Albuquerque.

"VIII. That in a majority of the last ten years there has been surplus water flowing in the said river at the proposed headgate at all times.

"IX. That the river became dry at Albuquerque about the last of June, 1894, and remained so for twenty-two days, and also in June, 1896, for a number of days, the court being unable to find the exact number or length of time from the evidence.

"X. That the months of June, July, August and September are the 'dry season.'

"XI. That the planting and growing season in the Rio Grande Valley begins in February and ends with October.

"XII. That very few farmers served by the present ditches sow wheat, oats, barley or rye in the fall of the year, but do so in the spring, beginning during February or March and that very little, if any, of the water now appropriated is used for these crops after June 15th, but the water is used for chili, corn, alfalfa and melons after that time, and for alfalfa as late as October.

"XIII. That for all the months in most years and for most of the months in every year there is a surplus of water flowing in the Rio Grande over and above the amount appropriated by said old ditches.

"XIV. The court finds that there is no evidence that plaintiff relies on any source of water supply than the Rio Grande or that the proposed canal of plaintiff is expected or intended to receive and distribute stored waters.

"XV. That the plaintiff is not the owner of any lands along the line of its proposed canal or elsewhere.

"XVI. That there is no evidence that plaintiff has any contract with or employment by any person who is the owner of lands irrigable from said proposed canal for the conduct of water upon any such lands, or that any owner of lands not now irrigated from existing acequias, desires or intends to irrigate such lands from plaintiff's canal when completed.

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"XVII. That the proposed canal of the plaintiff will cross and recross the existing acequias of Bernalillo nine times within a distance of one mile of its length.

"XVIII. That some of the defendants and some of their associates are the owners of lands through which the plaintiff proposes to construct its canal.

"*Conclusions of Law.*

"I. That the plaintiff corporation is entitled to exercise the power of eminent domain.

"II. That the plaintiff, by the filing of its articles of incorporation with the secretary of the Territory of New Mexico, and complying with the provisions of the act under which it is incorporated, has acquired a right to construct its canals and reservoirs to divert through its proposed canal surplus and unappropriated waters flowing in the Rio Grande, and that such a right of eminent domain does not depend upon the ownership of lands by plaintiff or the employment of plaintiff prior to the construction of its canal by owners of lands to carry waters for such owners.

"III. That the defendants, at the time of the filing of the complaint herein, unlawfully obstructed the plaintiff in the exercise of powers lawfully conferred upon it by the act under which it is incorporated.

"IV. That the defendants do not and cannot in this action lawfully represent the rights of such persons claiming a right to the use of the waters of the Rio Grande, by prior appropriation, when the appropriation of such persons was effected at a point below the mouth of the proposed canal of plaintiff.

"V. That the defendants cannot lawfully set up in this action any rights secured to them and their associates or their predecessors in title by the treaty of Guadalupe Hidalgo, and that the allegations of paragraph ten of the answer of defendants with reference to the treaty of defendants are immaterial.

"VI. That the plaintiff is entitled to the relief demanded in the complaint, including a perpetual injunction as prayed for.

"VII. That defendants are not entitled to any part of the

relief demanded in their cross complaint, but the same should be dismissed."

A motion to set aside the findings and judgment and for a new trial having been overruled, the cause was taken to the Supreme Court of the Territory. That court affirmed the judgment of the trial court and adopted as its own the findings of fact made by the judge of the District Court. Thereupon this appeal was allowed.

Mr. Neill B. Field for appellants.

Mr. William B. Childers for appellee.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the court.

The pertinent portions of the territorial act of February 24, 1887, under which the plaintiff below was incorporated, are noted in the margin.[1]

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[1] Corporation Laws of New Mexico, 1897.

§ 468. Any five persons who may desire to form a company for the purpose of constructing and maintaining reservoirs and canals, or ditches and pipe lines, for the purpose of supplying water for the purpose of irrigation, mining, manufacturing, domestic and other public uses, including cities and towns, and for the purpose of colonization and the improvement of lands in connection therewith, for either or both of said objects, either jointly or separately, shall make and sign articles of incorporation, which shall be acknowledged before the secretary of the Territory, or some person authorized by law to take the acknowledgment of conveyances of real estate, and when so acknowledged, such articles shall be filed with such secretary.

§ 469. Such articles shall set forth: First. The full names of the incorporators, and the corporate name of such company.

Second. The purpose or purposes for which such company is formed, and if the object be to construct reservoirs and canals, or ditches and pipe lines for any of the purposes herein specified, the beginning point and terminus of the main line of such canals and ditches and pipe lines, and the general course, direction and length thereof shall be stated.

Third. The amount of the capital stock and the number of shares as definitely as practicable.

Fourth. The term of existence of the company, which shall not exceed fifty years.

It will be seen that the act authorized the formation of corporations for the purpose of constructing and maintaining reservoirs and canals, or ditches and pipe lines, and that two pur-

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Fifth. The number of directors, and the names of those who shall manage the business of the company for the first year.

Sixth. The name of the city or town and county in which the principal place of business of the company is to be located.

* * * * * * * *

§ 484. Corporations formed under this act for the purpose of furnishing and supplying water for any of the purposes mentioned in section four hundred and sixty-eight, shall have, in addition to the powers hereinbefore mentioned, rights as follows:

First. To cause such examinations and surveys for their proposed reservoirs, canals, pipe lines and ditches to be made, as may be necessary to the selection of the most eligible locations and advantageous routes, and for such purpose, by their officers, agents and servants, to enter upon the lands or water of any person, or of this Territory.

Second. To take and hold such voluntary grant of real estate and other property, as shall be made to them in furtherance of the purposes of such corporation.

Third. To construct their canals, pipe lines or ditches upon or along any stream of water.

Fourth. To take and divert from any stream, lake or spring the surplus water, for the purpose of supplying the same to persons, to be used for the objects mentioned in section four hundred and sixty-eight of this act, but such corporations shall have no right to interfere with the rights of, or appropriate the property of any persons except upon the payment of the assessed value thereof, to be ascertained as in this act provided. *And provided, further*, That no water shall be diverted if it will interfere with the reasonable requirements of any person or persons using or requiring the same, when so diverted.

Fifth. To furnish water for the purposes mentioned in section four hundred and sixty-eight, at such rates as the by-laws may prescribe; but equal rates shall be conceded to each class of consumers.

Sixth. To enter upon and condemn and appropriate any lands, timber, stone, gravel, or other material that may be necessary for the uses and purposes of said companies.

* * * * * * * *

§ 492. That no incorporation of any company or companies to supply water for the purposes of irrigation and other purposes, shall have any right to divert the usual and natural flow of water of any stream which by the law of 1854 has been declared a public acequia for any use whatever, between the fifteenth day of February and the fifteenth day of October of each year, unless it be with the unanimous consent of all and every person holding agricultural and cultivated lands under such stream or public

poses were to be subserved by the formation of such companies, 1, the supplying of water for irrigation, mining, manufacturing, domestic and other public uses, including cities and towns; and, 2, the colonization and the improvement of lands in connection therewith. The articles of association of the appellee set out the second of the aforesaid objects as being the purpose for which the company was formed. The organization of the company in conformity to the requirements of the statute is not questioned, and the existence of surplus water over and above the needs of prior appropriators of water at the point where it was proposed to divert the waters of the Rio Grande for the proposed canal is a fact found by the trial court and not disputed either in the Supreme Court of the Territory or in the argument made at bar.

The contentions urged upon our notice substantially resolve themselves into two general propositions: First, that the territorial act was invalid, because it assumed to dispose of property of the United States without its consent; and, second, that said statute, in so far at least as it authorized the formation of corporations of the character of the complainant, was inconsistent with the legislation of Congress and therefore void. These propositions naturally admit of consideration together.

The argument in support of the first proposition proceeds upon the hypothesis that the waters affected by the statute are public waters, the property not of the Territory or of private individuals, but of the United States; that by the statute private individuals, or corporations, for their mere pecuniary profit, are permitted to acquire the unappropriated portion of such public waters, in violation of the right of the United States to control and dispose of its own property wheresoever situated. Assuming that the appellants are entitled to urge the objection referred to, we think, in view of the legislation of Congress on the subject of the appropriation of water on the public domain,

acequia, and to be irrigated by the water furnished by said stream or public acequia, and that no incorporation of any company or companies shall interfere with the water rights of any individual or company, acquired prior to the passage of this act.

particularly referred to in the opinion of this court in *United States* v. *Rio Grande Irrigation Co.*, 174 U. S. 690, 704–706, the objection is devoid of merit. As stated in the opinion just referred to, by the act of July 26, 1866, c. 262, sec. 9, 14 Stat. 253; Rev. Stat. sec. 2339, Congress recognized, as respects the public domain, "so far as the United States are concerned, the validity of the local customs, law and decisions of courts in respect to the appropriation of water." By the act of March 3, 1877, c. 107, 19 Stat. 377, the right to appropriate such an amount of water as might be necessarily used for the purpose of irrigation and reclamation of desert land, part of the public domain, was granted, and it was further provided that "all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights."

That the purpose of Congress was to recognize as well the legislation of a Territory as of a State with respect to the regulation of the use of public waters is evidenced by the act of March 3, 1891, c. 561, 26 Stat. 1095. By the eighteenth section of the act of 1891 it was provided as follows:

"SEC. 18. That the right of way through the public lands and reservations of the United States is hereby granted to any canal or ditch company formed for the purpose of irrigation and duly organized under the laws of any State or Territory, which shall have filed, or may hereafter file, with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals, and fifty feet on each side of the marginal limits thereof; also the right to take from the public lands adjacent to the line of the canal or ditch, material, earth, and stone necessary for the construction of such canal or ditch: *Provided*, That no such right of way shall be so located as to interfere with the proper occupation by the government of any

such reservation, and all maps of location shall be subject to the approval of the department of the government having jurisdiction of such reservation, and the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories."

It may be observed that the purport of the previous acts is reflexively illustrated by the act of June 17, 1902, 32 Stat. 388. That act appropriated the receipts from the sale and disposal of the public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands. The eighth section of the act is as follows:

"SEC. 8. That nothing in this act shall be construed as affecting or intending to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided*, That the right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right."

It would necessarily seem to follow from the legislation referred to that the statute which we have been considering is not inconsistent with the legislation of Congress on the subject of the disposal of waters flowing over the public domain of the United States. Of course, as held in the *Rio Grande* case, (p. 703), even a State, as respects streams within its borders, in the absence of specific authority from Congress, "cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the government property," and the power of a State over navigable streams and their tributaries is further limited by the

superior power of the general government to secure the uninterrupted navigability of all navigable streams within the limits of the United States. Necessarily, these limitations are equally applicable in restraint of the legislative branch of a territorial government, controlled, as is such body, by Congress. If we assume that a restriction on the power of a Territory similar to that first stated prevails in favor of private owners of lands along a running stream, the act in question clearly is not violative of such rights, for the same does not attempt to authorize an infringement of them. The water which it is provided may be appropriated is "surplus" water, of any stream, lake or spring, and it is specifically provided in subdivision 4 of section 17 of the act "That no water shall be diverted, if it will interfere with the reasonable requirements of any person or persons using or requiring the same, when so diverted." So, also, in section 25, it is declared "that no incorporation of any company or companies shall interfere with the water rights of any individual or company, acquired prior to the passage of this act." The finding of the court below that "surplus" water existed negates the idea that any legitimate appropriation of water which can be made by the appellee can in anywise violate the rights of others.

We perceive no merit in the contention that the proviso in the desert land act of March 3, 1877, declaring that surplus water on the public domain shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes, subject to existing rights, is an expression of the will of Congress that all public waters within its control or the control of a legislative body of its creation, must be *directly* appropriated by the owners of land upon which a beneficial use of water is to be made, and that in consequence a territorial legislature cannot lawfully empower a corporation, such as the appellee, to become an intermediary for furnishing water to irrigate the lands of third parties. As all owners of land within the service capacity of appellee's canal will possess the right to use the water which may be diverted into such canal, the use is clearly public, *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112, 163, and appellee is therefore a public

agency, whose right to divert water and whose continued existence is dependent upon the application by it within a reasonable time of such diverted water to a beneficial use. Irrigation corporations generally are recognized in the legislation of Congress, and the rights conferred are not limited to such corporations as are mere combinations of owners of irrigable land.

It is conceded on behalf of appellant that, by the laws of Mexico in force when the Territory of New Mexico was ceded to the United States, the use of the waters of both navigable and unnavigable streams was not limited to riparian lands, but extended as well to lands which did not lie upon the banks of the rivers, and that such use was subject to be regulated and controlled by the public authorities. It is however contended that the effect of the statute under consideration is to free the waters from public control and to transfer them to private control, a position which is manifestly unsound, in view of the public nature of such corporations and their liability to regulation by the legislative authority which has in effect created them. The concession above referred to and the implication arising from the statement in the answer and cross bill to the purport that the title of the defendants to their lands was derived, mediately or immediately, from those who held title thereto at the time of the acquisition of New Mexico by the United States, coupled with the finding by the trial court that, after making all due allowances for valid appropriations of water within the portion of the Rio Grande directly affected by the canal of the appellee, there yet existed a surplus of unappropriated water, warranted the trial court in treating as immaterial the claim asserted in the tenth paragraph of the answer of the defendants to the effect that, by the treaty of cession of New Mexico to the United States, the defendants and their associates acquired the right of user of all the waters of the Rio Grande adjacent to their lands. Neither do we think that the trial court was called upon, at the instance of the defendants, entire strangers in every aspect to other appropriators, to inquire into and pass upon the question whether appropriators of water below the mouth of the proposed canal of appellee would be injured by the construction of the canal. The rights of such per-

sons will not, of course, be injuriously affected by the decree in this cause, and *non constat* but that they may yet intervene for their own protection, if they deem that the construction of the canal will be an invasion of their rights, or that they may be willing to forego objection to the construction of the canal.

On the whole, we are of the opinion that the decree of the Supreme Court of the Territory of New Mexico was correct, and it is therefore

Affirmed.

MR. JUSTICE MCKENNA dissents.

RANKIN *v.* CHASE NATIONAL BANK.

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

No. 105. Argued December 3, 4, 1902.—Decided February 23, 1903.

The cashier of a bank in Elmira owing individually to the New York correspondent bank $15,012.50 tendered $8000 in currency and a draft for $7000 made to himself by himself as cashier on a Philadelphia bank with which the Elmira bank had funds. The New York bank declined to accept the draft on Philadelphia on account of risk and delay in collection and demanded funds current in New York. Thereupon the cashier drew his own check on the Elmira bank for the entire amount and certified it himself as cashier making it payable at the New York bank with which the Elmira bank had sufficient balance to pay the same without the $7000 draft. The New York bank accepted this check in payment of the debt and charged it to the Elmira bank's account. At the same time it credited that bank with the $8000 currency and took from the cashier the $7000 draft which was then made payable to himself as cashier, and after the proceeds had been collected credited the Elmira bank with them also. It subsequently developed that the cashier had no balance to his individual account in the Elmira bank and that he had stolen from it the $8000 of currency. In the court below it was found as fact that there was no evidence of bad faith on the part of the New York bank in the transaction and it was also found that there was no evidence to justify any departure from the rule that a person accepting the check of a cashier certified by himself and in payment of an individual debt does so at his peril and

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without recourse against the bank in case the cashier does not actually have the funds on deposit wherewith to meet the check.

In regard to the contention of the New York bank that it was entitled either to charge the $15,012.50 check against the Elmira bank or to retain both the $8000 in currency and the proceeds of the $7000 draft, in payment of the debt, it was *held*:—

(1) That as no exception was saved as to the rulings of the court below in regard to the illegality of the $15,012.50 check that question is not open to controversy in this court.

(2) As to the $8000 currency that the New York bank was entitled to retain the same as one who has in good faith and in payment of an existing debt received currency, cannot be compelled to repay the same even though it subsequently develops that it had been embezzled, and the burden of showing fraud is on the person claiming the repayment.

(3) As to the $7000 draft that the New York bank could not retain the proceeds thereof as it was simply an order transferring funds belonging to the Elmira bank from the Philadelphia bank to the New York bank and could not be used in payment of an individual debt due from the cashier which had, prior to the collection of such proceeds, actually been paid by the charging up of the $15,012.50 check.

On the 23d day of May, 1893, the Elmira National Bank of Elmira, New York, failed, and a receiver was shortly thereafter appointed. At the date of the failure, on the face of the ledger of the Chase National Bank of New York city, there was a balance to the credit of the Elmira bank which was paid with interest at six per cent, as previously agreed on. The receiver, at the time of this payment, asserted that he was entitled to a larger sum. This being disputed by the Chase bank, the present suit was brought. In substance the cause of action was based upon the averment that the Chase bank had wrongfully charged the account of the Elmira bank with a check for $15,012.50. The answer, whilst admitting the charging of the check, asserted its validity. In addition it was averred that, even although the check had not been legally charged, the Elmira bank was not entitled to recover, because at the time the check was debited to its account, and as a result of such charge two credit items, one of $8000 and the other of $7000, had been put to the account of the Elmira bank, to which it otherwise would not have been entitled, and

hence the check had been counterbalanced by the credits in question. There was verdict and judgment in favor of the Chase bank, and the case was taken by the Elmira bank to the Circuit Court of Appeals. That court decided that the trial court had correctly instructed the jury that the check for $15,012.50 was void, and therefore had been illegally debited to the Elmira bank. The court, moreover, held that the court below was right in instructing that the two credit items, referred to in the answer, could be retained by the Chase bank if the sum thereof belonged to that bank, which had given credit to Elmira for the amount, solely as a counter entry to the charge of the check for $15,012.50. The judgment was, however, reversed, and a new trial ordered, because it was concluded there was no proof from which the jury could have inferred that the Chase bank had a right to retain the $7000 item. 104 Fed. Rep. 214. On the new trial the case made was as follows:

J. J. Bush, who was the cashier of the Elmira bank, borrowed for his individual account from the Chase bank a sum of money, and his debt, evidenced by his demand note, secured by stock of the Elmira bank as collateral, amounted, on the 4th of May, 1893, in principal and interest, to a sum slightly exceeding fifteen thousand dollars. On that day Porter, the vice president of the Chase bank, through the long distance telephone, called Bush at Elmira, and requested that he either pay his debt or furnish additional security. Bush replied that he would come to New York city on the next morning and settle the matter. On the morning of the 5th of May he appeared at the office of the Chase bank and offered to Porter, the vice president, $8000 in cash and a draft for $7000, signed by Bush as cashier of the Elmira bank, drawn on the Quaker City National Bank of Philadelphia. The vice president stated to Bush that the draft on Philadelphia was not equivalent to cash, because of the disturbed financial condition prevailing in Philadelphia, and hence declined to receive the draft in payment of the note. It was thereupon agreed that Bush would give his individual check on the Elmira bank for the principal and interest of his debt; that this check should be by him certified and made payable at the

Chase bank; that the cash offered should be received, and that the check and cash should be at once put, respectively, to the debit and credit of the account of the Elmira bank. It was also understood that the draft on Philadelphia should be taken, and when collected its proceeds should be credited to the Elmira account. Thereupon a check was drawn by Bush individually on the Elmira bank. Across the face of this check the following was written:

"Certified and accepted May 5, 1893. Payable at Chase National Bank, New York.

"ELMIRA NATIONAL BANK,
"By J. J. Bush, *Cashier.*"

There was conflict in the testimony as to whether the $7000 draft on Philadelphia, signed by Bush as cashier, was when first offered by him, payable to his individual order or to his order as cashier. The officer of the Chase bank testified that when the draft was first offered it was payable to Bush's individual order, and that it was subsequently changed so as to make it payable to the order of Bush as cashier, to carry out the settlement agreed upon. There was no conflict, however, in the proof, showing that the draft on Philadelphia, as actually handed to the Chase bank, was drawn by Bush as cashier of the Elmira bank to his own order as such cashier, and was endorsed by him as cashier for deposit in the Chase bank. The $8000 in cash, having been received from Bush, was at once credited to the account of the Elmira bank, and also at once the account of that bank was debited with Bush's individual and certified check for the $15,012.50. As the account of the Elmira bank had to its credit a sum more than sufficient to pay the check, it resulted, upon the assumption of the legality and good faith of the Chase bank in charging the check, that it at once received the full amount of the debt due it by Bush. The draft on Philadelphia was forwarded for collection and was thereafter paid, and the proceeds put to the credit of the account of the Elmira bank. It was shown that on the 5th of May, when Bush drew and certified his individual check on the Elmira bank for $15,012.50, his deposit account with that bank

was overdrawn. It was shown that at various times, covering a considerable period, Bush had drawn as cashier of the Elmira bank a number of checks for a small amount, each to his individual order, and had used such checks to pay his personal debts, and there was also proof tending to show that the officers and directors of the Elmira bank knew, or had reason to know, that such checks had been drawn by the cashier. Other checks were also offered, from which it was contended the inference of implied authority could be legitimately drawn. It was shown that the Elmira bank had no knowledge of the drawing of the check of $15,012.50, and the fact that such check had been charged by the Chase bank to its account was only learned after the failure of the Elmira bank, when the Chase bank rendered its account to the receiver. It was also shown that Bush, the cashier, had, on the evening of the 4th or the morning of the 5th of May taken the $8000 of cash which he paid to the Chase bank from the funds of the Elmira bank.

The court instructed the jury that the check for $15,012.50 was void as to the Elmira bank, "because it was the certification of the cashier's individual check, given and received for his individual benefit, with no authority either to certify or to make it payable elsewhere than at the office of the Elmira National Bank. . . . There is no evidence tending to show that Bush had any real or apparent authority for this certification or to make the check payable at the office of the defendant. . . . The certification by a cashier of his own individual check is void, irrespective of the question whether he had funds in the bank to meet it, for he could not act in regard to the same check in two capacities, both as drawer and as endorser, to bind the bank for its payment."

To this instruction of the court no exception was reserved by the defendant. Having thus eliminated the check of $15,012.50 from the account, the court said:

"The importance of this case turns upon another set of facts, to which I will now call your attention. You will see that Bush, as cashier, certified his own individual check for $15,012.50, and that he left the currency, $8000, and the Quaker City draft for $7000. Consequently, whatever is to be found about the

liability of the defendant to repay $15,000, there is no question that it is liable to repay $12.50 and interest from May 5, 1893, and your verdict will be for the plaintiff for that sum at least."

To this charge also no exception was reserved by the defendant. The court then proceeded:

"The questions in the case beyond the $12.50 are in regard to the right of the Chase National Bank to retain the $8000 in currency and the $7000 draft. You will see that, with the exception of this $12.50, I put the case as though when Bush came in with his bag containing $8000 in currency and $7000 in a draft, those two, the currency and the draft, had been received by Porter and credited upon the note, and this form, this illegal, improper form of taking Bush's individual check and having it certified by himself as cashier, had not been gone into. The questions in the case beyond the $12.50 are in regard to the right of the Chase National Bank to retain the $8000 in currency and the $7000 draft. Now, this money, this currency, was without question taken by Bush from the vaults of the Elmira bank without authority, and was its property, but inasmuch as it was currency or money, bank bills, if it was received by the defendant in good faith, in due course of business and for the payment of a valid debt, the defendant is not subjected to the risk of repayment to the person from whom it was illegally obtained."

Coming to consider the draft for $7000, the court first called the attention of the jury to the fact that there was some dispute in the testimony as to whether this draft, when originally offered by Bush to the Chase bank in part payment of his debt, was drawn to his individual order or to his order as cashier, but expressed an opinion that it was satisfactorily established by the testimony adduced by the Chase bank that the draft, when first offered to that bank, was drawn to Bush's individual order, and that the adding of the word cashier after the name of Bush, so as to make it payable to him as cashier, was subsequently done, and that such also was the case as to the endorsement on the draft making it payable for deposit in the Chase National Bank to the credit of Bush, cashier, that is, of the Elmira bank. The court, however, instructed the jury that in

any event the addition of the word cashier upon the face of the draft and the endorsement put upon it was of no importance except as a mere element of proof on the subject of the good faith of the Chase bank in having received the money and draft from Bush. Thus treating the fact that the draft was signed by Bush as cashier, and was payable to his order as cashier for deposit in the Chase bank to the credit of the Elmira bank, as irrelevant, except on the question of good faith, the court came to consider whether the Chase bank was entitled to retain the proceeds of the draft. The jury were instructed that "in the absence of any authority in the cashier to draw cashier's drafts to his own order in payment of his individual debts, the person who receives such a draft in payment of a cashier's individual debt takes the risk of being obliged to pay the draft to the bank. . . . The general authority of the cashier to draw drafts or checks on the bank in the conduct of its business does not, by itself, permit him to draw such drafts or checks in payment of his personal debts or to raise money for the transaction of his personal business. When, therefore, he draws a draft or a check on the bank payable to his own order, and for his own individual debt, the party acting thereon takes the risk that he may act without authority to do so."

The jury, however, were instructed that either express or implied authority might have been conferred to draw such drafts, but that, as there was no proof tending to show express authority, it could only be found by implication. The source from which such implication might be derived from the proof before it was stated to the jury as follows:

"The authority of a cashier may be inferred from the general manner in which, for a period sufficiently long to establish a settled course of business, he has been allowed, without interference, to conduct the affairs of the bank. It may be implied from the conduct or acquiescence of a corporation as represented by its board of directors. When during a series of years and in numerous business transactions he has been permitted without objection, and in his official capacity, to pursue a particular course of conduct, it may be presumed, as between his bank and those who in good faith deal with it upon the basis

of his authority to represent the corporation, that he has acted in conformity with instructions received from those who have the right to control its operation. His authority is to be implied from the acquiescence of the directors in permitting an officer, during a series of years, to pursue a particular course of conduct, and this acquiescence is derived from their actual knowledge, or from what should have been their knowledge of the conduct, of the course of business of the officers."

Commenting at length upon the testimony showing the drawing of checks by Bush as cashier to his individual order, and pointing out the fact that the proof on the subject was different and stronger than had been the proof in the case when previously tried, the question of fact as to the existence of the course of business authorizing the inference of authority in Bush, was submitted to the jury. Exceptions were reserved by the receiver to the foregoing rulings, as well as to the refusal of the court to give instructions which were asked, embodying asserted principles of law which were directly antagonistic to those charged by the court to the jury. There was verdict and judgment against the Chase bank for $12.50 with interest, and the case was taken again to the Circuit Court of Appeals. That court, considering that all the legal controversies in the case had been settled by its previous opinion, and that the additional evidence on the subject of course of business was sufficient to support the verdict as to the proceeds of the draft for $7000, affirmed the judgment, for the reasons just mentioned, which were stated in a *per curiam* opinion.

Mr. Edward B. Whitney for plaintiff in error.

Mr. Thomas Thacher for defendant in error. *Mr. Alfred B. Thacher* was on the brief.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the court.

1st. The illegality of the check for $15,012.50 and the wrong resulting from charging it to the account of the Elmira bank is not open to controversy. The ruling to that effect on the first

trial seems to have been acquiesced in by the Chase bank, since it prosecuted no writ of error, and this is also true of the case now before us. Besides, no exception was saved by the Chase bank at the trial now under review to the instruction of the court concerning the illegality of the check and its insufficiency as a charge against the funds of the Elmira bank on deposit with the Chase bank. That question may be therefore put out of view.

2d. The errors assigned by the receiver of the Elmira bank concerning the right of the Chase bank to retain the $8000 paid it in cash are also in substance not open to inquiry because of the verdict of the jury. Whether the $8000 in currency was actually received by the Chase bank from Bush in good faith in part payment of his note was left by the court to the jury under adequate instructions, and these issues of fact are therefore foreclosed by the verdict in favor of the Chase bank. It follows that the $8000 when deposited was the money of the Chase bank, received by it in part payment of a debt. This leaves open only the question whether one, who has in good faith received currency in payment of an existing debt, can be compelled to repay such currency because it subsequently develops that the currency paid had been embezzled by the one who made the payment. That under such conditions repayment cannot be exacted is elementary and is not disputed. It is equally clear, we think, that the court correctly charged the jury that the burden of showing fraud on the part of the Chase bank was on the receiver.

3d. Conceding, without so deciding, the correctness of the ruling of the court below as to the right to imply authority on the part of the cashier to draw a draft in his official capacity in his individual favor from the course of previous business, we fail to perceive its relevancy to the case before us. The draft for $7000, which was collected by the Chase bank, was not drawn by the cashier to his individual order, but was drawn by him as cashier to his order as cashier, and was endorsed for deposit to his credit as cashier. It was therefore but an order transferring the funds of the Elmira bank, which were on deposit in the Philadelphia bank, to the deposit account of the El-

mira bank with the Chase bank. True it is that Bush, from one view of the testimony, first tendered a draft signed by himself as cashier to his individual order; but such draft was not taken by the Chase bank. It may be, if the principles of authority implied from a course of business as announced by the lower court, be sound, and if the facts brought this case within such a rule, if the Chase bank had taken the cashier's draft to his individual order, it could have retained the money. We are not however called upon to pass upon the rights of the parties upon the basis of what might have been done, but alone upon what was done. We may not indulge in conjecture, but must dispose of the case as depending upon the real, not the imaginary transaction. Measuring the rights of the parties by this rule, we see no escape from the conclusion that the money collected by the Chase bank for account of the Elmira bank was obviously the property of the latter. The draft on Philadelphia was refused because of the delay which it was feared would attend its collection. The certified check was taken. It was for the entire debt, principal and interest. It was at once charged. The sum to the credit of the account of the Elmira bank when the check was charged was more than sufficient to pay it. Upon the theory of the good faith of the transaction, on the part of the Chase bank, its debt was paid, and it could have no possible interest in the proceeds of the collection of the draft. Of course, on the theory that the Chase bank was suspicious of the legality of the certified check and of its right to debit the Elmira bank with it, the purpose to retain a right in the proceeds of the draft would be in reason conceivable. But to indulge in this hypothesis would be to assume the existence of bad faith, and hence to defeat the right to the proceeds of the draft and of the money as well.

It follows that there was error committed in the instructions as to the right of the Chase bank to retain the $7000 collected by it from the proceeds of the draft in favor of the Elmira bank, and

The judgment of the Circuit Court of Appeals is therefore reversed and the case remanded to the Circuit Court with directions to set aside the verdict and grant a new trial.

COMMERCIAL PUBLISHING COMPANY *v.* BECKWITH.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 132. Argued December 19, 1902.—Decided February 23, 1903.

1. Where a right to recover as the result of a judicial sale made under decrees, both of the courts of the United States and of a State other than that in which the action is brought, is unquestionably set up in the complaint, Federal questions exist in the record and a motion to dismiss must be denied.
2. Questions involved in the construction of a contract for the advancement of money and its repayment and the effect of the lien which the lender has on the accounts pledged as security for such repayment, are not Federal in their nature, and this court must assume that the construction given by the highest court of the State in which the action was brought is correct.
3. Where the highest court of a State has construed decrees made by a United States court and a state court of another State authorizing the sale of certain accounts by a receiver as merely authorizing a sale of the receiver's right, title and interest in such accounts, and that such right, title and interest was subject to the lien of one who had advanced money on the faith of a contract authorizing him to collect such accounts and repay himself thereout, such construction is not an unreasonable one, and the burden rests upon the plaintiff in error to show that such construction is in violation of the due faith and credit clause of the Federal Constitution. And the judgment will be affirmed unless the record shows with certainty that such construction did deny due faith and credit to the decrees in question.

A TENNESSEE corporation, styled the Commercial Publishing Company, brought this action in a court of the State of New York to recover from Samuel C. Beckwith a sum of money which, it was averred, belonged to the publishing company. It was alleged in the complaint that the right was derived from one Crawford, who, it was averred, became the owner of certain newspaper advertising accounts, on which payments had been made to Beckwith, the aggregate thereof constituting the amount sued for. The manner in which Crawford was asserted to have acquired the ownership of the accounts will appear in the following statement summarized from the pleadings:

Statement of the Case.

On September 30, 1893, an action was begun in the Chancery Court of Shelby County, Tennessee, to foreclose a deed of trust which had been made by the Memphis Appeal Company, publishers of a newspaper known as the Memphis Appeal-Avalanche. Samuel C. Beckwith was made a party defendant to the cause. Cotemporaneously with the filing of the bill, a receiver of the assets of the newspaper company was appointed, and he continued the publication of the paper. Although the complaint in the action at bar did not set out the nature of the controversy in the Tennessee suit between the trustees, who were plaintiffs in the action, and Beckwith, it was alleged that a short time after the bill was filed Beckwith procured the removal to a Circuit Court of the United States of a separate controversy existing between himself and the trustees, in which court it was averred such controversy thereafter continued. Subsequently, it was alleged, other actions were filed in the Tennessee court against the Memphis Appeal Company, which actions were ultimately consolidated with the trustee cause. It was charged that in the month of April, 1894, like decrees were simultaneously entered in the consolidated actions in the state court and in the one which had been removed to the United States court, and that, under such decrees, a sale was had on June 16, 1894, of the property vested in the receiver, including the accounts due said receiver, representing moneys earned by the receiver in the operation of the newspaper, of which the accounts upon which Beckwith had collected the money sued for formed a part. At this sale, it was alleged, Crawford became the purchaser of all the property embraced in the order of sale, and he thereafter assigned his purchase to the plaintiff.

In an amended answer Beckwith admitted having collected and retained the moneys sued for, and specially denied the other allegations of the complaint. He also set up as a defence that he had collected the moneys in question rightfully, under the authority of an agreement with the Memphis Appeal Company made prior to the execution of the deed of trust heretofore referred to. He further alleged that the receiver never acquired title to the moneys, and had never offered for sale or

sold any right or title thereto. Subsequently, by supplemental answer, it was alleged that after the execution of the decrees of sale, and on appeal from a final decree which had been entered in the consolidated cause, the Supreme Court of the State of Tennessee adjudicated that the trust deed and all proceedings based thereon were null and void, and that, by reason thereof, the sale in question was a nullity.

The action at bar was tried by a jury, upon an agreed statement of facts. By direction of the court there was a verdict in favor of the plaintiff for the full amount claimed. This judgment was affirmed by the appellate division of the Supreme Court of the State of New York. An appeal was then taken to the Court of Appeals of the State, which reversed the judgment, and ordered the complaint to be dismissed with costs. 167 N. Y. 329. The judgment of the Court of Appeals having been made that of the trial court, a writ of error from this court was prosecuted.

Mr. A. Walker Otis for plaintiff in error.

Mr. Anthony B. Porter for defendant in error.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the court.

As in the complaint the plaintiff in error unquestionably set up a right to recover as the result of a judicial sale made under decrees, both of courts of the United States and of a State, Federal questions exist in the record, and the motion which has been made to dismiss is therefore denied.

Coming to the merits, the questions for decision are whether due effect was given by the Court of Appeals of New York to the decrees in question. *Jacobs* v. *Marks*, 182 U. S. 583, 587.

Two questions were considered by the state court in its opinion, viz.: 1, the meaning and effect of the contract entered into between Beckwith and the Memphis Appeal Company; and, 2, whether the rights of Beckwith under the contract had been conclusively adjudicated by the prior litigation in Tennessee.

The agreement referred to was evidenced by two letters and endorsements thereon, and a copy thereof is contained in the margin.[1]

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[1] Memphis, Tenn., Jan. 3, 1891.

S. C. BECKWITH,

48 Tribune Building, New York City.

DEAR SIR: In consideration of special efforts which you pledge yourself to make in our behalf to the best of your efforts and ability, and furthermore, in consideration of allowing you nothing in the shape of salary, office rents or traveling expenses, we hereby authorize and appoint you our sole and exclusive agent for a term of five years from September 1, 1891, and sooner if possible, on a plain commission basis of twenty-five per cent on all business for all that portion of the United States, north of a line running east and west with the southerly boundary of Ohio, Missouri, embracing Cincinnati and St. Louis, including these two points.

All applications for rates, space, etc., from aforesaid territory to be referred to you, and in case we should make a deal direct with any parties, agent or advertisers, from your territory (which, however, is not contemplated,) we will allow you the commission named upon same, and refer it to you for collection.

You are to collect all bills and render monthly statements, and to be held responsible for all accounts, except where a concern should fail through no fault of yours, and, in event of that, you are simply to lose your commission, but not to be liable beyond that.

You are not to represent any other morning paper in the State of Tennessee or Arkansas without our consent in writing, but to do all you can in every way, and at all times, within the above territory, to advance the interests of the Appeal-Avalanche.

MEMPHIS APPEAL-AVALANCHE COMPANY.
T. B. HATCHETT, *Bus. Manager.*

Accepted. S. C. BECKWITH.

Memphis, Tenn., Jan. 3, 1891.

THE MEMPHIS APPEAL COMPANY,

Memphis, Tenn.

GENTLEMEN: In consideration of a contract this day entered into by and between us, I hereby agree to advance to you thirty thousand dollars ($30,000.00,) as follows:

$5000 in cash on or before January 7th, $5000 on or before the 12th of January, 1891, then $5000 on the 26th of January, 1891, to take up your note now in the Nassau Bank of N. Y. for that amount. And $15,000 from time to time as you may advise me and so desire.

The amount named of $30,000.00 to be loaned you on the Appeal Company's notes, endorsed by W. A. Collier, and I am to be further secured by a deposit as collateral of an equal amount of the capital stock of your

Opinion of the Court.

In disposing of the first question the court held that "The clause of the agreement giving to Beckwith the right to collect all of the bills was evidently intended to give him the control of the proceeds resulting from the advertisements, so that he could apply the same upon his loan to the amount of $1000 per month," and that the clause referred to "was in the nature of an equitable pledge of the receipts for that purpose." It was further held that the receiver of the newspaper took possession of the assets and business thereof subject to the liens and obligations of the corporation, (in other words, took only the interest which the corporation had in the property which it assumed to possess and own,) and as the receiver "accepted and published the advertisements procured by the defendant (Beckwith), he (the receiver) must be deemed to have done so under the contract which the defendant (Beckwith) had with the corporation, and under that contract the defendant had the right to collect the moneys accruing for such advertisements, and to retain out of such collections a sum not to exceed $1000 per month, to be applied upon the loan." It is manifest that the question of the proper construction of this contract being non-Federal in its nature, is not subject to review, and we consequently assume that the construction was correct.

The second question was treated as involving only the issue of *res judicata*. Considering the final decree entered in the consolidated action, and the decree as subsequently entered by the trial court upon the mandate of the Supreme Court of Tennessee, it was decided that the Tennessee court "did not adjudicate nor attempt to determine the right of Beckwith to

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company, and which stock shall not be increased without my consent during the term of this loan; neither shall any encumbrance be placed upon same.

Said loan and interest at six per cent to be paid me in monthly installments by monies coming into my hands from the advertising in your paper, in amounts, say $1000 per month, until paid.

S. C. BECKWITH.

O. K.: MEMPHIS APPEAL COMPANY.
T. B. HATCHETT, *Business Manager.*

(Endorsed): As the debt is reduced I will surrender stock collateral *pro rata*.—S. C. BECKWITH.

the moneys received by him for advertisements inserted in the paper by the receiver after his appointment." The court then said—evidently assuming that the last decree embodied the direction for sale—"Under the judgment the purchaser became entitled to all the moneys due and owing to the receiver by reason of the publication of the paper, but moneys that did not belong to the receiver, or to which he was not entitled, did not pass to the purchaser, and we find nothing in the prior decree that is an adjudication upon this question." In effect, therefore, the Court of Appeals of New York construed the decrees of sale and held that the direction to sell merely authorized a sale of the right, title and interest of the receiver in the accounts in question and left for future determination, in any controversy which might arise in respect thereto, the question of the extent of the interest, if any, of the receiver in such accounts.

The sole contentions which are open for our consideration are, did this judgment fail to give full faith and credit to the judicial proceedings in the Tennessee courts as required by section 1 of article IV of the Constitution, and did it deny due efficacy to a title or right claimed under an authority exercised under the United States. It is strenuously argued that, properly interpreted, the decrees directed a sale of the accounts as they stood on the books of the receiver, and that the effect of the decrees and the sale made thereunder was that any right to or lien possessed by Beckwith in the moneys due upon the accounts was transferred to the proceeds of sale of all the property of the Memphis Appeal.

In considering this question it is to be observed that the records of the proceedings in the actions in which the decrees relied upon were rendered were not offered at the trial below, but that the case was disposed of solely upon an agreed statement of facts, to which certain of the decrees made in those actions were annexed as exhibits. To this agreed statement therefore, and to it alone, we are to look, for the purpose of determining the question presented for decision. A summary of the statement will be found in the margin.[1]

[1] On January 3, 1891, the Memphis Appeal Company, then engaged in pub-

It is to be borne in mind that upon the plaintiff in error rested the burden of establishing that the decrees of sale were not given the due effect to which they were entitled, and if it has

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lishing a newspaper at Memphis, entered into the contract with Beckwith which has heretofore been set out. Beckwith made the advances stipulated and $20,000 thereof was owing to him at the time the action at bar was instituted. While the Memphis Appeal Company was a going concern Beckwith, under the contract aforesaid, procured advertising orders, the indebtedness upon which collected by him was the basis of the recovery sought in this action. After the making of the contract and prior to September 30, 1893, the Memphis Appeal Company executed a deed of trust upon its property to secure certain creditors. On the date named Andrew D. Gwynne and others, the trustees under the deed of trust, brought suit to enforce that instrument. Beckwith was made a party defendant, and a receiver was appointed, who took possession of the property of the Memphis Appeal Company and continued the publication of its newspaper from September 30, 1893, to June 16, 1894. On October 5, 1893, Beckwith procured the removal of the controversy between himself and the trustees into a court of the United States, and that controversy there continued, though it does not appear how it was terminated, if it ever was.

Beckwith served written notice on the receiver that he claimed that his rights under the contract were not affected by the appointment of the receiver, and the receiver replied disputing the right of Beckwith to collect moneys for advertising matter which might be published by the receiver.

After the institution of the trustee suit sundry actions were filed in the same court by general creditors and others against the Memphis Appeal Company, which were afterwards consolidated with the trustee suit. In April, 1894, in the consolidated action, and in the action pending in the United States court, a decree of sale was entered, "on the motion of the several complainants," directing a sale of the property in the hands of the receiver, because of the asserted fact that the property was deteriorating and was not self-supporting. The property which was ordered to be sold, after due advertisement, was thus described in the order:

"The Memphis Appeal-Avalanche newspaper, with all the rights, privileges, benefits, franchises, etc., belonging to or in any way pertaining to same, together with its good will, subscription list, advertising patronage, income and profits, and all the machinery, appliances, furniture, material, property, assets, etc., of every kind and description, and the general outfit of the newspaper now in the hands of the receiver in these causes.

"He will sell all and every kind and description of property in his hands, saving and except the uncollected book accounts of the Memphis Appeal Company, accruing prior to his appointment as receiver, and which were placed in his hands for collection. Such of these accounts as remain uncollected will not be sold.

failed to sustain such burden this court cannot say that error was committed by the judgment below rendered.

The decrees of sale were made in the consolidated action in

"All accounts which may be or are to become due to the receiver by reason of the operation of the newspaper in his hands will pass to and be acquired by the purchaser at this sale, who will become the full owner of the same. And such purchaser will take the property decreed to be sold herein, subject to all of the contract obligations incurred by the receiver, and will assume the payment of same, including any amount due the receiver on the day of sale for overchecks made by him for personal advances on account of the property in his hands. Excepting only the certificates issued by the receiver for the payment of which the purchaser shall in no way be liable."

After directing that the receiver report his proceedings under the decree to the court, it was further recited as follows:

"The purchaser at the sale herein ordered will acquire the absolute title to all the property decreed to be sold, free from all claims, liens, and encumbrances whatever, save as provided above as to the contract obligations of the receiver; and the proceeds of sale will stand in these causes in lieu and place of the property itself."

Subsequently the decree of sale was modified by directing a sale to be made by the clerks of the respective courts, as commissioners. Respecting the sale and the confirmation thereof, it is recited in the agreed statement as follows (italics not in original):

"13. Thereafter and on the 16th day of June, 1894, said commissioners, acting under the decrees aforesaid, sold at public auction in the city of Memphis, the property aforesaid, *and also all the right, title and interest of said receiver to the various sums set forth in Exhibit B annexed to the complaint herein, and in and to the claims of said receiver against the parties therein mentioned for said advertisements published by said receiver for their account in said Memphis Appeal-Avalanche between September* 30, 1893, *and June* 16, 1894, *as aforesaid*, when and where same was struck off to one West J. Crawford, he paying therefor to said J. B. Clough and E. B. McHenry as such commissioners the sum of $65,200, and he being the highest, best and last bidder therefor. That whatever title the receiver had to said sums set forth in Exhibit B was derived from said trust deed and his appointment as such receiver. On the 3d day of July, 1894, decrees were simultaneously entered in said actions thus pending in said Chancery Court of Shelby County, and said Circuit Court of the United States, confirming the sale."

On March 26, 1896, a final decree was entered in the consolidated action determining the rights of a large number of persons, one such being Beckwith, whose claim of a lien on the fund under an execution issued in an action brought by a named party other than Beckwith, in which action judgment had been obtained against the Memphis Appeal Company was

the state court and in the action pending in the United States court, and preceded, by nearly two years, the making of the final decree, which however was entered only in the consolidated cause, and not in the action pending in the United States court. It is disclosed by the record that in two of the actions which were consolidated—that filed by the trustee and one on behalf of certain employés of the Memphis Appeal Company—liens were asserted upon all the assets which came into the possession of the receiver, viz., those embraced in the deed of trust which was sought to be foreclosed. The deed of trust was made long after the execution of the contract between Beckwith and the Memphis Appeal Company, and vested rights, if any, of Beckwith were not affected by the execution of the deed or by the appointment of a receiver. The agreed statement is silent as to what was the controversy between the trustees and Beckwith, but Beckwith, in the correspondence with the receiver claimed that his contract right was unaffected by the receivership. Now, in the recital in the decrees of sale of the property to be sold there is first an enumeration of property generally, in language similar to that contained in the deed of trust; there is then an exemption from sale of uncollected book accounts accruing prior to the appointment of the receiver; and next is the following recital: "All accounts which may be or are to become due to the receiver by reason of the operation of the newspaper in his hands will pass to and be acquired by the purchaser at this sale, who will become the full owner of the same." It may be fairly inferred, that Beckwith then was

overruled and he was allowed an appeal. A portion of the defendants thereafter prosecuted an appeal to the Supreme Court of Tennessee, and after the decision of that appeal a decree was entered in the trial court in conformity to the directions of the Appellate Court, on July 8, 1896. The appeal of Beckwith was disposed of by a general affirmance of the decree below, except as particularly specified in the judgment of the Appellate Court.

Crawford, the purchaser at the sale, "duly assigned and transferred to the plaintiff all his claims, demands and right of action against the defendant, which he acquired by virtue of the sale of June 16, 1894, above referred to." As heretofore stated, the collections made by Beckwith sought to be recovered in the action at bar were made on advertising orders procured by Beckwith under the contract and published by the receiver.

and prior thereto had been making direct collections from advertisers under the assumed authority of the contract, and he was undoubtedly asserting the right to retain the moneys which he might collect upon advertisements which had been procured by him. The sum due upon such accounts for advertisements published by the receiver was small as compared with the main assets in the custody of the receiver, yet, in that portion of the decree which made the liens and encumbrances operative against the proceeds of sale, the entire proceeds of sale and not the proceeds of a particular portion of the property sold were made subject to all liens and encumbrances sought to be enforced in the litigation.

As before stated, the record shows that, in two of the actions which had been consolidated, the complainants were asserting liens against *all* the property which had come into the possession of the receiver, and the decree of sale recites that the sale was ordered upon the motion of the complainants. Beckwith nowhere appears to have been an active participant in obtaining such decree or assenting thereto. It does not even appear that, at the time of the entry of the decrees of sale, he was a party to any of the actions which had been consolidated, for it cannot in reason be so inferred from the mere circumstance that nearly two years after, on the entry of the final decree, he is referred to therein as being a cross complainant in one of the actions seeking to enforce a lien, the nature of which was not disclosed.

The stipulations contained in the agreed statement, particularly the recitals in subdivision numbered 13, lend color to the construction that, as respects the accounts in question, all that was intended to be sold was the right, title and interest of the receiver therein, the nature and extent of which title was left unadjudicated. The expression, "the property aforesaid," used in the paragraph, it may well be argued, was intended to refer to something distinct from the accounts in question, and the language may properly be interpreted as relating to the property covered by the trust deed, which came into the possession of the receiver. A reasonable construction of the paragraph can be adopted supporting the claim that, as regards the accounts,

all that was sold was the right, title and interest of the receiver therein. In the light, therefore, of all the circumstances which have been detailed, we cannot sustain the contention of the plaintiff in error that the guaranty clause of the decrees, transferring liens upon the property to the proceeds of sale, was intended to apply to the accounts in question without indulging in conjecture and giving to the plaintiff in error the benefit of the doubts which arise as to the precise meaning of the decrees.

The parties having chosen to try the case on a statement of facts, which does not afford us the means of saying with that certainty which is required, that the judgment below denied due faith and credit to the decrees in question, we cannot, in view of the burden of proof, reverse the judgment below; and it is therefore

Affirmed.

UNITED STATES *v.* BARRINGER.

APPEAL FROM THE COURT OF CLAIMS.

No. 252. Argued January 5, 1903.—Decided February 23, 1903.

The provisions in the sundry civil appropriation act of June 11, 1896, and in the prior acts of Congress referred to in the opinion, in regard to leaves of absence to the employés of the Government Printing Office, and for *pro rata* extra pay to those not receiving leaves of absence, relate only to permanent employés, or employés *regularly* employed on the Congressional Record and do not relate to temporary employés.

This construction of the statutes referred to is in accord with the interpretation placed thereon by the Public Printer and also by Congress in appropriating for the payment of such extra pay allowed in lieu of such leaves of absence.

THE findings of the Court of Claims upon which it predicated the conclusion that the plaintiff was entitled to judgment against the United States are as follows:

"I. The claimant, Arthur B. Barringer, was from time to time employed as a compositor in the Government Printing

Office during the following periods: December 31, 1895, to February 26, 1896, inclusive; July 2, 1897, to July 31, 1897, inclusive; December 10, 1897, to July 16, 1898, inclusive; October 24, 1898, to March 4, 1899, inclusive; October 28, 1899, to April 27, 1900, inclusive, aggregating one (1) year, eight (8) months and twelve (12) days.

"II. During his term of service as such he was paid at the rate of three dollars and twenty cents ($3.20) per diem of eight hours for the time served prior to July 1, 1899, amounting to one (1) year, two (2) months and twelve (12) days, and at the rate of four dollars ($4) a day for such service rendered after July 1, 1899, amounting to six (6) months.

"III. He was not during any of the times of his employment allowed leave of absence or *pro rata* pay for leave of absence. If allowed leave of absence of thirty (30) days a year, he would have been entitled to fifty-one (51) days' leave.

"If instead of taking such leave he had been paid *pro rata* for the same, he would have been paid three dollars and twenty cents ($3.20) a day for thirty-six (36) days and four dollars ($4) a day for fifteen (15) days, amounting to one hundred and seventy-five dollars and twenty cents ($175.20).

"IV. The claimant did not, at any time during his several terms of service, set forth in finding I, apply for a leave of absence or for a money equivalent for the same. No leave of absence was granted or allowed to the claimant, for the reason that under the rules adopted by the Public Printer regarding leaves of absence persons temporarily employed were not granted leave.

"V. All employés of the Government Printing Office in service from the 1st of July, 1886, to the 30th of June, 1895, whether permanent or temporary, have been paid for all accrued but unused leaves of absence. The last of the appropriations for such unused leaves was that of fifty-seven thousand eight hundred and fifty-nine dollars and sixty cents ($57,859.60), made by the act of July 19, 1897, 30 Stat. 134, and was based on an estimate of the Public Printer, who in transmitting the same to the Senate informed that body that it included 'many employés whose terms of service in the office were only for periods of

less than one year,' and that 'the amounts of *pro rata* leave which accrued to such persons are herewith included in the respective years in which they were earned.'" 37 C. Cl. 1.

Mr. Assistant Attorney General Pradt for appellant. *Mr. Assistant Attorney Anderson* was on the brief.

Mr. George A. King for appellee. *Mr. William B. King* was with him on the brief.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the court.

Although the court below found that among the rules for the government of the Printing Office adopted by the Public Printer, in pursuance of power conferred by law, there was a rule forbidding the allowance of leaves of absence to temporary employés, the court in effect treated the rule in question as void, since it assumed that, by the acts of Congress governing the Printing Office, temporary employés of the office were entitled to leave of absence with pay. The court deemed that the duration of such leave of absence was such proportion of the yearly annual leave allowed to permanent employés as the period of service of the temporary employé in each year bore to a year's employment. From the premise of law thus assumed the court held that where a temporary employé had not been allowed his leave of absence because of the enforcement by the Public Printer of the rule denying the right to such leave, the temporary employé was entitled to be paid an extra amount equal to the sum of his regular wages for the period which would have been embraced by the leave had it been granted. In effect, therefore, the conclusion of the court was that because the statutes were held to allow to a temporary employé leave of absence with regular pay, they must be construed as allowing to such person extra pay without leave, and this upon the theory that the employé who had a right to leave with pay, who had not received it under the circumstances stated, was entitled, so to speak, to a commutation in money at his regular rate of wages for the period of leave of which he had been deprived.

The conclusion thus reached was stated by the court to be exceptional and anomalous, but was deemed to be required by what was conceived to be the unambiguous purport of a provision, held to be mandatory, found in the act of June 11, 1896, making appropriations for sundry civil expenses of the government for the fiscal year ending June 30, 1897. 29 Stat. 413. The provision in question was said to be entirely new in the legislation of Congress with respect to leaves of absence to the employés of the Government Printing Office. Whilst the anomalous result of the conclusion, as observed by the court below, is, we think, apparent, it would seem to us that a yet greater anomaly is involved in the premise which was taken for granted, that is, that the statutes contemplate the enjoyment by mere temporary employés of the provisions of law relating to an annual leave of absence. We think this is so, because singular as may be the conclusion that since employés enjoy the right to leave with pay, they are therefore entitled to extra pay without leave, we think it is far more singular to conceive that one who is engaged for a temporary employment, say for a day or a week or a month or so, comes within the purview of the statutes providing for annual leaves of absence.

If, however, the acts of Congress compel the adoption of the premise assumed or the conclusion drawn from it by the court, however anomalous they may be, our duty is to enforce the result. Whether the acts of Congress do either cannot be ascertained by a mere reference to the particular proviso in the appropriation act which constrained the judgment of the court below, but must be determined by an examination of the acts of Congress concerning leaves of absence to employés in the Government Printing Office from the beginning. The review of the statutes for the purpose of determining whether leave with regular pay involves the right to extra pay without leave, will also necessarily require us to examine the same statutes upon which the right, if it exists at all, of temporary employés in the Printing Office to leave of absence must rest. In proposing to first investigate such question we are not unmindful of the fact that the government at bar did not at all dispute the assumption indulged in by the lower court, but rested its

claim to reversal on other grounds. In view of the fact, however, that we must correctly administer the statutes, and that the question as to the right of a temporary employé to leave of absence has been fully presented by the appellees, we shall examine and decide it. The problems, then, for solution in the order stated are, First. Do the acts of Congress which provide for leave of absence to the employés of the Government Printing Office embrace mere temporary employés of such office? and, Second. If such employés are so embraced, do the statutes, whilst providing for leave in favor of the temporary employés with pay during the term of the leave, provide also for extra pay without leave where the leave has not been enjoyed because of a rule of the Printing Office forbidding its allowance?

The original grant of authority to allow leaves of absence, with pay, to employés of the Printing Office was the act of June 30, 1886. 24 Stat. 91. The statute consisted of two sections, in the second of which it was provided that the act should take effect on and after the first day of July, 1886. The first section is as follows:

"That the employés of the Government Printing Office, whether employed by the piece or otherwise, be allowed a leave of absence, with pay, not exceeding fifteen days in any one fiscal year, after the service of one year and under such regulations and at such time as the Public Printer may designate. Such employés as are engaged on piece work shall receive the same rate of pay for the said fifteen days' leave as will be paid to day hands: *Provided*, That those regularly employed on the Congressional Record shall receive leave, with pay, at the close of each session, *pro rata*, for the time of such employment."

We think the employés embraced within this statute were permanent employés and not those who might be called in for temporary or emergency purposes, since the object of the statute was to provide for annual leave during each fiscal year, and the leave was allowed only after the service of one year. Any doubt as to this construction is removed by the proviso which allows a *pro rata* leave to regular employés of the Congressional Record. As the duration of the work which this class of employés performed was necessarily limited by the sessions of

Congress, it is obvious that they were considered as excluded by the general language in the prior portions of the act, and hence an exceptional provision giving them its advantages was inserted. And the proviso itself adds emphasis to the significance arising from its enactment, since it conferred the benefits only on such employés as were *regularly* employed for such work, and therefore excluded those merely called in to meet an emergency in the employment in question.

It is also obvious that the Public Printer in administering this act did not interpret it as embracing temporary employés, since the rules of his office excluded employés of that character from the grant of leaves of absence. And the appropriations made by Congress to execute the act of 1886, one of the acts being enacted by the very Congress which passed the act of 1886, serve to enforce the meaning arising on the face of the act itself. Those appropriations were thus defined: "To enable the Public Printer to comply with the provisions of the law granting fifteen days' annual leave to the employés of the Government Printing Office." (Act of August 4, 1886, making appropriations for the fiscal year ending June 30, 1887, 24 Stat. 255; act of March 3, 1887, 24 Stat. 509, and the urgency deficiency appropriation act of March 30, 1888, 25 Stat. 47, making appropriations for the fiscal year ending June 30, 1888.) From the subsequent legislation, to which we shall hereafter refer, we think that it may be inferred that those charged with the administration of the act of 1886 construed it as meaning that a year's service was necessary to give the right to receive leave of absence, and that, if after earning and enjoying leave by a year's service, before the completion of another full year, the employé severed his connection with the service, he was not entitled to any proportional leave. On August 1, 1888, an act was approved, which, with its title, reads as follows, c. 722, 25 Stat. 352:

"An act to extend the leave of absence of employés in the Government Printing Office to thirty days per annum.

"That the act entitled 'An act granting leave of absence to employés in the Government Printing Office,' approved June thirtieth, eighteen hundred and eighty-six, be so amended as to

extend the annual leave of absence therein described to thirty days in each fiscal year: *Provided*, That it shall be lawful to allow *pro rata* leave to those serving fractional parts of a year."

Clearly this act was but an amendment of the act of 1886, and did not attempt to repeal that act or to extend its benefits to classes of employés not embraced by the prior act. Its object on its face was simply to extend the period of leave of absence from fifteen to thirty days and to confer upon the permanent employés who were entitled to leave, in accordance with the terms of the previous act, an additional right to enjoy the benefits of a *pro rata* leave, if thereafter they severed their connection with the service before they had completed another entire year's service so as to be entitled to that year's leave.

Undoubtedly the statute was thus construed by the Public Printer in its administration, since he continued in force the rule forbidding leaves of absence to temporary employés, and besides construed the statute as giving the right to proportional leave of absence to only a permanent employé who had served sufficient time to earn at least one annual leave. As the act of 1888 considered and dealt with the prior law, as administered by the Public Printer in pursuance of the authority conferred upon him by the act of 1886, and as the act of 1888 conferred only a new right in one particular—that is, as to fractional leaves to permanent employés—it is not probable that, if it was intended to overthrow the construction which the Public Printer had put upon the previous act, by formulating a rule expressly excluding temporary employés from the right to leave, that some express provision on that subject would not have been incorporated into the amendatory act.

What was intended by the act of August, 1888, is moreover shown by an act passed by the very same Congress at the same session. Thus, the appropriation act for the fiscal year ending June 30, 1889, became a law on October 2, 1888. That act contained an appropriation "To enable the Public Printer to comply with the provisions of the law granting thirty days' annual leave to the employés of the Government Printing Office." This was immediately followed by an appropriation "To pay *pro rata* leaves of absence to employés who resign or are discharged

(decision of the First Comptroller)." We have not been referred to the decision of the Comptroller to which the act adverts, nor have we been able to find it. But, the appropriation made in furtherance of the act of 1888 shows that such act was designed for the benefit solely of the regular employés, and the authority to pay *pro rata* leaves of absence which it granted was such *pro rata* leaves of absence to employés who, from the nature of their previous and permanent service, might expect to earn a full annual leave but were prevented from doing so by resignation or discharge. Appropriations of like character, couched in substantially identical language, were made for the fiscal year ending June 30, 1890, 25 Stat. 980; 26 Stat. 159; for the fiscal year ending June 30, 1891, 26 Stat. 371; and for the fiscal year ending June 30, 1892, 26 Stat. 948. Indeed, the appropriation act for the last quarter of the fiscal year ending June 30, 1890, makes clear what was the legislative conception of the meaning of the right to *pro rata* leave, granted by the amendatory act of 1888, and the character of the employés embraced by it, for that act, after appropriating a sum to pay employés entitled to annual leave of absence, added the sum necessary to pay for the *pro rata* leaves of "such" employés "who resign or are discharged."

The contention then that temporary employés were embraced within the provisions of the act of 1888 not only is in conflict with the text of that act, but is opposed to the administrative construction placed upon the act by the Public Printer charged with its execution. It is, besides, directly repugnant to the legislative interpretation of that act manifested by Congress, during a period of nearly five years, in appropriating the money for its execution.

In the appropriation acts for the fiscal year ending June 30, 1893, 1894 and 1895, 27 Stat. 388; 27 Stat. 572; 28 Stat. 41, whilst appropriations were made for the allowance of annual leaves of absence to the employés of the Government Printing Office, in substance in the same words as found in the previous acts, the clause contained in the previous acts providing for the allowance of *pro rata* leaves to such employés was omitted. It followed, therefore, that, although the act of 1888 provided for

pro rata leave to the regular employés, the appropriation acts for the years 1893, 1894 and 1895 were susceptible, by their silence on that subject, of the inference that they did not provide a sum to pay such *pro rata* leaves. The attention of Congress was evidently directed to this omission, since, on June 19, 1894, the deficiency appropriation act for the fiscal year of 1894, 28 Stat. 93, contained the following:

"To enable the Public Printer to pay to the employés heretofore or now employed in the Government Printing Office since July first, eighteen hundred and ninety-three, such sums as may be due them for leaves of absence, notwithstanding the fact that thirty days' leave of absence, with pay, had been granted to such persons in said fiscal year on account of service rendered in the preceding fiscal year, and also to pay all employés of the said office any leave of absence which they may have failed to obtain from the lack of necessary appropriations or other cause, sixty-five thousand dollars, or so much thereof as may be necessary.

"Hereafter the Public Printer is authorized to pay *pro rata* leave of absence out of any appropriation for leaves of absence to employés of the Government Printing Office in any fiscal year, notwithstanding the fact that thirty days' leave of absence, with pay, may have been granted to such employés in that fiscal year on account of service rendered in a previous fiscal year." 28 Stat. 94.

This act also created no new class of beneficiaries of leaves of absence. It recognized the right of permanent employés, who had for annual services in a previous fiscal year earned leave, to be granted in a succeeding year in addition their *pro rata* leave when they were prevented from completing a full year of service, by resignation or discharge, as provided in the previous statute. The act besides corrected the omission, if omission resulted, from the silence of the regular appropriation on the subject of *pro rata* leaves for the fiscal year ending June 30, 1894, and, looking to the future, provided a rule for the guidance of the Public Printer, making appropriations for leave of absence without particular specification applicable to *pro rata* leaves in cases where they were allowed by law. All

the reasoning previously adverted to on the subject of the prior acts is applicable to this, and constitutes but another confirmation by Congress of the settled construction excluding temporary employés from the operation of the provisions as to leave of absence. It would seem from a document, to which we shall have occasion hereafter to more particularly advert, that the construction of the *pro rata* leave of absence clause was somewhat widened in its practical administration after that, from and including the fiscal year 1893, by allowing a *pro rata* leave to a permanent employé who had not served a year, and therefore had not earned the full leave of thirty days because of the termination of his permanent employment, by resignation or discharge, before the completion of the year. The exact origin of this broadening of the construction of the act has not been made manifest, but it is inferable that it arose from expressions used in an opinion of the acting Comptroller of the Treasury of date July 3, 1894. Dec. First Comp. 1893–1894, p. 260. Whilst the ruling in question was subsequently somewhat modified, such modification had no relation to the particular expressions in the opinion lending themselves to the construction in question. 3 Dec. Comp. Treas. 28.

In 1895 a general act relative to the conduct of the Government Printing Office was passed. 28 Stat. 601. The twenty-third section of that act, in effect, reënacted and recapitulated the existing laws on the subject of leaves of absence to the employés of the Government Printing Office, as follows:

"The employés of the Government Printing Office, whether employed by the piece or otherwise, shall be allowed leaves of absence with pay to the extent of not exceeding thirty days in any one fiscal year under such regulations and at such times as the Public Printer may designate at the rate of pay received by them during the time in which said leave was earned; but such leaves of absence shall not be allowed to accumulate from year to year. Such employés as are engaged on piece work shall receive the same rate of pay for the said thirty days' leave as will be paid to day hands: *Provided*, That those regularly employed on the Congressional Record shall receive leave, with pay, at the close of each session, *pro rata* for the time of

such employment: *And provided further*, That it shall be lawful to allow *pro rata* leave to those serving fractional parts of the year."

The text of this section contains nothing which can, we think, be construed as changing the past legislation so as to extend leaves of absence to temporary employés. It cannot in reason be argued that Congress, in reënacting the legislation in question, did not have in mind the class of employés entitled to leaves of absence, since in the act of 1895 it expressly reproduced the exception making a class of temporary employés—those regularly employed on the Congressional Record—beneficiaries of the leave of absence legislation, and excluded from the class of temporary employés so benefited those not regularly employed in such temporary work. When it is considered that the language thus reënacted had been construed by the Public Printer, the officer charged with the execution of the previous statutes, for nearly ten years, as excluding temporary employés other than the particular class of such employés referred to in the statute, viz., those regularly employed on the Congressional Record, it follows that the reënactment of the previous laws carried with it the settled administrative construction which had prevailed in their enforcement from the beginning. Here again it cannot in reason be said that the mind of the lawmaker did not address itself to the necessity of making a change in the previous laws where one was deemed necessary, since the act as reënacted not only goes over the ground covered by the progress of the statutes since 1886, and reënacts the legislative steps manifested in such progress, but also adds a new provision concerning accumulations of leaves of absence not contained in any prior statute.

When the deficiency appropriation act for the fiscal year ending June 30, 1895, was adopted on March 2, 1895, 28 Stat. 868, the provision found in the appropriation act of June 19, 1894, was substantially reiterated, except in some particulars not necessary to be noticed, with no words contained therein giving rise to the implication that there was any intention to alter the uniform rule which had obtained from the beginning respecting leaves of absence, excluding temporary employés from the benefit of such

leave, except the particular class of such employés enumerated in the previous statutes.

In the appropriation act for the year ending June 20, 1896, 28 Stat. 910, the sum set apart was simply "to enable the Public Printer to comply with the provisions of the law granting thirty days' annual leave to the employés of the Government Printing Office." Doubtless, any specific provision as to payment of *pro rata* leaves of absence to regular employés who had severed their connection with the service was omitted because of the general provision in the prior statute authorizing the use of leave of absence appropriations for the payment of *pro rata* leaves. In the act of June 11, 1896, making appropriations for the fiscal year of 1897, 29 Stat. 413, the same general language was used as contained in the previous act, making an appropriation applicable to payment of leaves of absence of employés in the Government Printing Office, but such provision was followed by a recapitulation of the previous statutes regulating the subject of leaves of absence to such employés, in the following language:

"The employés of the Government Printing Office, whether employed by the piece or otherwise, shall be allowed leaves of absence with pay to the extent of not exceeding thirty days in any one fiscal year under such regulations and at such times as the Public Printer may designate at the rate of pay received by them during the time in which said leave was earned; but such leaves of absence shall not be allowed to accumulate from year to year. Such employés as are engaged on piece-work shall receive the same rate of pay for the said thirty days' leave as will be paid to day hands: *Provided*, That those regularly employed on the Congressional Record shall receive leave, with pay, at the close of each session, *pro rata* for the time of such employment: *And provided further*, That it shall be lawful to allow pay for *pro rata* leave to those serving fractional parts of a year; also to allow pay for *pro rata* leave of absence to employés of the Government Printing Office in any fiscal year, notwithstanding the fact that thirty days' leave of absence, with pay, may have been granted to such employés in that fiscal year on account of service rendered in a previous fiscal year.

And the Public Printer is hereby authorized to pay to the legal representatives of any employés who have died during the fiscal years of eighteen hundred and ninety-four, eighteen hundred and ninety-five, eighteen hundred and ninety-six, or may hereafter die, who have or hereafter may have any accrued leave of absence due them as such employés, and said claims to be paid out of any unexpended balances of appropriations for the payment of leaves of absence to the employés of the Government Printing Office, for the fiscal years eighteen hundred and ninety-four, eighteen hundred and ninety-five, eighteen hundred and ninety-six, and out of any future appropriations for leaves of absence."

It is language contained in the provision just quoted which the Court of Claims found to be new, and constrained it to decide that a temporary employé who had not been allowed leave of absence was nevertheless entitled to pay therefor by way of commutation. We do not stop now to consider that question, as we are not presently concerned with it. Now, an analysis of the act of 1896 discloses nothing which lends support to the argument that, in reiterating the previous law in this appropriation act, it was the intention of Congress to depart from the rule applied from the beginning by conferring the right to leave of absence on a mere temporary employé. On the contrary, this statute—like the previous ones—reiterates the exception in favor of a particular class of temporary employés, and by its silence is a further manifestation of the approval by the lawmaking power of the construction of the previous statutes resulting from the rule adopted by the Public Printer from the beginning, excluding temporary employés from the right to leave. And this recapitulation again demonstrates that the mind of Congress was addressed to the necessity of making such changes as it deemed wise, since there is a new provision allowing the legal representatives of deceased employés who were entitled to a leave to recover the amount due therefor.

From the review of the statutes which we have just made, our conclusion is that the assumption that temporary employés of the Government Printing Office were entitled to leave, upon which the decision of the lower court necessarily rests, was

mistakenly made, and therefore the judgment below was erroneous, unless it be that the plain text of the statutes, reiterated time and time again, and settled by years of administrative construction, is to be disregarded, in consequence of what is asserted to be a Congressional interpretation to the contrary, arising from an act passed in 1897, and the retroactive effect which it is claimed must necessarily follow as the result of this law and as a consequence of the fifth finding which the court below made.

To the contrary, we think an analysis of the matters relied upon serves but to confirm the construction which we have given to the acts of Congress which we have previously reviewed. In 1896, in the first session of the Fifty-fourth Congress, a resolution was passed by the Senate calling upon the Public Printer for information concerning the employés in the Government Printing Office who had failed to receive their annual leaves of absence during the fiscal years of 1890, 1891, 1892, 1893 and 1894, and asking a statement of the amount due each person therefor. Temporary employés during the years named could not have been included in the purposes of the resolution, since the general appropriation act passed at that very session contained the provision to which we have heretofore referred, reënacting the leave of absence laws, containing no repudiation of the rule prevailing from the beginning excluding temporary employés from the right to leave of absence. To conceive that the inquiry concerned leaves not granted to temporary employés would be to assume that inquiry was made as to a class of employés who had been deprived of their right to leave of absence in the past, whilst at the same time such employés, by the reënactment of the previous laws and the approval of the previous rule governing the Printing Office, had been declared at that session not to be entitled to such leave. Moreover, the fact that the resolution did not reach other years than 1890 to 1894 shows that it was not the denial of leave of absence to temporary employés which had been complained of and as to which the resolution made inquiry, because undoubtedly temporary employés had not received a leave of absence, not only prior to 1890, but also subsequent to 1894 and

up to the time of the passage of the resolution. If the denial of leave to temporary employés had been the subject of the inquiry, it would have been concerning the past and existing evil, and not to a mere fraction thereof.

The reply of the Public Printer to the resolution was made at the following session of Congress, in 1897, and practically consisted of a transmittal of a report to the Public Printer made by the cashier of the Government Printing Office, which was printed by the Senate as a public document, Sen. Doc. 59, 54th Congress, 2d Sess., and is largely reproduced in the brief of counsel for the appellee. The report, instead of confining itself to the years from 1890 to 1894, both inclusive, which were inquired about, proceeded to call attention to the subject of unpaid leave of absence claims prior to the year 1890, as follows:

"In view of the anticipated legislation looking forward to the liquidation of the unpaid leave of absence claims of present and former employés of this office, as indicated by Senate resolutions, it would seemingly appear in the interest of justice and equity that the scope of such legislation should not be limited or confined simply to the fiscal years of 1890 to 1894, inclusive, but that its provision should also embrace such accrued and unpaid leave of absence claims which were also lost and forfeited during the fiscal years of 1887, 1888 and 1889, and to that end I would respectfully submit for your further consideration a supplemental statement, in detail covering such leaves of absences as were unpaid in the fiscal years of 1887, 1888 and 1889."

This was followed by a statement of the amount which would be needed to pay such prior claims.

Now, it cannot be that the report had in view the refusal to give leave or pay for leave to merely temporary employés, since such claims, if they existed, would have covered a much longer period than that embraced in the report. It could not moreover have covered such claims, inasmuch as at that very time such leaves were not being allowed and could not be allowed under the rules of the office. What the report contemplated was loss of leave in the past sustained by permanent employés of the Government Printing Office, through a con-

struction of the statute which no longer obtained or for failure of appropriations in particular fiscal years or other cause. Acting upon the report, an act was passed by Congress, which became a law on July 19, 1897, 30 Stat. 134, authorizing the Public Printer to pay employés, former employés and the legal representatives of deceased former employés of the Government Printing Office such sums as may be due said employés and former employés, for accrued and unpaid leaves of absence for the fiscal years 1887 to 1894, both inclusive, and appropriating a sum of money therefor.

Now we think from what has already been said concerning the resolution of inquiry, and the report made in answer thereto, which were the foundations of the act in question, that it is impossible to construe this act as at all affecting temporary employés without assuming that both Congress and the Public Printer, and indeed everybody concerned, were engaged at one and the same time in rectifying a wrong and in perpetuating the wrong for the future. The act, however, lends itself to no such deduction. Its provisions become clear, when the review of the legislation which we have made is considered. From that review it results that the exclusion of temporary employés from the right to leave of absence had prevailed from the beginning, and the rule so excluding had been ratified and approved by Congress over and over again, whenever it considered the subject. But it was also true that, from 1886 to 1894, in which latter year the legislation as to leave of absence in the Government Printing Office crystallized, except as to a minor provision, added by the law of 1896, Congress had been called upon in each successive step when it considered the subject to broaden in favor of the permanent employés entitled to leave, the construction placed upon its prior action on the subject. Thus, permanent employés, at each successive consideration by Congress of the subject, had become entitled thereafter to leaves of absence, which had been denied the employés prior thereto. And the purpose of the appropriation act of 1897 was first, as an act of grace to equalize this condition where it had resulted from a change of legislation, and, second, by an act of justice to provide for the cases, where, by

lack of appropriations, which the review we have made shows may have sometimes been the case, leaves of absence to permanent employés had not been provided for.

Without going into detail, it suffices to say, we repeat, that the confining of the appropriation in the act of 1897 to the years covered by the act, causes the conclusion just stated we think to be irresistible, since it conflicts with the conception that the act was intended to or did embrace temporary employés who had been denied leave from the beginning, including the period down to the time of the passage of the appropriation act in question.

It remains only to consider the fifth finding made by the court below. When the text of that finding is analyzed, we think it but embodies an inference of law deduced by the court from its consideration of the report of the Public Printer made in answer to the Senate inquiry and the court's construction of the provisions of the act of 1897. But the matters from which such legal inference was drawn, as we have seen, are in conflict with the import which we have given them. For instance, the language quoted in the finding and taken from the letter of the Public Printer in answering the resolution of inquiry of the Senate heretofore referred to, in full is as follows:

"Your attention is also called to the fact that during the fiscal years of 1890 to 1893, inclusive, many employés whose terms of service in the office were only for periods of less than one year have never received any *pro rata* leave of absence, with pay, which appears to have been the practice of the office during that period."

The construction adopted by the court below that this clause necessarily referred to temporary employés is dispelled by the history of the legislation and practice to which we have referred. That clause embraced only the permanent employés during the years in question to whom leave of absence had not been given, owing to the construction prevailing at the time named, which was either departed from by express changes made in subsequent acts of Congress, or by a construction thereafter placed upon the same. This is the result of the concluding words of the passage relied on, viz., "which appears to

have been the practice of the office during that period," excluding therefore temporary employés, since not only at that period but at all times from the beginning, and at the time the report was made, temporary employés were excluded from a right to leave of absence by the express rule of the office. If we were to treat the finding as one of fact, in view of the history of the legislation, the absence of any appropriation at any time to pay temporary employés for leaves of absence, the ever presence of the rule forbidding leave to such employés, and the findings as a whole of the court below, and what we deem to be the only implication deducible from the act of 1897, and the communication upon which the court below rested its construction, we should be obliged to say that the ultimate fact which the fifth finding embodies is not consistent with the other findings, and is not entitled to weight.

Our conclusion that temporary employés are not entitled to leaves of absence under the acts of Congress renders it wholly unnecessary to consider the second question which we at the outset proposed, that is, whether, if such employés were entitled to leave with regular pay, they had a claim for pay without leave against the United States because of the rule adopted for the government of the Printing Office by which no leave was allowed. However, whilst not deciding this question, we deem it our duty to direct attention to the fact that the significance which the court below attached to the language found in the act of 1896, and the statement that that language was new in the legislation on the subject, was, we assume, caused by overlooking the various appropriation acts between 1888 and 1894, which the court did not allude to in its opinion, where the language in question is to be found.

The decree of the Court of Claims is reversed, and the cause is remanded to that court with directions to dismiss the claimant's petition.

WAGGONER *v.* FLACK.

ERROR TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

No. 28. Argued December 8, 1902.—Decided February 23, 1903.

While this court is not bound by the construction placed by the state court upon statutes of that State when the impairment of contract clause of the Constitution is invoked, yet when the true construction of a particular statute is not free from doubt considering former legislation of the State upon the same subject, this court feels that it will best perform its duty in such case by following the decisions of the state court upon the precise question, although doubts as to its correctness may have been uttered by the same court in some subsequent case.

By the Laws of Texas of 1883, c. 58, as amended by the Laws of 1885, c. 12, p. 13, a purchaser was bound to pay the notes given in payment for public land as they matured, and it was the duty of the commissioner to issue a patent for the land on payment of the notes and interest. In November, 1885, the laws of Texas did not give the State the right to forfeit lands for non-payment of installments due from purchasers, although at various periods prior thereto there had been provisions in the law to that effect. In 1897 and 1895 laws were enacted providing for forfeiture in case of such non-payment, but giving the purchaser the right to be heard in a court of justice pursuant to certain forms of procedure prescribed in the law upon the question of whether he was actually in default.

Held, as to a purchaser of lands in 1885 (after the passage of the act of that year) and who from 1893 to December, 1897, (after the passage of the act of that year) had failed to make any of the payments due under his contract, that the act of 1897 was not repugnant to the Federal Constitution on the ground that it impaired the obligation of the contract, as there was no promise expressed in the legislation existing when the land was purchased to the effect that the State would not enlarge the remedy or grant another on account of the violation by the purchaser of his contract, and no such promise is to be implied. There is a plain distinction between the obligation of a contract and a remedy given by the Legislature to enforce that obligation.

THE plaintiff in error brought his action against the defendant in error in a District Court of Texas to recover as owner certain land described in his petition, and of which he alleged the defendant to be in possession. The defendant denied the

averments of the petition, and upon the trial judgment was given in his favor and he was adjudged to be the owner of the land. An appeal was taken to the Court of Civil Appeals of Texas, where the judgment was affirmed, 21 Tex. Civ. App. 449, and upon application to the Supreme Court of the State for a writ of error, the application was denied. The plaintiff then sued out a writ of error from this court to the Court of Civil Appeals, and the record has been brought here for review.

The plaintiff in error alleges the existence of a contract with the State of Texas, the obligations of which he asserts have been impaired by subsequent legislation in that State. The case involves an inquiry into some of the legislation of the State in regard to its public lands, providing for their sale and for the application of the proceeds of such sales for the benefit of its public schools and for other public purposes.

The State has been and is the owner of a large amount of public lands, portions of which it has put upon the market for sale from time to time, under different acts of its legislature, which acts have provided a general system for the sale or leasing of such lands and for the disposition of the proceeds arising therefrom. Among others the legislature passed the act of 1879, chap. 28, Laws of that year, p. 23. That act provided in detail for the sale of certain public lands, and the terms and conditions upon which the sales were to be made and patents therefor granted. The twelfth section provided that, upon a failure of the purchaser to pay the purchase money as agreed upon, it should be the duty of the district attorney to cause a writ to be issued to show cause why the purchaser should not be ejected from the land, and upon his failure to show such cause, a judgment was to be rendered against him and a writ of possession issued in favor of the State. In 1881 the act was amended in immaterial matters.

By chapter 88 of the Laws of 1883, p. 85, another general system for the sale of the public lands for the benefit of the public school system, etc., was enacted, the ninth and tenth sections of which provided for payment of installments of principal and interest, and in case of failure to pay, the lands were

to be entered as "lands forfeited," without any judicial inquiry. This act provided that the interest on the obligations given by the purchaser of the lands should be payable on the first of March in each year. Subsequently by chapter 12 of the Laws of 1885, p. 13, approved February 16, 1885, the ninth and tenth sections of the act of 1883 were amended, the right of forfeiture of the land being still retained, only there was an extension of the time for payment of interest from the first of March to the first of August in each year before the forfeiture could be asserted. In one week after the passage of the act last named the same legislature passed an act, approved February 23, 1885, Laws of Texas, 1885, p. 18, by which it was enacted "That the failure of a holder of public free school, university or asylum land, under contract of purchase from the State, to make the annual payments of principal or interest thereon prior to the first day of August after the same becomes due shall not cause a forfeiture of the rights of such holder in such land." By this act it is claimed that all laws providing for forfeitures of land because of non-payment of installments of principal or interest prior to August first after the same became due were repealed, and while the law thus stood the plaintiff in error's grantor purchased the land in controversy.

By chapter 99 of the Laws of 1887, page 83, a further provision for the sale or leasing of public lands was made. Section 11, page 86, restored the provisions as to forfeiture without resort to judicial proceedings, and by chapter 47, Laws of 1895, section 11, as well as by chapter 37, Laws of 1897, page 39, approved March 25 and taking effect August 20, 1897, further provision was made in regard to forfeitures without a resort to the courts. It was under the act of 1897 that the forfeiture herein was asserted, and the first section, the only material one here, is set forth in the margin.[1]

[1] SEC. 1. *Be it enacted by the Legislature of the State of Texas*, That if upon the first day of November of any year any portion of the interest due by any person to the State of Texas for lands heretofore sold by the State of Texas, whether said lands be a part of the public domain or shall have been heretofore set apart for the public schools, university, or any of the other various state institutions, has not been paid, it shall be the duty of

Statement of the Case.

D. B. Phillips, under the act of 1883, as amended by the act of February 16, 1885, and modified by the act of February 23, 1885, made application to purchase the land in question on the 30th of October, 1885, and the land was duly awarded him in November of that year. The plaintiff in error, by proper transfers and deeds, has become the vendee, or grantee through others, of Phillips, and represents all the rights that the latter or his grantees had with regard to the premises in controversy.

Phillips, or those claiming under him, paid the interest on the purchase money up to January 1, 1893, and no interest was thereafter paid. The land was forfeited for non-payment of interest since 1893, by the commissioner of the general land office, without any judicial procedure or suit in court, on August 20, 1897, the day the act of 1897 took effect. In answer to a certified question from the Court of Civil Appeals, the Supreme Court of the State held in this case that the State had the right to so forfeit the lands by virtue of that act.

Some time after August 20, 1897, namely, on December 16,

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the land commissioner to endorse on the obligation for said lands, "Lands forfeited," and shall cause an entry to that effect to be made on the account kept with such purchaser, and thereupon said land shall thereby be forfeited to the State, without the necessity of reëntry or judicial ascertainment, and shall revert to the particular fund to which it originally belonged, and be resold under the provisions of the existing law, or any future law: *Provided*, The purchaser of said land shall have the right, at any time within six months after such endorsement of "Lands forfeited," to institute a suit in District Court of Travis County, Texas, against the commissioner of the general land office, for the purpose of contesting such forfeiture and setting aside the same, upon the ground that the facts did not exist, authorizing such forfeiture, but if no such suit has been instituted as above provided, such forfeiture of the commissioner of the general land office shall then become fixed and conclusive: *Provided*, That if any purchaser shall die, or shall have died, his heirs or legal representatives shall have one year in which to make payment after the first day of November next after such death.

This act is cumulative, and is not intended to deny to the State the right to institute any legal proceedings that may be deemed necessary to secure the purchase money or possession of the land so sold. And this act is intended to be applicable to all purchases heretofore made under any or all of the various acts of the legislature under which land may have been sold by the State.

in that year, plaintiff through his agent tendered the state treasurer $286.95 to pay up all accrued interest due on the land purchased by Phillips, and on the last-named date through his agent he asked the reinstating of the account of Phillips, and forwarded to the commissioner of the general land office the transfers or deeds, or copies of the same, showing the chain of title from Phillips to himself, and these transfers were filed by the commissioner in his office, but he refused to reinstate as demanded, on the ground that the rights of the defendant Flack had intervened. Flack, prior to this tender and demand, and on November 17, 1897, made his application in due form to purchase the land. His application was on that day accepted, and his obligation to pay the purchase money was received, and thereafter in March, 1898, the land was awarded him on his application of the previous November. On August 13, 1898, after this suit was brought, the plaintiff in error, through his attorney, again made written application to have the Phillips account for the purchase of the land reinstated, and for this purpose tendered to the state treasurer of Texas, to pay the interest in arrear, the sum of $345.25, which application was rejected on the ground of the intervening rights of the defendant Flack.

Mr. W. W. Flood for plaintiff in error.

No appearance for defendant in error but *Mr. C. K. Bell*, attorney general of the State of Texas, and *Mr. T. S. Reese* filed a brief as to the rights of the State.

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

Referring to the facts in this case, it is seen that the question arising is as to the right of the State to proceed under the act of 1897 to forfeit the lands held by the plaintiff in error for non-payment of interest.

At the time when the land was purchased by Phillips in November, 1885, the act of 1883 as amended by the act of February 16, 1885, was in force, excepting, it is said, that the act of February 23, 1885, repealed the provisions in regard to

forfeiture which existed in the prior acts of 1879, 1883 and 1885, so that when Phillips purchased, the State had no right to forfeit the lands, as had theretofore been provided by law.

The Attorney General of Texas in his brief filed herein now argues that the act of February 23, 1885, did not unqualifiedly repeal the law in regard to forfeiture as theretofore existing, but simply regulated it so as to place on the same terms those who had purchased lands under the act of 1879 and those purchasing under the act of 1883 as amended by the act of February 16, 1885, so that no forfeiture could be claimed under any act until after August 1 in any year. As the act of 1879 made the interest payable on the first of March in each year, and the subsequent acts extended the time for the payment of the moneys for lands sold under their authority to the first of August, it is contended that the purpose and effect of the act of 1885 were to place the purchasers of lands under all acts upon the same footing as to the time for the payment of interest. This was in substance held by the Court of Civil Appeals of Texas in 1892 in *Berrendo Stock Company* v. *McCarty*, 20 S. W. Rep. 933. The case was, however, reversed in the Supreme Court in 1893, 85 Texas, 412, and that court in 1891, in *Culbertson* v. *Blanchard*, 79 Texas, 486, 493, had also held the same principle it announced in the *Berrendo* case.

It is true that *Anderson* v. *Bank*, 86 Texas, 618, and *Fristoe* v. *Blum*, 92 Texas, 76, 85, throw some doubt upon the correctness of the former decisions of the Supreme Court in this respect, but we do not feel here called upon to construe the state statute otherwise than it has been construed up to this time by the court of last resort of the State.

Although this case involves the question of an impairment of an alleged contract by subsequent legislation, and we are not therefore bound by the construction which the state court places upon the statutes of the State which are involved in such an inquiry, yet, as the true construction of the particular statute is not free from doubt, considering the former legislation of the State upon the same subject, we feel that we shall best perform our duty in such case by following the decision of the state court upon the precise question, although doubts as to its cor-

rectness may have been uttered by the same court in some subsequent case. *Wilson* v. *Standefer*, 184 U. S. 399, 412.

We come, then, to the question of what was the contract, and whether it has been impaired by virtue of the enactment of the statute of 1897, under which the forfeiture has been enforced? Although not material it may yet be observed that the act of 1897 is not the first act which was passed subsequently to the act of 1885, reinstating the provisions for a forfeiture. By section 11 of the act of 1887, Laws, 1887, pp. 83, 86, provision was again made for forfeiting the lands on non-payment of moneys due, and the same was continued by section 11 of the Laws of Texas of 1895, pp. 63, 67.

We assume that, at the time these lands were purchased by Phillips, no statute existed providing for forfeiture by entry on the books of the state commissioner of the general land office, and it is admitted that only by virtue of the act of 1897 can the State now claim the right to forfeit the lands by an entry to that effect on the account kept with the purchaser, because of the failure to pay the interest since 1893. The plaintiff in error asserts that the statute of 1897, reinstating or providing for the right of the State to thus forfeit the lands for non-payment of moneys due by the purchaser of land, is an impairment of the contract created between the State and Phillips at the time his application for the land was granted by the state authorities; and the plaintiff in error asserts he has succeeded to all the rights of Phillips, and this is not denied.

We must first decide what were the obligations of the contract which was created by the granting of Phillips' application for the purchase of this land and the taking of his notes therefor. The Laws of Texas of 1883, chapter 58, as amended by chapter 12, page 13, Laws of 1885, furnish the evidence of the obligations of the contract. By those acts it was made the duty of the commissioner of the general land office, after an application for a grant of land had been made and approved, to issue a patent to the purchaser or his assigns, etc., upon payment of all the purchase money and interest upon notes given for the purchase of the land, and provision was made for the giving of the notes or other evidences of the obligation of the purchaser

to pay for the land. His obligation was to pay these notes as they matured. The obligation of the State was to give the patent as mentioned. What particular remedy then existed by which the State might enforce the obligations of the contract made by the purchaser is not material in this aspect of the case. It is true that the remedy for the enforcement of a contract sometimes enters into the contract itself, but that is where an endeavor has been made to so change the existing remedy that there is no effective and enforceable one left, or the remedy is so far impaired that the party desirous of enforcing the contract is left practically without any efficient means of doing so; but in the case of an alteration of a remedy, if one is left or provided which is fairly sufficient, the obligations of a contract are not impaired, although the remedies existing at the time it was entered into are taken away.

It appears in the record that the plaintiff in error, or those he represents, failed for years to comply with the obligations of the contract, and failed to pay the interest as it became due, as they promised, and hence the contract was violated.

The question, then, is, what is the remedy against the party who has broken the contract? The statute of 1897 is turned to for the authority to take possession of the land, the right to keep which the plaintiff in error had ceased to retain because of his failure to do that upon which such right was founded.

The plaintiff in error, however, says to the State, you cannot avail yourself of the remedy provided by the act of 1897, because it did not exist when I purchased the land, and you then contracted not to create any such remedy against me, and the evidence of the contract is to be found in the statute of February 23, 1885, which was in force when I purchased. But the answer is that, although at the time Phillips purchased the land a statute had taken away the remedy by way of forfeiture, as therein stated, yet the act taking away the remedy did not constitute a contract on the part of the State with all who purchased lands from it at that time, that it would never pass any other act by which the State might be empowered through its agents to forfeit the lands and take possession thereof by virtue of such forfeiture. The act of February 23, 1885, was a mere

enactment, declaring the law to be as therein stated, upon the subject of a remedy for a violation by a purchaser of the obligations of his contract, and it did not assume to bind the hands of any future legislature that might think proper to deal with the subject. There was no promise or contract expressed in the statute that the State would not enlarge the remedy or grant another on account of the purchaser's violation of his contract, and we think no such contract is to be implied.

A purchaser of lands at the time Phillips purchased had no right to assume that the State would not alter the law in the future so far as to give it another and better or a quicker remedy for a violation of his contract by the purchaser, than existed at the time the purchase was made. To enact laws providing remedies for a violation of contracts, to alter or enlarge those remedies from time to time as to the legislature may seem appropriate, is an exercise of sovereignty, and it cannot be supposed that the State in a case like this, contracts in a public act of its legislature, to limit its power in the future, even if it could do so, with or without consideration, unless the language of the act is so absolutely plain and unambiguous as to leave no room for doubt that its true meaning amounts to a contract by it to part with its power to increase the effectiveness of existing remedies as against those who purchase lands while the act remains alive. No such language is to be found in the act in question, and none ought to be implied.

We cannot discern the difference in principle between this case and that of *Wilson* v. *Standefer*, 184 U. S. 399, which involved a portion of this same legislation. In that case the lands were purchased under the act of 1879, which provided (sec. 12) for a forfeiture after judicial inquiry determining the failure of the purchaser to pay the annual installments of interest as they became due. Subsequently the act of 1897, already mentioned, was passed and that act, it is seen, authorized the commissioner, when any portion of the interest due by the purchaser had not been paid, to declare a forfeiture of the purchase without judicial aid, and it gave to his action the effect of putting an end to the contract. It was under the act of 1897 that the forfeiture was declared in that case. There, as here, it was contended

that the act of 1897 violated the contract between the parties. It was urged that as the act of 1879 provided a remedy by a resort to judicial proceedings for the purpose of enforcing a forfeiture, that such remedy was a part of the contract, and that the act of 1897, which provided for a forfeiture of the lands without judicial action, was a violation of the contract, and therefore void. This court held that the stipulation in the twelfth section of the act of 1879, providing for a judicial forfeiture, did not amount in legal contemplation to a promise by the State that the only remedy which might thereafter be resorted to by it was the one therein provided for. The court recognized the plain distinction between the obligation of a contract and a remedy given by the legislature to enforce that obligation, and it held that the remedy might be modified and enlarged without impairing such obligation.

It is to be noted that the act of 1897 does not take away from the purchaser the right to be heard in a court of justice upon the question whether he, in fact, is in default in his payments of the obligations given by him for the land which he purchased. The act of 1897 grants the purchaser six months after the land commissioner has endorsed on the purchaser's obligation for payment for the land, the words "lands forfeited," within which the purchaser may institute suit in the District Court of Travis County, Texas, against the commissioner for the purpose of contesting the forfeiture and setting aside the same, upon the ground that the facts do not exist authorizing such forfeiture.

Neither Phillips nor any of the successors to his title availed themselves of the opportunity to be judicially heard afforded by the law of 1897, and, as stated by the court in *Wilson* v. *Standefer*, *supra*, p. 415, the reason clearly appears in the admitted facts that the payments were in arrear for a considerable period of time, and that the tender made, if it ever had any legal effect at any time, was manifestly too late after the State had declared a forfeiture and sold the land to another.

We cannot see any difference in principle between a case where an act was in existence when a contract was made, providing a certain remedy for a violation of the contract, and

then after the contract is entered into, the legislature passes another act, giving an altogether different remedy, as in *Wilson* v. *Standefer*, *supra*, and a case where an act which denied the remedy of forfeiture when the contract was made, was repealed by a subsequent enactment which provided a forfeiture as a remedy. In both cases there is a plain alteration of remedy, while in neither is there any contract springing from the passage of the first act that no other remedy more effective should be given as against one who purchased land during the existence of the statute. The right to rescind the contract on the part of the State, upon the failure of the purchaser to pay as he had agreed, resided in the State at common law, as the Supreme Court of Texas has held. *Fristoe* v. *Blum*, 92 Texas, 76, 84. The act of 1897 simply provided a particular means by which such right might be enforced.

We are of opinion that the act of 1897 does not impair the obligation of any contract within the meaning of the Federal Constitution, as asserted by the plaintiff in error, and the judgment of the Court of Civil Appeals of Texas is therefore

Affirmed.

MR. JUSTICE BREWER concurred in the result.

HELWIG *v.* UNITED STATES.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No 65. Argued November 4, 1902.—Decided February 23, 1903.

That part of section 7 of the customs administrative act of 1890 which provides that where the appraised value of any article of imported merchandise shall exceed by more than ten per centum the value declared in the entry, there shall be levied, collected and paid in addition to the regular duties a further sum equal to two per centum of the total appraised value for each one per centum that such appraised value exceeds the value declared in the entry, is penal in its nature and the additional duties imposed are a penalty; and the District Court has exclusive jurisdiction of

a suit brought by the United States to recover the additional duties imposed under such section and the Circuit Court has no jurisdiction of such suit.

THIS case comes before the court upon a certificate from the United States Circuit Court of Appeals for the Second Circuit. The certificate contains the following statement:

"In February and March, 1895, Rudolph Helwig, plaintiff in error, made three certain importations of wood pulp into the United States, entering the same at the custom house at the port of New York. As the facts are substantially the same in respect to each importation, except as to values, amounts, date, etc., they are spoken of herein as one importation.

"At the time when said wood pulp was imported the duty imposed by law on wood pulp was ten (10) per centum ad valorem, paragraph 303, act of August 28, 1894.

"Upon making the entries at the custom house, Helwig declared the invoice and market value to be marks 191 per ton; the aggregate invoice value of all three importations was $13,252.00 in United States currency; at the time of making the entries Helwig paid to the collector of customs $1325.20, being the duty upon said wood pulp at the rate of ten (10) per centum ad valorem based upon the invoice value.

"The merchandise was thereafter appraised by the United States appraiser, as provided in section 7 of the act of June 10, 1890, 26 Stat. 131, who reported that the foreign market value of said wood pulp was marks 263.70 per ton; Helwig thereupon requested a reappraisement by a United States general appraiser, in accordance with section 13 of the act of June 10, 1890; a reappraisement was had, and the United States general appraiser reappraised the market value of said wood pulp at marks 245 per ton net; thereupon Helwig appealed to the board of United States general appraisers, in accordance with said section 13 of the act of June 10, 1890, and said board affirmed the decision of the United States general appraiser, thereby deciding that the foreign market value of said wood pulp was marks 245 per ton net, and making an advance over the invoice and entered value of over twenty-seven per centum.

"Thereupon the collector of customs liquidated said entries,

fixing the dutiable value of all of said merchandise at $16,792.20, and computing the duty thereon at the rate of ten per centum at $1679.20, and made demand upon said Helwig for the sum of $354, being the difference between the amount already paid by Helwig and the amount of duty at the rate of ten (10) per centum ad valorem found to be due on said final reappraisement; thereafter Helwig paid the sum of $354, and that amount is not in question on this appeal.

"At the time the collector of customs found said additional sum of $354 to be due, as aforesaid, he also found and decided that there was due from Helwig to the United States the further sum of nine thousand and sixty-seven dollars and sixty-eight cents ($9067.68), and made demand for said amount, said amount being the further sum in addition to the duties imposed by law, ascertained and fixed as provided in section 7 of the said act of June 10, 1890, being 2 per centum of the total appraised value of said merchandise for each 1 per centum that such appraised value exceeded the value declared in the entry.

"Before the commencement of this action Helwig duly presented his petition to the United States District Court for the Southern District of New York, claiming that said sum of nine thousand and sixty-seven dollars and sixty-eight cents ($9067.68) was a penalty, and praying that the district judge would cause an investigation of the facts to be made, in accordance with section 5292 of the Revised Statutes and sections 17 and 18 of the act of June 22, 1874, 18 Stat. 186, and cause the facts to be stated and transmitted to the Secretary of the Treasury, and praying that said penalty be remitted on the ground that it had been incurred without willful negligence or intent to defraud.

"The said district judge caused such summary investigation to be made, and a statement of the facts shown thereon was duly transmitted to the Secretary of the Treasury, who, thereafter, and on the 6th day of July, 1898, found and decided that said penalties had been incurred without willful negligence or intention of fraud on the part of said Helwig, and thereupon

mitigated the penalties to one half of the amount thereof, namely, $4533.84.

"Subsequently the collector of customs relinquished said entries, reducing the amount of said further sum to $4533.84, and again made demand upon Helwig for payment. As Helwig did not pay the amount suit was commenced against him in the Circuit Court for the Southern District of New York on the 24th of August, 1898. Upon learning of the pendency of that suit, however, the Secretary of the Treasury advised the collector that he revoked his decision of the 6th of July, 1898, and directed the collector to reliquidate the entries at the original amount and to request the United States attorney to institute suit for nine thousand and sixty-seven dollars and sixty-eight cents ($9067.68).

"The collector followed these instructions and again reliquidated the entries accordingly.

"The suit then pending was discontinued and the present action begun, including the full amount of the penalty, namely, nine thousand and sixty-seven dollars and sixty-eight cents ($9067.68).

"The case was tried at the Circuit Court upon an agreed statement of facts.

"Upon the reading of the agreed statement of facts, the plaintiff in error moved to dismiss the complaint and for the direction of judgment in his favor, on the ground that the action was to recover a penalty or penalties arising under the customs laws, and that under the provisions of sections 629 and 563 of the Revised Statutes the United States Circuit Court had no jurisdiction in such an action. The motion was denied and plaintiff in error duly excepted.

"The court subsequently directed judgment in favor of the United States for the amount of nine thousand and sixty-seven dollars and sixty-eight cents ($9067.68), together with interest and costs.

"The defendant thereafter sued out his writ of error to this court.

"The sum for which judgment was rendered, namely, nine thousand and sixty-seven dollars and sixty-eight cents

($9067.68), being the 'further sum' accruing 'in addition to the duties imposed by law,' upon wood pulp, under the provisions of section seven of the act of June 10, 1890."

Upon these facts the court has asked the following question:

"Has the United States Circuit Court jurisdiction of an action to recover the aforesaid 'further sum' accruing 'in addition to the duties imposed by law,' under the provisions of section seven of the act of June 10, 1890, 26 Stat. 131?"

Mr. Henry W. Rudd for plaintiff in error.

Mr. Assistant Attorney General Hoyt for defendant in error. *Mr. James A. Finch* was on the brief.

MR. JUSTICE PECKHAM, after making the foregoing statement of facts, delivered the opinion of the court.

That part of section 7 of the customs administrative act of 1890, 26 Stat. 131, 134, which relates to the question involved in this case is set forth in the margin.[1]

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[1] SEC. 7. . . . And the collector within whose district any merchandise may be imported or entered, whether the same has been actually purchased or procured otherwise than by purchase, shall cause the actual market value or wholesale price of such merchandise to be appraised; and if the appraised value of any article of imported merchandise shall exceed by more than ten per centum the value declared in the entry, there shall be levied, collected, and paid, in addition to the duties imposed by law on such merchandise, a further sum equal to two per centum of the total appraised value for each one per centum that such appraised value exceeds the value declared in the entry; and the additional duties shall only apply to the particular article or articles in each invoice which are undervalued; and if such appraised value shall exceed the value declared in the entry more than forty per centum, such entry may be held to be presumptively fraudulent, and the collector of customs may seize such merchandise and proceed as in cases of forfeiture for violations of the customs laws; and in any legal proceedings which may result from such seizure the fact of such undervaluation shall be presumptive evidence of fraud, and the burden of proof shall be on the claimant to rebut the same, and forfeiture shall be adjudged unless he shall rebut said presumption of fraudulent intent by sufficient evidence: *Provided*, That the forfeitures provided for in this section shall apply to the whole of the merchandise or the value thereof in the case or package containing the particular article or articles in each invoice

By section 629, Revised Statutes, subdivisions third and fourth, jurisdiction is granted to the Circuit Court of all suits at common law where the United States, or any officer thereof, suing under the authority of any act of Congress, are plaintiffs, and of all suits at law or equity, arising under any act providing for revenue from imports or tonnage, except suits for penalties and forfeitures.

Under this section the plaintiffs claim the Circuit Court had jurisdiction in this action as one at common law, etc., or as one arising under any act providing for revenue, and not being one for a penalty or forfeiture.

By section 563, Revised Statutes, jurisdiction is conferred upon the District Court in various cases, the third subdivision of which section gives it jurisdiction of all suits for penalties and forfeitures incurred under any law of the United States.

It has been heretofore held that the act conferred exclusive jurisdiction upon the District Court in suits for penalties or forfeitures. The early cases to that effect are cited in *United States* v. *Mooney*, 116 U. S. 104; *Lees* v. *United States*, 150 U. S. 476, 478, and the above two cases reiterate the same holding. It would seem to be beyond the necessity of further argument since the decision of these cases that the jurisdiction is exclusive in the District Court of all actions to recover for a penalty or forfeiture. Indeed, the counsel for the government frankly concedes that if this action be one to recover a penalty or forfeiture exclusive jurisdiction is by the law vested in the District Court.

The sole question is whether the sum imposed by section 7, already quoted, is a penalty?

Without other reference than to the language of the statute itself, we should conclude that the sum imposed therein was a penalty. It is not imposed upon the importation of all goods, but only upon the importer in certain cases which are stated

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which are undervalued: *And provided further*, That all additional duties, penalties, or forfeitures, applicable to merchandise entered by a duly certified invoice shall be alike applicable to goods entered by a *pro forma* invoice or statement in form of an invoice. The duty shall not, however, be assessed upon an amount less than the invoice or entered value.

in the statute, and it is clear that the sum is not imposed for any purpose of revenue, but is in addition to the duties imposed upon the particular article imported, and in each individual case when the sum is imposed it is based upon the particular act of the importer. That particular act is his undervaluation of the goods imported, and it is without doubt a punishment upon the importer on account of it. Whether the statute defines it in terms as a punishment or penalty is not important, if the nature of the provision itself be of that character. If it be said that the provision operates as a warning to importers to be careful and to be honest, it is a warning which is efficacious only by reason of the resulting imposition of the "further sum," in addition to the duties, provided for by the statute.

This case is a good illustration of the penal features of the statute. The aggregate value of the merchandise as entered by the importer was $13,252, and the amount of duty provided for by the statute (ten per centum) was $1325.20. The final reappraisement made under section 13 of the same act was $16,792.20, and the duties $1679.20, the difference being $354; yet this difference in valuation between the importer and the appraisers, though the valuation of the importer was made without intent to defraud, brought upon him the imposition, under the statute, section 7, of the additional sum of $9067.68, being the "further sum" spoken of in the statute in addition to the payment of the $354 of duty, which was demanded of the importer by reason of this difference. Now what can this be but a punishment, or, in other words, a penalty for undervaluation, whether innocently done or not? It certainly was no reward of merit, and whether called a "further sum" or an "additional duty," or by some other name, the amount imposed was so large in proportion to the value of the merchandise imported, as to show beyond doubt that it was a sum imposed not, in fact, as a duty upon an imported article, but as a penalty and nothing else.

The statute also provides that, if the appraised value exceed by more than forty per centum the value declared in the entry, then the entry value is presumed fraudulent and the whole property is to be seized by the collector, who is to proceed as

in the case of a forfeiture, and the burden of showing that the undervaluation was not fraudulent is cast upon the importer. Now, whether the excess in valuation on the reappraisement is more or less than forty per centum of the value declared in the entry, seems to be important only upon the question of the presumption of fraud and the consequent forfeiture of the whole property. If more than forty per centum, the presumption of fraud is declared by the statute and the property is forfeited, unless the importer shows there was no fraud. If less, the sum imposed by the statute is to be paid, but the property is not forfeited. In the case of good faith, it is simply a less penalty than in the case of fraud. It is, however, argued that the error for undervaluation not fraudulent is repaired by imposing an additional duty on the particular goods in such invoice which have been undervalued, and there is no penalty, a simple enlarged duty upon merchandise, while in the other case, the presumed fraudulent undervaluation, (if the fraud be found,) the whole of the merchandise is forfeited by the expressed terms of the statute.

Whether the error is repaired by imposing the sum named as an additional duty, is not material in the consideration of the nature of the imposition. It is still a punishment and nothing else, because of the carelessness, ignorance or mistake, without fraudulent intent, upon the part of the importer. If the fraudulent intent were present, the penalty would be enlarged and the goods forfeited. In both cases, the nature of the penalty is the same, only in one case it is satisfied by the imposition of a certain amount of money, while in the other a total forfeiture is demanded.

To the question, why the additional sum is imposed in the one case, or why the goods are forfeited in the other, there can be but one answer. It is because of the action of the importer with relation to the importation in question, and in one case such action calls down upon his head punishment by way of a money imposition, and in the other it is a forfeiture of his property. In either case there is to be punishment, either for carelessness or fraud.

Although the statute, under section 7, *supra*, terms the

money demanded as "a further sum," and does not describe it as a penalty, still the use of those words does not change the nature and character of the enactment. Congress may enact that such a provision shall not be considered as a penalty or in the nature of one, with reference to the further action of the officers of the government, or with reference to the distribution of the moneys thus paid, or with reference to its effect upon the individual, and it is the duty of the court to be governed by such statutory direction, but the intrinsic nature of the provision remains, and, in the absence of any declaration by Congress affecting the manner in which the provision shall be treated, courts must decide the matter in accordance with their views of the nature of the act. Although the sum imposed by reason of undervaluation may be simply described as "a further sum" or "an additional duty," if it is yet so enormously in excess of the greatest amount of regular duty ever imposed upon an article of the same nature, and it is imposed by reason of the action of the importer, such facts clearly show it is a penalty in its intrinsic nature, and the failure of the statute to designate it as a penalty, but describing it as "a further sum," or "an additional duty," will not work a statutory alteration of the nature of the imposition, and it will be regarded as a penalty when by its very nature it is a penalty. It is impossible, judging simply from its language, to hold this provision to be other than penal in its nature.

But it is urged that although this part of the section may be of a penal character within the ordinary or general meaning of the words, yet as used in the various statutes upon the subject it will be seen that those words are not regarded by Congress as imposing a penalty and should not be so treated by the court. If it clearly appear that it is the will of Congress that the provision shall not be regarded as in the nature of a penalty, the court must be governed by that will. This leads to a short examination of the previous legislation upon the subject.

By the act of April 20, 1818, chapter 79, sec. 11, 3 Stat. 433, 436, the manner of collecting the additional sum imposed by reason of undervaluation was by adding fifty per centum to

the appraised value of the property, and on that aggregate amount the usual duties were to be estimated. The twenty-fifth section of that act enacted "That all penalties and forfeitures incurred by force of this act, shall be sued for, recovered, distributed, and accounted for in the manner prescribed by" the act of March 2, 1799, 1 Stat. 627, "and may be mitigated or remitted, in the manner prescribed" by the act of March 3, 1797, 1 Stat. 506.

In an opinion delivered by Attorney General Wirt, February, 1821, 5 Opinions of Attorneys General, 730, that officer ruled that the fifty per centum provided by section 11 could not be remitted, because he thought that by the language of the statute Congress permitted the Secretary of the Treasury to remit penalties or forfeitures only in such cases where by the provisions of the act they could be recovered by suit. He did not deny that the additional sums imposed by statute were in the nature of penalties, but the fifty per centum not being recoverable by suit, he thought the Secretary of the Treasury had no power to mitigate or remit.

By the act of March 1, 1823, 3 Stat. 729, 734, sec. 13, reference was made to a penalty of fifty per centum, (the same provision in substance as is set forth in the statute under consideration, only different amounts are provided for,) and Congress described the provision as a penalty.

Section 9 of the act passed May 19, 1828, 4 Stat. 270, 274, provided that where the appraisement exceeded by ten per centum the invoice value there was to be imposed in addition to the duty imposed by law on the same property fifty per centum of the duty imposed on the same goods when fairly invoiced, and this amount is described in the statute as a duty of fifty per centum. Further on in the same section, it is provided that the penalty of fifty per centum imposed by the thirteenth section of the act approved March 1, 1823, *supra*, was not to attach to any of the property subject to the additional duty of fifty per centum imposed by section 9 of the act of 1828. The sum imposed was in its nature no more a penalty under the thirteenth section of the act of 1823 than it was a penalty under the ninth section of the act of 1828, yet in the earlier act

it is described as a penalty and in the later a duty. The mere description was evidently not regarded as of vital importance.

By section 17 of the act of 1842, chapter 270, 5 Stat. 548, 564, the amount imposed is stated to be "in addition to the duty imposed by law on the same, there shall be levied and collected, on the same goods, wares, and merchandise, fifty per centum of the duty imposed on the same, when fairly invoiced." Although this fifty per centum, mentioned in the above act, is not designated in terms as a penalty, yet it was regarded as such by the then Attorney General, Legare, who in response to the question put by the Secretary of the Treasury, whether the latter had power to remit it as a penalty within the meaning of the act of 1795, stated that in his opinion he had, as it was very clear that the fifty per centum was a penalty. 4 Opinions of Attorneys General, 182.

By the act of February 11, 1846, relative to collectors and other officers of the customs, 9 Stat. 3, section 3, it was provided that no portion of the additional duties mentioned in the seventeenth section of the act of 1842, *supra*, "should be deemed a fine, penalty, or forfeiture" for the purpose of being distributed to any officer of the customs, but the whole amount thereof when received was to be paid directly into the Treasury. This would seem to be a recognition on the part of Congress that the additional duties mentioned in the seventeenth section would be regarded as penalties, and that it was necessary to provide specifically that they should not be so treated, so far as distribution was concerned. It may possibly be that the legislation was enacted in order to meet the construction of the seventeenth section put upon it by the Attorney General in his answer to the Secretary of the Treasury, June 7, 1843. At any rate, the opinion and the legislation show that the additional duties had been regarded as penalties, and that such construction was only altered by Congress to the extent of providing that for the purpose of being distributed to any customs officer they should not be so regarded.

The statute of July 30, 1846, chapter 74, 9 Stat. 42, relating to duties, by its eighth section provided that, in case of undervaluation, in addition to the duties imposed by law, a duty of

twenty per centum ad valorem on such appraised value should be imposed, using the same language substantially as had been used in the seventeenth section of the act of 1842, only reducing the amount from fifty to twenty per centum.

By the twenty-third section of the act approved June 30, 1864, chapter 171, 13 Stat. 202, 216, it is again declared that, "in addition to the duties imposed by law on the same, there shall be levied, collected, and paid a duty of twenty per centum ad valorem on such appraised value."

The language used in these various statutes in making provision for the imposition of additional sums on account of the action of the importer in undervaluing the goods imported, does not give any clear indication on the part of Congress that the sum imposed shall not be regarded as a penalty excepting as to the act of 1846, (9 Stat. 3,) relative to collectors, etc., and there the provision is limited to the statement that the sum shall not be deemed a fine, penalty or forfeiture for the purpose of being distributed to any officer of the customs. At that time, it must be remembered, moiety legislation was in force, by which a certain proportion of some fines and penalties was distributed to the customs officer.

By the act of July 29, 1897, chapter 11, section 32, 30 Stat. 151, 212, Congress has plainly directed that the additional duty therein spoken of shall not be construed as a penalty, and shall not be remitted nor payment thereof in any way avoided, with the exception stated in the statute. As this statute was passed subsequently to the importation mentioned in this case, it does not affect the question as to the character of the legislation which preceded it and which had no such provision as is contained in the last act. It was under the act as it stood in the customs administrative act of 1890, the same under which the question here arises, that on September 9, 1893, Mr. Olney, who was then Attorney General, gave an opinion upon this same question in response to a communication from the Secretary of the Treasury, 20 Opinions Attorneys General, 660. In that opinion the Attorney General reviewed the previous legislation of Congress on this subject and came to the conclusion that, as the law then stood, the additional duty, so-called, was in its

nature a penalty, and that being so, it was subject to remission like other fines, penalties and forfeitures by the Secretary of the Treasury.

Referring to some of the decisions of this court, we think it is made quite apparent that these provisions of the statute were regarded as in the nature of penalties.

In *Bartlett* v. *Kane*, 16 How. 263, decided in 1853 under the statute of 1846, where the question of drawback arose, the additional duty of twenty per centum mentioned in the act was regarded as in the nature of a penalty. Mr. Justice Campbell, in delivering the opinion of the court, (at page 274,) said:

"An examination of the revenue laws upon the subject of levying additional duties, in consequence of the fact of an undervaluation by the importer, shows that they were exacted as discouragements to fraud, and to prevent efforts by importers to escape the legal rates of duty. In several of the acts, this additional duty has been distributed among officers of the customs upon the same conditions as penalties and forfeitures. As between the United States and the importer, and in reference to the subject of drawback and debenture, it must still be regarded in the light of a penal duty. . . . It does not include, in its purview, any return of the forfeitures or amercements resulting from illegal or fraudulent dealings on the part of the importer or his agents. Those do not fall within the regular administration of the revenue system, nor does the government comprehend them within its regular estimates of supply. They are the compensation for a violated law, and are designed to operate as checks and restraints upon fraud and injustice."

In *Greely* v. *Thompson*, 10 How. 225, Mr. Justice Woodbury, speaking of the language on this subject used in the act of 1842, (at page 238,) said: "Especially in a penal provision, it could not seem judicious, any more than legal, to extend it beyond the clear language of the act;" and he referred to the immediately succeeding case of *Maxwell* v. *Griswold*, at page 242. In that case, as stated by Mr. Justice Woodbury, in the opinion of the court, (at page 255,) "The importer had put in his invoice the price actually paid for the goods, with charges, and

proposed to enter them at the value thus fixed. But the collector concluded in that event to have them appraised, and the value would then, by instructions and usage at New York, be ascertained as at the time of the shipment, which was considerably higher, and would probably subject the importer, not only to pay more duties, but to suffer a penalty. The importer protested against this, but in order to avoid the penalty, under such a wrong appraisal, adopted the following course." And again, in speaking of the manner in which the question arose, the justice continued: "The importer, knowing that this would subject him to a severe penalty, in order to avoid it, felt compelled to add to his invoice the amount which the price had risen between the purchase and the shipment." This is in relation to the language already referred to in the act of 1842.

In *Ring* v. *Maxwell*, 17 How. 147, the court did not find it necessary to determine whether the additional duties prescribed under the acts of 1842 and 1846 might have been deemed penalties, because the court was of opinion that whatever was the nature of the sums levied as additional duties under the eighth section of the act of 1846, they were not distributable to the customs officers as penalties.

In *Stairs* v. *Peaslee*, 18 How. 521, it was said that the penal duty of twenty per centum exacted by the eighth section of the tariff act of July 30, 1846, 9 Stat. 43, was properly levied upon goods entered at their invoice value. Mr. Chief Justice Taney, (page 527,) in speaking of the language of the act of 1842, 5 Stat. 563, *supra*, providing for levying an additional fifty per centum because of undervaluation, said:

"It would seem, however, that this provision was found by experience to operate, in some instances, unjustly upon the importer; and that it sometimes happened that, under favorable opportunities of time or place, goods were purchased in a foreign country for ten per cent less than their market value in the principal markets of the country from which they were imported into the United States. And if they were so invoiced, the importer was liable for the above-mentioned penal duty, although he was willing and offered to make the entry at their dutiable value. The fact that the invoice value was ten per

cent below the standard of value fixed by law, subjected him to the penal duty; and he had no means of escaping from it. The eighth section of the tariff act of 1846 was obviously intended to relieve the importer from this hardship."

See also *Swanston* v. *Morton*, 1 Curtis, 294, where the court described it as an additional duty, by way of penalty, and the court was by no means clear that the strictly technical term appropriate to such a demand would not be the word "penalty," though in that case it did not feel compelled to go so far.

In *Passavant* v. *United States*, 148 U. S. 214, the question of whether these sums are to be regarded as penalties or simply additional duties was not regarded as material, and consequently was not decided in terms, although the case of *Bartlett* v. *Kane*, *supra*, was quoted from as to the sums imposed by statute being "a compensation for a violated law," etc.

From these various decisions it is seen that the courts have either regarded the language used in these statutes as penal in its nature, and that the sums imposed under the various sections of the statutes were imposed as penalties or the property forfeited, for the careless or fraudulent conduct of the importer in making an undervaluation, or else they have declined to decide the question, because not involved. We think the sum sought to be recovered in this action was a penalty, and the Circuit Court, therefore, had no jurisdiction.

Whether the Secretary had the power, after he had once reduced the amount to be paid, to raise it to the original sum, as stated in the foregoing certificate, is not material to the question now before us, and we express no opinion regarding it.

The question propounded by the Circuit Court of Appeals is answered in the negative, and it will be

So certified.

JAQUITH *v.* ROWLEY.

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

No. 81. Argued and submitted November 10, 1902.—Decided February 23, 1903.

One who received money to indemnify him for giving bail bonds for a person subsequently and more than four months thereafter adjudicated a bankrupt, and against whom the judgment creditors in the suits in which he gave the bonds are seeking to enforce execution, holds such money as an adverse claimant within the meaning of section 23 *a* and *b* of the bankruptcy act of 1898, and the District Court of the United States does not have jurisdiction in a summary proceeding on the petition of the trustee to compel him to turn such money over to the trustee in bankruptcy.

It makes no difference as to this question of jurisdiction whether the judgment creditors have or have not proved their claims before the referee in bankruptcy. Such creditors have the right to obtain and enforce their judgments in the state courts.

THE appellant herein was appointed a trustee in bankruptcy by the United States District Court in Massachusetts on September 18, 1900, and his bond was approved on the 21st of that month. The bankrupt was duly adjudged such on August 15, 1900, and at the date of that adjudication there were pending in the Superior Court of Massachusetts, for Middlesex County, two suits, one of E. W. Thayer against the bankrupt, in which a bail bond had been taken on November 14, 1899, and the other a suit of E. F. Flanders against the bankrupt, in which case a bail bond had also been taken on that day, and in order to protect the surety, Joseph P. Silsby, Jr., on the bail bond in each of the two cases, the bankrupt on the same day deposited in the hands of the surety the two sums of $148 in the Thayer suit and $125 in the Flanders suit. These sums were to be held to indemnify the surety in each case, respectively, if the bankrupt avoided the bail bond. After the adjudication in bankruptcy these suits proceeded to judgment in the state court and the plaintiffs took out execution, which they are seeking to enforce

against the surety on the bail bond, but not against the bankrupt himself.

At the first meeting of the creditors the plaintiff Thayer in the suit in the state court against the bankrupt appeared in the bankruptcy court and proved her claim for $150. Flanders, the plaintiff in the other suit in the state court, did not appear or prove his claim. After the appointment of the trustee, and without leave of the bankruptcy court, and without notice to or the knowledge of the trustee, the plaintiff in each of the two suits took judgment by default in the state court. Upon learning of the entry of the judgments the trustee notified the surety not to pay the money over, and then, in the name of the bankrupt, petitioned the state court to vacate the judgment and to order the execution returned, which the state court refused to do, and thereupon the trustee filed his petition in the District Court of the United States for the District of Massachusetts against the plaintiffs in the two suits, their attorney and the surety, setting up that the prosecution of the suits in the state court was contrary to the provisions of the bankruptcy act and a contempt of court, and praying that the plaintiffs and their attorney be enjoined from collecting the judgments, and that the surety be enjoined from paying the money in his hands, and that the parties, plaintiffs in the judgments and their attorney, be adjudged in contempt, etc. This motion was denied and the restraining order refused.

The petition was subsequently amended by leave of the court so as to ask that the plaintiffs and their attorney in the state suits be enjoined from collecting the judgments or making any levy under the execution or taking any further proceedings thereon pending the further and final determination of the court in bankruptcy upon the petition of the trustee, and also that the surety, Joseph P. Silsby, Jr., be ordered to pay over to the trustee the funds deposited in his hands; also that the several plaintiffs in the state suits be ordered to appear before the referee in bankruptcy and prove their claims against his estate and establish their liens, if any, upon the funds paid over to the trustee by Joseph P. Silsby, Jr. This amended petition omitted the prayer that the plaintiffs in the suits in the state court might

be adjudged guilty of contempt, etc. Upon the petition as amended a motion for a rehearing was made and granted, and the appellees appeared and objected that the court had no jurisdiction in the matter of the petition, and after argument the court so held and denied the petition for want of jurisdiction only, and allowed an appeal to this court.

In dismissing the petition the district judge certified that the following questions arose before him, namely:

"1. Do the provisions of the second clause of section 23 of the act of Congress, known as the bankruptcy act of 1898, control and limit the jurisdiction of the several District Courts of the United States, so that said courts cannot permanently enjoin a creditor of the bankrupt who *has* proved his debt in the bankruptcy court, from collecting a judgment recovered in the state court and from making levy under an execution taken out on said judgment; and do they limit the jurisdiction of the said courts so that these courts may not require said creditor to submit the controversy to their judgment?

"2. Do the provisions of the second clause of section 23 of the act of Congress, known as the bankruptcy act of 1898, control and limit the jurisdiction of the several District Courts of the United States, so that said courts cannot permanently enjoin a creditor of the bankrupt who *has not* proved his debt in the bankruptcy court, from collecting a judgment recovered in the state court, and from making levy under execution taken out on said judgment; and do they limit the jurisdiction of the said courts so that these courts may not require said creditor to submit the controversy to their judgment?

"3. Do the provisions of the second clause of section 23 of the act of Congress, known as the bankruptcy act of 1898, control and limit the jurisdiction of the several District Courts of the United States over controversies between the trustee and a third person in the possession of property alleged to belong to the bankrupt, it being also alleged that said third person has no beneficial interest in the said property, but has the sole duty of paying or delivering it over in settlement of the debts of the bankrupt?

"4. Can the District Court of the United States entertain

jurisdiction of proceedings on petition by a trustee in bankruptcy to recover property alleged to belong to the bankrupt, but held under a claim or lien or security by the bankrupt's creditor, or by third parties for the benefit of said creditors?

"5. Can the District Court for the District of Massachusetts take jurisdiction over this suit as it now stands on record?"

Submitted by *Mr. Harry J. Jaquith*, in person, for appellant.

Argued by *Mr. Clarence W. Rowley*, in person, for appellees.

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

This proceeding is governed by the principles decided in *Bardes* v. *Hawarden Bank*, 178 U. S. 524; *Bryan* v. *Bernheimer*, 181 U. S. 188, and *Mueller* v. *Nugent*, 184 U. S. 1.

The objection that it is not a suit within the meaning of the twenty-third section of the bankruptcy law is without force. The proceeding was a summary application to the court in bankruptcy to grant an order in a matter, the result of the granting of which would be to immediately take from the surety moneys which had been deposited with him before the commencement of the proceedings in bankruptcy, and thus compel him to come into the bankruptcy court for the litigation of questions as to his right to retain the money claimed by him. It would also enjoin the plaintiffs in the state suits from proceeding to collect their judgments from the surety in the bail bonds. To extend such a jurisdiction over an adverse claimant would be within the prohibition of section 23, *a* and *b*, whether such jurisdiction were exerted by an action strictly so-called or by a summary application to the court in bankruptcy. It is the exercise of jurisdiction which the section prohibits, and the particular method of procedure in the court is immaterial. The surety in whose hands the money was deposited to indemnify him for his liability on the bail bond was an adverse claimant within the meaning of that section of the act, and could not be pro-

ceeded against in the bankruptcy court unless by his consent, as provided for therein. It is not necessary in order to be an adverse claimant that the surety should claim to be the absolute owner of the property in his possession. It is sufficient if, as in the present case, the money was deposited with him to indemnify him for his liability upon the bail bond and that liability had not been determined and satisfied. If the trustee desire to test the question of the right of the surety to retain the money he must do so in accordance with the provisions of the section of the bankrupt law above referred to.

Bryan v. *Bernheimer*, 181 U. S. *supra*, does not, so far as the question here involved is concerned, touch or limit the decision in *Bardes* v. *Hawarden Bank*, 178 U. S. *supra*.

In *Mueller* v. *Nugent*, 184 U. S. 1, it was claimed that where property of a bankrupt came into the hands of a third party before the filing of the petition in bankruptcy, as the agent of the bankrupt, and to which the agent asserted no adverse claim, the bankruptcy court, nevertheless, had no power by summary proceedings to compel the surrender of the property to the trustee in bankruptcy duly appointed. In regard to this claim it was said by the court, through Mr. Chief Justice Fuller, as follows:

"In other words, the question reduces itself to this: Has the bankruptcy court the power to compel the bankrupt, or his agent, to deliver up money or other assets of the bankrupt, in his possession or that of some one for him, on petition and rule to show cause? Does a mere refusal by the bankrupt or his agent so to deliver up oblige the trustee to resort to a plenary suit in the Circuit Court or a state court, as the case may be? If it be so, the grant of jurisdiction to cause the estates of bankrupts to be collected, and to determine controversies relating thereto, would be seriously impaired, and, in many respects, rendered practically inefficient. The bankruptcy court would be helpless indeed if the bare refusal to turn over could conclusively operate to drive the trustee to an action to recover as for an indebtedness, or a conversion, or to proceedings in chancery, at the risk of the accompaniments of delay, complication,

and expense, intended to be avoided by the simpler methods of the bankrupt law.

* * * * * * * *

"The position now taken amounts to no more than to assert that a mere refusal to surrender constitutes an adverse holding in fact and therefore an adverse claim when the petition was filed, and to that we cannot give our assent.

* * * * * * * *

"In this case, however, respondent asserted no right or title to the property before the referee, and the circumstances under which he held possession must be accepted as found by the referee and the District Court.

* * * * * * * *

"In the case before us, William T. Nugent held this money as the agent of his father, the bankrupt, and without any claim of adverse interest in himself. If it was competent to deal with Davidson, the assignee in the case of *Bryan* v. *Bernheimer*, by summary proceedings, William T. Nugent could be dealt with in the same way."

In other words, *Nugent's* case simply holds that, where the agent held money belonging to the bankrupt, to which he made no claim, but simply refused to give up the property, which he acknowledged belonged to the bankrupt, the bankruptcy court had power, by summary proceedings, to order him to deliver such property to the trustee in bankruptcy.

The case before us is wholly different. The surety claims the right to hold the money as against everybody until his liability on the bail bond is satisfied, and that claim is adverse to any claim that the trustee may make upon him for the money which is to indemnify him as stated.

There is no difference between the two plaintiffs in the state court on account of one having proved her claim in bankruptcy and the other having failed so to do. She did not waive her claim against the surety in the bail bond even by implication, but, on the contrary, stated that she intended to retain the same.

If the trustee has the right to obtain possession of the money from the surety, he must assert it in accordance with the pro-

visions of section 23 of the bankruptcy act and not by this summary proceeding in bankruptcy.

The plaintiffs in the suits in the state court had the right to proceed to judgment in that court and to collect their judgments against the surety on the bail bond, and the court in bankruptcy had no power to prevent such proceedings in suits over which the state court had full cognizance. *Eyster* v. *Gaff*, 91 U. S. 521, cited in *Bardes* v. *Hawarden Bank*, *supra*.

Our conclusion is that the District Court was without jurisdiction in the matter submitted to it in the petition of the trustee, and its decree dismissing such petition for want of jurisdiction is, therefore,

Affirmed.

AMERICAN ICE COMPANY *v.* EASTERN TRUST AND BANKING COMPANY.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 95. Argued December 2, 1902.—Decided February 23, 1903.

Although, as held in *Farmers' Loan & Trust Company* v. *Penn Plate Glass Company*, 186 U. S. 434, a covenant in a mortgage to keep the property insured does not run with the land so that an actual grantee taking subject to the mortgage comes under a primary obligation to insure, the case is different, under the peculiar language of the covenant contained in the mortgage herein, and where the mortgagor after failing to insure in accordance with the covenant transfers the property to a voluntary assignee. In such case the insurance taken out by the assignee, who stands in the shoes of the assignor, must be assumed to be taken out in fulfillment of the mortgagor's covenant, and in the event of loss the amount collected under the policies inures to the benefit of the mortgagee, and cannot be retained by the assignee as representing his interest, or that of general unsecured creditors, in the equity of the property.

THE appellee herein was the complainant in the court of original jurisdiction and commenced its suit in the Supreme Court of the District of Columbia to foreclose a mortgage ex-

ecuted by the American Ice Company, one of the appellants, to the appellee as trustee, etc. Judgment of foreclosure was entered, from which an appeal was taken to the Court of Appeals of the District, where it was modified by reducing the amount of the indebtedness found due by the trial court and secured by the mortgage, and as so modified the judgment was affirmed. 17 D. C. App. 422; also reported on former hearing in the Court of Appeals, 14 D. C. App. 304. Another phase of the controversy appears in 6 D. C. App. 375 and 169 U. S. 295.

The facts are somewhat numerous, but for the purpose of presenting the question discussed in the opinion herein the following only are necessary to be noticed:

The American Ice Company was a Maine corporation, and in that State it made a mortgage to the appellee, which was also a Maine corporation, to secure the payment of bonds executed by the ice company to the amount of $40,000, payable in installments of $5000 each. The bonds were payable to the mortgagee or bearer, and all were duly sold and delivered to various persons for full value before maturity. The property mortgaged embraced real estate in Maine, and also certain real estate which the mortgagor claimed to own in the city of Washington, D. C., opposite square 270, and being within the limits of the bed of the Potomac River. On this property were erected a wharf and ice houses for storing and distributing the ice gathered in Maine and shipped to Washington. The mortgage contained the following provisions as to insurance:

"Article 7. The American Ice Company hereby expressly covenants and agrees to pay any and all taxes, assessments and governmental charges assessed or laid upon the property herein conveyed or intended so to be, and also to keep said premises and property at all times insured in such insurance companies as may be approved by the trustee, in such amounts as shall reasonably protect all the insurable property, payable in case of loss to the trustee as its interest may appear. In case of loss the insurance money may be applied by the trustee toward the renewal of or additions to the property destroyed or injured, or at the option of the trustee the money may either be retained

Counsel for Parties.

and invested in such securities as it approves, as a sinking fund for the redemption of the bonds when due, or be applied to the payment of the principal of such of the aforesaid bonds as may be at the time due and unpaid and of the interest which may at that time have accrued upon the principal and be unpaid, without discrimination or preference; and ratably to the aggregate amount of said unpaid principal and accrued and unpaid interest, rendering the surplus, if any, to the American Ice Company, or to whomsoever may be lawfully and equitably entitled to receive the same."

The mortgagor company thereafter fell into financial difficulties, defaulted in the payment of its bonds and other indebtedness, and on October 13, 1893, it made an assignment to William G. Johnson, the other appellant, as assignee, for the benefit of its creditors. The assignee took possession of the real property mortgaged and situate in Washington, and in November, 1896, took out fire insurance policies to the extent of $3000 on the buildings and improvements on the Washington property, the premiums being paid from the assigned estate. On February 11, 1896, the buildings and improvements were destroyed by fire and the insurance moneys were paid to the assignee, who set up in his answer to the bill of foreclosure that he had taken out the insurance upon his separate interest as owner of the equity of redemption for the benefit of all the creditors of the ice company, secured and unsecured; while the trustee claims the insurance moneys for the benefit of the bondholders.

The trial court decreed the foreclosure of the mortgage and sale of the mortgaged premises, and in the event that the proceeds arising therefrom should be insufficient to pay the bonded indebtedness, it further decreed that the assignee should pay to the trustee the insurance moneys, or so much as might be necessary to pay the deficit, and that the trustee should apply the same as directed.

Mr. William G. Johnson for appellants.

Mr. Benjamin F. Leighton for appellee.

Opinion of the Court.

MR. JUSTICE PECKHAM, after making the above statement of facts, delivered the opinion of the court.

The appellants have made several assignments of error which have been argued before us, but the only one we think it necessary to notice is that which relates to the disposition of the moneys received by the assignee on account of the insurance effected by him upon the property destroyed by fire.

The assignee claims to be entitled to pay these moneys for the benefit of all the creditors, unsecured as well as secured, while the appellee, the trustee in the mortgage, demands that the moneys should be paid to it for the purpose of reducing the deficit which may arise from the sale of the mortgaged premises, and the courts below have so decreed. The claim of the appellee is founded upon the language used in the mortgage, by which the ice company was to keep the "premises and property at all times insured . . . in such amounts as shall reasonably protect all the insurable property. . . . In case of loss the insurance money may be applied by the trustee toward the renewal of or additions to the property destroyed or injured, or, at the option of the trustee, the money may either be retained and invested in such securities as it approves, as a sinking fund for the redemption of the bonds when due, or to be applied to the payment of the principal" of such bonds, etc. This language, it is urged, takes the case out of the ordinary rule that a simple covenant to insure contained in a mortgage does not run with the land. The assignee appellant founds his claim upon the assertion that, as assignee, he was the owner of the equity of redemption, having an insurable interest in the premises as such, and that, in fact, he intended such insurance for the benefit of all creditors, and not as a fund for the security of the bondholders alone.

In *Farmers' Loan & Trust Co.* v. *Penn Plate Glass Co.*, 186 U. S. 434, we had occasion to examine the nature and effect of a covenant to insure contained in a mortgage, and we concluded that such a covenant does not run with the land, so that one taking a conveyance subject to the mortgage comes under a primary obligation to insure. In that case the mortgage was

foreclosed and the property bid in at the judicial sale, and the grantee of the Master took out insurance in his own name for the purpose of insuring his own interest in the premises which he had purchased, and he repudiated in terms any obligation to insure for the benefit of the mortgagee, and accordingly the policies were issued, and they stated they did not cover the mortgagee's interest in the premises.

Here there is in substance no difference between the mortgagor and its assignee for the benefit of creditors, so far as this question is concerned. The mortgagor had indeed failed to insure, as it had covenanted to do, but when it transferred the legal title of the property to its voluntary assignee, he stood in the shoes of his assignor, and when he took out insurance policies upon the property he in effect fulfilled the obligation which had rested upon the mortgagor to insure, and the insurance thus becomes by virtue of the covenant a security for the payment of the bonds secured by the mortgage. This does not make a case of a covenant to insure running with the land as against a subsequent purchaser of the property for value, but, as we have said, it is simply the case of a taking out of insurance by a voluntary assignee having no beneficial interest in the property, and when such assignee insures the premises under the circumstances herein stated, with such a covenant in a mortgage, the insurance moneys enure to the benefit of the bondholders secured by the mortgage.

It was conceded in the court below that, as a general proposition, a covenant to insure was a mere personal covenant, and did not attach to and run with the land, but it was held that the peculiar language of this mortgage took it out of that rule.

Mr. Chief Justice Alvey said in the Court of Appeals in this case, 14 App. D. C. 331:

"It is very clear, that, by the terms of the covenant, it had relation to the land, and its principal object was to keep and maintain the buildings on the property in condition for carrying on the ice business. This was the great object of the insurance required, as means of security to the bondholders. Without this, the property, by fire, might be rendered of little value, and the bondholders be left without security. By means

of the insurance it was intended that the property should be maintained as security; and hence it was provided, primarily, that the insurance money might be expended in renewal of or adding to the buildings. In such cases it has been repeatedly held, that the covenant does run with the land, at least in an equitable sense; and where an insurance has been obtained, though by an assignee, and a fire has occurred, and the insurance money has been received, a court of equity has held that the insurance money should be applied for the benefit of those for whose protection the original covenant was made."

The cases of *Vernon* v. *Smith*, 5 Barn. & Ald. 1, 7; *Thomas* v. *Vonkapff*, 6 Gill & John. 372; *Miller* v. *Aldrich*, 31 Michigan, 408, 411; *Ellis* v. *Kreutzinger*, 27 Missouri, 311; *Nichols* v. *Baxter*, 5 R. I. 491; *Masury* v. *Southworth*, 9 Ohio St. 340, 348, and *In re Sands Ale Brewing Company*, 3 Biss. Rep. 175, were cited by the Chief Justice in support of his contention.

In the case of *Wheeler* v. *Insurance Company*, 101 U. S. 329, it was held that where a mortgagor is bound by his covenant to insure the mortgaged premises for the better security for the mortgagees, the latter have to the extent of their interest in the property destroyed, an equitable lien upon the money due from the policy taken out by him, and that this equity exists, although the contract provides that, in case of the mortgagor's failure to procure and assign such insurance, the mortgagees may procure it at the mortgagor's expense.

So in this case, we practically have a fulfillment of the mortgagor's covenant to insure, because its voluntary assignee, standing in its shoes, did himself insure the premises, and such insurance enures to the benefit of the mortgagee, because the assignee is a voluntary one, and is but carrying out an obligation imposed originally upon his assignor. The peculiar language of the mortgage upon the subject of insurance takes it out of the general rule governing such covenants.

We think the case at bar is not covered by the case of *Trust Company* v. *Penn Glass Company*, 186 U. S. 434, *supra*, and that the court below made the proper decree in relation to the insurance moneys.

We have examined the other assignments of error argued

before us, but are of opinion that they are clearly untenable and were properly disposed of by the court below.

Finding no error in the record, the judgment is

Affirmed.

BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER MINING COMPANY *v.* MONTANA ORE PURCHASING COMPANY.

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

No. 103. Argued December 3, 1902.—Decided February 23, 1903.

To give the Circuit Court jurisdiction under section 1 of the act of March 3, 1887, as corrected by the act of August 13, 1888, Federal questions must appear necessarily in the statement of the plaintiff's cause of action and not as mere allegations in the plaintiff's bill of the defence which the defendants intend to set up or which they rely upon. And if it further appear from defendant's answer that no such defence is set up, no jurisdiction exists to try questions not of the kind coming within the statute, and the Circuit Court should dismiss the bill for want of jurisdiction.

In order for a party in possession to maintain a bill of peace for the purpose of quieting his title to land against a single adverse claimant ineffectually seeking to establish a legal title by repeated actions of ejectment, it is necessary for the bill to aver that complainant's title has been established by at least one successful trial at law; and where it appears from the bill that an action at law involving the same questions has been commenced, but has not been tried, it is a fatal defect.

To maintain a bill of peace in the Federal courts there must be an allegation that the complainant is in possession, or that both parties are out of possession.

THE appellant in this case (being the complainant below) has brought it to this court by an appeal from the judgment of the Circuit Court of the United States for the District of Montana dismissing its complaint and ordering judgment for the defendants on the ground that the court had no jurisdiction of the action. A decree having been entered in accordance with the direction of the court dismissing the bill, the Circuit Court has certified to this court the question of jurisdiction, and whether or not a Federal question is presented in complainant's amended bill and the answer of the defendant corporation.

Statement of the Case.

The cause of action relates to the ownership of a certain quantity of copper ore taken and converted by the defendants from the mining ground alleged to be owned by the complainant. For the purpose of presenting the question of jurisdiction, the court below has certified to this court the amended bill and the answer of the defendants. The complainant in the bill alleges that it is the owner and entitled to possession of certain property therein described, known as and called the Pennsylvania lode mining claim, lot No. 172, situated in Summit Valley mining district, county of Silver Bow, Montana. A full description of the land is given in the bill. The complainant's title is next set out with much particularity and detail, from which it appears that the original source of its title is a United States patent covering the claim, dated April 9, 1886, issued to persons named therein, from whom the complainant deraigns title. It is then averred that on April 1, 1895, defendants wrongfully and unlawfully entered upon complainant's premises, and from that time on extracted from the mine large quantities of valuable ores, of the reasonable value of $500,000, and that they have continued to extract and mine ores from the premises belonging to the complainant, and are now mining and extracting ores therefrom and threatening to continue to do so unless enjoined by the court.

The land which the complainant claims to own is valuable almost exclusively for the copper, silver and gold ores which are found there in large quantities, and it is these ores that the defendants have extracted and are threatening to continue to extract in the future.

It is averred that the complainant has no means of ascertaining the quantity or value of the ores which the defendants have extracted or may hereafter extract from such premises, and if the defendants are permitted to continue to extract such ores it will be altogether uncertain and indefinite as to what the amount or the value of such ores may be, and the complainant will be compelled to rely to a great extent on the defendants as to such amount and value; that unless the defendants are enjoined and restrained from taking the ores the complainant will be required to bring numerous actions for the deter-

mination of the damages it has from time to time sustained by reason of such trespasses, which are continuing on the part of the defendants. Therefore the complainant brings this suit in order to avoid a multiplicity of suits in the premises; and by reason of the trespasses of the defendants and their threatened continuance the complainant has suffered and will suffer great and irreparable injury and damage, unless the defendants are enjoined from further trespass as prayed for.

This is the complainant's cause of action, as set forth in the bill, regarding the trespass and the injury inflicted and the difficulty of proof thereof and the prevention of a multiplicity of suits.

The complainant then further averred in the bill, for the purpose as therein stated, of showing the jurisdiction of the court to determine the matters set forth in such bill, that the determination of the controversy between the parties involved the construction of the mining laws of the United States; that the property of the complainant is a mining claim and has been patented as such under the provisions of the Revised Statutes of the United States relating to mines and mineral lands; that the defendants owned a portion of certain properties called the Rarus lode claim, lot No. 179; the Johnstown lode claim, lot No. 173; and the Little Ida lode claim, lot No. 126, which claims lie north of and partially adjoining and near to the Pennsylvania lode claim, owned by the complainant.

It is further stated that the various claims which are and will be made by the defendants as to their rights in complainant's mine by reason of their ownership of the other mines above mentioned are without foundation, yet, nevertheless, they will be urged as a defence to the cause of action set forth in the bill of complaint, and the claims of defendants are denied and disputed, as are also the facts upon which the defendants base their defence, and the law arising from the same, and complainant adds "that it disputes each and every one of the claims made by the defendants, relative to the construction of said several patents, and it (complainant) claims that all veins, whose apexes lie within the Johnstown patent must be governed and regulated in extralateral rights, if any they have, under the

Statement of the Case.

Johnstown patent, and not under or by virtue of the Rarus patent." The complainant also averred "that the said defendants contend and claim that the complainant cannot under any circumstances obtain any relief for ores extracted within that portion of the premises owned by it, without first showing that the apices of the veins from which the ores were extracted are within the surface lines of the ground owned and claimed by the complainant, whereas your orator claims that *prima facie* it is the owner of all ores found within its boundaries extended downward into the earth, until it has been shown that some other person or company has some right thereto by reason of ownership of the apex of the vein within some other claim." The complainant further stated its right to enjoin defendants from mining ore beneath the ground of complainant, because no vein having its apex in the defendants' claim passes in its strike through the end lines thereof so as to confer extralateral rights.

And finally: "Wherefore, your orator shows to your honors that there is involved in the matters in controversy, between your orator and the said defendants, the numerous questions aforesaid, involving the construction of the statutes of the United States, relative to locating, purchasing and patenting of mineral lands and the construction of the statutes, relative to the right of one claimant to follow veins down to and into the premises of another, under the circumstances and situation of the parties as hereinbefore set out, and also the construction of the said statutes in relation to patenting of claims and whether the vein can be patented to one person and the surface to another, and to the right of the Land Department to segregate the surface from the mineral in the ground, granting one to one person and the other to another, and as to whether said action is authorized under and by virtue of said statutes; and also as to whether, when an apex of a vein is divided upon the surface, part being within the premises granted in one patent and a part within another, as to what, if any extralateral rights, are granted under such circumstances to either party."

The answer of the defendants is also set forth in the certificate of the court below, in which the defendants deny that they

wrongfully or unlawfully entered the premises of the complainant or that they took out any amount of ore belonging to the complainant from that mine, and deny that the defendants ever mined or extracted ores from premises belonging to the complainant or threatened to do so; also deny the averments as to the value of the ore set forth in the bill. Defendants also deny that the determination of the controversy between the parties involves a construction of the mining acts of the United States or the construction of any statute of the United States whatever. They admit that the Rarus and the Johnstown lode claims are mineral claims, located under the laws of the United States, and that the same have been patented under those laws, and that the defendants own a portion of the lode called the Rarus lode claim. The defendants also assert that they are the owners of a certain parcel of ground within the Johnstown lode claim, and also the owners of that portion of the Pennsylvania lode claim thereafter described, and they claim the right to enter upon the premises of the complainant, namely, that portion of the Pennsylvania lode claim described in its amended bill of complaint, by reason of the fact that certain veins owned and claimed by the defendants and in their possession have their top or apices within the Johnstown lode claim, lot No. 173, and that portion thereof owned by the defendants, and that the defendants assert the right to follow such veins on their downward course or dip, although the same so far depart from a perpendicular as to depart from the said Johnstown lode claim and from that portion thereof claimed by the defendants, and enter the premises owned and claimed by the complainant, namely, that portion of the Pennsylvania lode claim described in its amended bill of complaint. But the defendants deny that they claim the right to enter complainant's premises by reason of the fact that any veins owned or claimed by them or in their possession have their top or apices within the Rarus lode claim or in that portion thereof owned by the defendants, or by reason of the fact that the same have their top or apices within the Little Ida lode claim or any portion thereof, and deny that the defendants assert the right or any right to follow such veins on their downward course or dip, although the same so far de-

part from a perpendicular as to depart from said Rarus lode claim, and to enter the premises claimed by the complainant; and deny that they assert or claim the right to enter the premises of the complainant by reason of the fact that any veins owned or claimed by the defendants have their top or apices within that portion of the Johnstown lode claim owned by the defendant, or that they assert the right to follow such veins on their downward course or dip, although the same so far depart from a perpendicular as to depart from the Johnstown lode claim and from the portions thereof owned by the defendants and enter the premises of the complainant.

It was further averred in the answer "that in this action it makes no claim of any right under the Rarus patent to enter upon the veins within the ground claimed or owned by the complainant, but that it asserts its right to do so by reason of its ownership of a portion of the Johnstown lode claim, and the fact that the top or apices of the veins or lode in question are within said portion of the Johnstown lode claim." It also "denies that in this action it contends or claims that only the surface ground of the Johnstown claim was patented to the patentees named therein or that all or any veins lying within the original location lines of the Rarus claim were patented to the claimant under the Rarus claim; . . . but defendant alleges that it contends and claims in this action, and in so far as this controversy between complainant and defendant is concerned, that its extralateral rights to the veins in question should be determined by its ownership of that parcel of ground now included within the Johnstown claim and not by the Rarus, for the reason that said veins or lodes have their tops or apices within the said parcel of ground owned by defendant."

Various other denials were made, from which it appears that the only claim made by the defendants in this action is by virtue of their ownership of the Johnstown lode claim. The defendants by this answer therefore admit the averments in the bill that their rights must be governed and regulated in this action by reason of their ownership of the Johnstown patent, and not by virtue of the Rarus patent, and as to those rights the complainant claims that the course of the vein cannot be followed because of the nature of the ground.

Opinion of the Court.

Mr. Louis Marshall for appellant. *Mr. John F. Forbis* was on the brief.

Mr. John J. McHatton for appellees. *Mr. John W. Cotter* was on the brief.

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

It is quite plain that the various averments contained in the complainant's bill for the purpose of showing jurisdiction in the Circuit Court are wholly unnecessary in order to make out complainant's cause of action for the conversion of ore by the defendants on premises belonging to complainant. To make out a *prima facie* case on the part of complainant, so far as its right to the ore in question is concerned, all that was necessary was to show the patent and the complainant's possession under it, and from such patent and possession the presumption would be that the complainant was the owner of all ores found within the boundaries contained in the patent extended downward into the earth, and the burden would then rest upon the defendants to show that, notwithstanding such presumption, they had the right to enter upon and take the ore from the ground within the limit described in the patent under which the complainant derives title. It could then prove facts to sustain its averments in regard to ascertaining the quantity and value of the ores which the defendants were extracting or might extract from the complainant's premises, and that it would be altogether uncertain and indefinite as to what amount of ores or the value thereof the defendants might extract in the future, and that the complainant would be compelled to rely upon the good faith and showing of the defendants as to the amount and value of the ores which they had theretofore extracted and might thereafter extract from the premises. Indeed, the complainant asserted in the bill, an extract from which is contained in the foregoing statement, that *prima facie* it is the owner of all ores found within its boundaries extended downwards into the earth, until the contrary has been shown. It would be wholly unnecessary and improper in order to prove complainant's cause of

action to go into any matters of defence which the defendants might possibly set up, and then attempt to reply to such defence, and thus, if possible, to show that a Federal question might or probably would arise in the course of the trial of the case. To allege such defence and then make an answer to it before the defendant has the opportunity to itself plead or prove its own defence is inconsistent with any known rule of pleading so far as we are aware, and is improper.

The rule is a reasonable and just one that the complainant in the first instance shall be confined to a statement of its cause of action, leaving to the defendant to set up in his answer what his defence is and, if anything more than a denial of complainant's cause of action, imposing upon the defendant the burden of proving such defence.

Conforming itself to that rule the complainant would not, in the assertion or proof of its cause of action, bring up a single Federal question. The presentation of its cause of action would not show that it was one arising under the Constitution or laws of the United States.

The only way in which it might be claimed that a Federal question was presented would be in the complainant's statement of what the defence of defendants would be and complainant's answer to such defence. Under these circumstances the case is brought within the rule laid down in *Tennessee* v. *Union & Planters' Bank*, 152 U. S. 454. That case has been cited and approved many times since, among the latest being *Arkansas* v. *Kansas &c. Railroad*, 183 U. S. 185, where it was stated by Mr. Chief Justice Fuller, speaking for the court, at page 188, as follows:

"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." See also *Blackburn* v. *Portland &c. Co.*, 175 U. S. 571; *Shoshone &c. Co.* v. *Rutter*, 177 U. S. 505.

The test of the right of removal is that the case must be one over which the Circuit Court might have exercised original jurisdiction under section 1 of the act of March 3, 1887, as corrected by the act of August 13, 1888, 24 Stat. 552; 25 Stat. 433. The cases hold that to give the Circuit Court original jurisdiction the Federal question must appear necessarily in the statement of the plaintiff's cause of action, and not as mere allegations of the defence which the defendants intend to set up or which they rely upon. *Third Street Railway Company* v. *Lewis*, 173 U. S. 457.

It is urged, however, on the part of the complainant that its averments in regard to the jurisdiction of the court are necessary to be set forth as a part of its cause of action, and that they show that the appellees are questioning complainant's title and interfering with its enjoyment of its property right by asserting ownership to a portion of such claim of complainant based upon two government patents issued for the Rarus and Johnstown claims respectively, and although such assertion of ownership of the appellees is, as complainant avers, without legal foundation, yet, for reasons stated in the bill, the consideration of which necessitates an examination of Federal questions, the case is in effect one to quiet complainant's title or to prevent an interference with its rights and property, and complainant avers that the allegations of jurisdiction relate to its cause of action; that they state the controversy existing between the parties as to its subject matter, not as anticipatory of the defence, but as establishing the complainant's right to have its title quieted.

But it is plain that the suit is not in truth a suit to quiet title. There is a cause of action alleged that is not founded upon any such theory, to prove which it is not necessary or proper to go into the defendants' title or to anticipate their defence to the cause of action alleged by the complainant. What is thereafter said is for the purpose of showing jurisdiction in the Federal

court, not over an equitable cause of action in the nature of a bill to quiet title, but over a cause of action arising out of the laws of the United States; and the various mining laws of the United States are cited to show the truth of the assertion. It is also clear that jurisdiction in a Federal court cannot be predicated in this case upon an assertion that it is brought to prevent a multiplicity of suits. Even then the complainant's proof in the first instance would remain the same as already stated. The frequent trespasses, as alleged, of the defendants, by reason of which an equitable remedy by injunction is sought, might exist, and still it would not necessarily appear from the complainant's proof that the defendant's justification arose by reason of an alleged right under the Constitution or laws of the United States. That might appear in the defence, but would constitute no cause of action by complainant.

If, however, the bill is to be looked upon as one in the nature of a bill of peace or to quiet title, it is fatally defective in that aspect. There are two distinct kinds or classes of bills of peace, or bills to quiet title, the one brought for the purpose of establishing a general right between a single party and numerous persons claiming distinct and individual interests; the other for the purpose of quieting complainant's title to land against a single adverse claimant. In the second class the suit can be maintained by a party in possession against a single defendant ineffectually seeking to establish a legal title by repeated actions of ejectment, and in such case it is necessary to aver that the title of complainant has been established by at least one successful trial at law before equity will entertain jurisdiction. 3 Pom. Eq. Jur. 2d ed. § 1394, note 3, and 1 Pom. Eq. Jur. § 246.

This bill evidently would come under the second of these classes, and it is defective in not containing an averment that the complainant's title has been at least once successfully tried at law. On the contrary, it appears from the bill itself that an action at law has been commenced involving the same questions, but has not been tried.

It is also objected that, as a bill of peace or to quiet title, it is defective, because there is no allegation that the complainant was in possession, which is necessary in such a bill. If not in

possession, an action of ejectment would lie. The contention that under the Code of Montana a person not in possession may maintain an action to quiet title cannot prevail in a Federal court, unless it be alleged and proved that both parties are out of possession. *Whitehead* v. *Shattuck*, 138 U. S. 146.

The complainant fails, on both these grounds, to show that its bill is sufficient as one to quiet its title, and it therefore fails to show that the case is not covered by the *Union & Planters' Bank* case, 152 U. S. 454, and other cases, above cited. If the bill do not contain facts sufficient to constitute it a bill to quiet title, all the averments as to defendants' claims as defences, and complainant's answers thereto, are only material for the purpose of showing that the defence may disclose facts which will show a case arising out of the mining laws of the United States. But this would not constitute complainant's cause of action.

But assuming for this purpose (what is otherwise denied) that the bill is sufficient to confer jurisdiction, it is so only because of its averments as to the defence to be made by the defendants to the complainant's cause of action. When we come to examine their answer we find that defendants disclaim any right under the patent for the Rarus lode claim, and confine their alleged rights to such as exist by virtue of their ownership of the Johnstown lode claim only. Defendants' claim of right to follow the veins which they aver have their top or apices in the Johnstown patent is denied by complainant. It sets up in the bill that it denies and disputes the fact that the veins upon which defendants have mined in the claim of complainant, even if such veins had their apices in defendants' ground, (which complainant does not admit,) are yet such veins as can be followed on their dip beyond the lines of defendants' possessions into the ground of complainant, and complainant alleges that the veins are broken and intersected by faults in such a manner that the same cannot be traced or followed from the ground of defendants into that of the complainant, and therefore defendants have no right to enter upon the ground of complainant for the purpose of extracting ores therefrom by reason of their ownership of the apices of any veins within their ground. There is the further fact alleged that the veins, if any, which have their

apices in defendants' claim, do not pass in their strike through the end lines of defendants' claim. This alleged inability to follow the veins, assuming that they apex in the defendants' Johnstown patent, and the allegation as to the veins not passing through end lines, are mere questions of fact, depending upon the proof as to the truth of those averments. This does not constitute a question arising out of the Constitution or laws of the United States. The answer, by its denials and disclaimers as to what it sets up by way of defence, takes away a defence which might show the case as arising under such Constitution or laws.

Complainant contends, however, that if a case of jurisdiction is made out by the bill, the court is not ousted thereof by whatever is set up in the answer. In this case the contention cannot be maintained. The only foundation for the alleged jurisdiction consists of the averments of complainant relative to the contention of the defendants as to their defence. Now, if it appear from the answer of defendants that no such claim as is necessary to give the court jurisdiction is in fact made, but on the contrary is disclaimed and denied, then the basis of jurisdiction fails and the court cannot proceed. This is so held in *Robinson* v. *Anderson*, 121 U. S. 522, 524. In that case Mr. Chief Justice Waite, speaking for this court and delivering its opinion, said:

"Even if the complaint, standing by itself, made out a case of jurisdiction, which we do not decide, it was taken away as soon as the answers were in, because if there was jurisdiction at all it was by reason of the averments in the complaint as to what the defences against the title of the plaintiffs would be, and these were of no avail as soon as the answers were filed and it was made to appear that no such defences were relied on." See also *Crystal Springs &c. Co.* v. *City of Los Angeles*, 82 Fed. Rep. 114, affirmed 177 U. S. 169.

Jurisdiction in this class of cases must be based upon the fact that the case is one arising under the Constitution or laws of the United States. If it appear to be such in the plaintiff's pleading simply because of the allegations as to what the defences are on the part of the defendant, if when the answer

come in it is seen that no such defence in fact is set up or insisted upon, it is then seen that no such case exists as stated in the complaint, and no jurisdiction therefor exists to try questions which are not of a kind coming within the statute, and the court should then dismiss for want of jurisdiction.

The complainant also objected that the defendants did not properly or effectively disclaim or deny the allegations of the complainant's bill.

In relation to the evasive character of the answer it was stated by Circuit Judge Gilbert in 93 Fed. Rep. 274, in regard to this case, as follows:

"It is objected that the denials of the answer do not fully and explicitly traverse the new averments of the amended bill, but that they are denials only that the defendant relies in 'this action' upon the alleged rights and claims, and that the defendant disclaims only for the purpose of this present suit, without waiving its right to assert such claims in some other suit or proceeding hereafter. No exception, however, was taken to the answer for insufficiency. It was accepted as responding to the allegations of the amended bill. We think it was properly so accepted. If, in view of some possible other action affecting other interests, the defendant has attempted to reserve the privilege to assert other rights under the Rarus patent, it is immaterial to the present controversy. It is only to the rights asserted by the complainant in this suit that the defendant must make answer. It is required to make its defence to the allegations of the bill, and to show cause why the relief prayed for should not be decreed. It has answered as to its rights to extract the ores in question. It says that it claims nothing by virtue of the Rarus patent, but that it relies solely upon the fact that the ores it has taken belong to a vein which has its apex in the Johnstown lode claim, and in its strike passes through the end lines of said claim, and in its downward course extends beneath the surface of the complainant's claim. Upon such a bill and such an answer all questions concerning the right of the defendant to mine the ores in controversy are determinable, and the decree, if against the defendant, would be as effective to bar it from hereafter assert-

Counsel for Parties.

ing rights under the Rarus patent as would be a decree upon any other form of answer."

We concur in the views thus expressed, and the result of the whole case is that the complainant failed to show any jurisdiction in the Circuit Court to try this case, and the order of the Circuit Court dismissing complainant's bill and giving judgment for the defendant is, therefore,

Affirmed.

BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER MINING COMPANY *v.* MONTANA ORE PURCHASING COMPANY.

Error to the Circuit Court of the United States for the District of Montana.

No. 102. Argued December 3, 1902.—Decided February 23, 1903.

The same counsel appeared as in No. 103.

MR. JUSTICE PECKHAM delivered the opinion of the court.

This case arises upon demurrer to the complainant's complaint. The demurrer was sustained and the complaint dismissed, and judgment given for the defendants, and thereupon the circuit judge certified the question of jurisdiction to this court.

The action was brought to recover $500,000 damages sustained by the plaintiff in error by reason of the wrongful taking of ore of that value from the mining claim of the plaintiff in error. Substantially the same averments are made in the complaint as in the case which immediately precedes and the questions involved are the same, excepting that the former is a suit in equity and this is an action at law.

For the reasons stated in the opinion in No. 103, the judgment in this case is

Affirmed.

BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER MINING COMPANY *v.* CHILE GOLD MINING COMPANY.

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

No. 104. Argued December 3, 1902.—Decided February 23, 1903.

The same counsel appeared as in No. 103.

Syllabus.

MR. JUSTICE PECKHAM delivered the opinion of the court.

This case involves the same questions as that of the *Boston and Montana Consolidated Copper and Silver Mining Company* v. *The Montana Ore Purchasing Company &c.*, (No. 103,) *ante*, p. 632, the only point of difference between the two being that the Chile Gold Mining Company and the other defendants herein are sued as lessees of the Montana Ore Purchasing Company, they having as such lessees attempted to interfere with the complainant's right of property. The complaint was dismissed for want of jurisdiction.

For the reasons stated in the opinion in No. 103, this decree is also

Affirmed.

WINSLOW *v.* BALTIMORE AND OHIO RAILROAD COMPANY.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 125. Argued December 17, 18, 1902.—Decided February 23, 1903.

A lease containing a covenant to renew at its expiration with covenants, terms and conditions similar to those contained in the original lease, is fully carried out by one renewal without the insertion of another covenant to renew. Otherwise a perpetuity is provided for, and this the court will not presume in the absence of plain and peculiar language.

Where land is owned by three trustees under a trust requiring an exercise of the judgment and discretion of all the trustees and there is no evidence of authority for one of them to act alone, the execution of what purports to be a lease for five years by one of the trustees does not make a valid lease of the property, nor does it affect the share of the trustee executing it as in the case of ordinary joint tenants; and where all the trustees do not join in the execution of an instrument, the burden is on the grantee to prove the deaths of those not joining therein. Recognition or ratification by the other trustees cannot be assumed unless it is shown to have been founded upon full knowledge of all the facts.

The receipt of rent by the beneficiary under the trust directly from the tenant will not amount to a part performance of the contract in such manner as to make it binding upon the trustees not signing when it appears that the check received for such rent was not endorsed by the trus-

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tee and there is no proof that the beneficiary knew there was no binding lease in existence, but it does appear that subsequently rent was refused and only accepted under an agreement that the acceptance was without prejudice.

Where a lease contains an option to the lessee to purchase at a price named in the lease during the continuance thereof and the trustees making the lease have no general or absolute power of sale, specific performance of that portion of the contract should be denied.

Where a railroad company has built its line on land affected by such a lease, and the trustees have commenced an action to recover rent for the period of occupancy subsequent to the expiration of the lease, and also to recover possession of the property, there is no ground for an injunction against the prosecution of the action as to the recovery of the rent; it is proper, however, for this court to enjoin for a reasonable period, in order to permit condemnation proceedings to be instituted and prosecuted, that portion of the action which is an attempt to oust the railroad company from land upon which it has entered with a view to its purchase and constructed its road thereon for public purposes under the sanction of public authority and over which the public have rights which should not be obstructed or destroyed either by the company itself or by antagonistic parties claiming ownership as a result of a private agreement.

THE Court of Appeals of the District of Columbia, reversing the judgment of the Supreme Court of the District, (which dismissed the bill of the railroad company,) directed that court to give judgment in favor of the company, and from the judgment of the Court of Appeals an appeal to this court has been taken by the defendants below.

The company brought this suit to obtain a judgment declaring the validity of an alleged lease to it for five years from the first day of August, 1897, and to compel the specific performance of an alleged contract to sell to it the same land mentioned in the lease and lying in the city of Washington, owned by the defendants as substituted trustees under the will of the late Catherine Pearson, deceased, and to enjoin the defendants from continuing proceedings at law which they had commenced to obtain possession of the premises, and also to enjoin them from the prosecution of an action to recover damages for the use and occupation of the land by the railroad company. The facts are as follows:

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Catherine Pearson in her lifetime owned certain land, consisting of unimproved lots in the city of Washington, near the Baltimore and Ohio Railroad Company's depot, and lying on the line of its Metropolitan branch as subsequently constructed in that city. After the decease of Mrs. Pearson, and on June 30, 1868, her will was duly proved before the proper probate court in the District. In it she devised the premises to trustees for the sole and separate use of her daughter, Eliza W. Patterson—

"During the term of her natural life, and so that the same shall not be liable for the debts or subject to the control, contracts or engagements of her present or any after-taken husband; to permit her by herself, or her special attorney appointed in writing, to be signed by her, to receive the annual income and profits of the same for her own sole and separate use, her receipt or that of her attorney so appointed as aforesaid alone to be an acquittance to the person or persons charged with the payment of such income or any part of the same, and to the extent only therein expressed to have been paid—and if she please to occupy, possess and use for her own account, accommodation and convenience and that of her family any part of the property, real and personal, so held for her separate use and benefit, she shall be allowed to do so; and if at any time the said Eliza Patterson shall in writing, to be signed by her in the presence of and to be attested by a subscribing witness, desire the said Carlisle P. Patterson, William H. Philip and Walter S. Cox, or the survivors and survivor of them, to sell any part of the estate, real and personal, held by them for her separate use, for the purpose of changing the investment thereof, it shall be lawful for the said named trustees or the survivors or survivor of them to sell the same for such purpose only, and to transfer and convey the absolute estate in fee therein, to the purchaser thereof; to receive the proceeds of any and every such sale of the purchaser, who shall not be required to see to the application thereof; and to invest the same in such manner as the said Eliza W. Patterson may require; and such new investment shall be held by the said trustees for the same use, trusts and purposes, and with the

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same powers and authority of sale and reinvestment as is herein declared of and concerning the original trust, subject and separate estate.

"And after the death of the said Eliza W. Patterson the said named trustees and their successors shall hold the said trust, subject and separate estate—original and subsequently acquired by sale and reinvestment—for the use and benefit of any child, or children, of the said Eliza W. Patterson, and the issue of any child or children of the said Eliza who may die leaving issue in the lifetime of the said Eliza, and such issue shall take the share or portion of the said estate which their parent or parents would have taken had they survived the said Eliza. And if the said Eliza W. Patterson shall die without leaving a child or children, or issue of any child or children, living at the time of her death, the said trustees and their successors shall hold the said trust, subject and separate estate for my right heirs. And if it shall happen that either of the said trustees shall die, or become incapable of acting, or shall refuse to act in the execution of said trust, then and in every such case the continuing trustees or trustee shall from time to time nominate some other person or persons to be approved by the said Eliza W. Patterson to be trustee or trustees in the place and stead of the person or persons so dying, or becoming incapable or refusing to act, and shall convey and settle the said trust, subject and separate estate in such manner, that the same shall be legally vested in such continuing trustees or trustee, and such person or persons so named and appointed to that office for the same uses, trusts and purposes, and with the same power and authority of administration, sale and reinvestment as is hereinbefore declared of and concerning the said trusts, subject and estate, and the said new trustee or trustees shall have the same power to act in the premises in conjunction with the continuing trustee or trustees, and as survivors of them, as if they had been originally named trustee or trustees in the premises in this my last will and testament.

"I do hereby nominate and appoint Carlisle P. Patterson, William H. Philip and W. S. Cox to be the executors of this my last will and testament."

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In 1872 the trustees under Mrs. Pearson's will leased to the railroad company the land for five years, the lease containing a privilege to the railroad company to purchase such land during those five years on payment of $12,592. It also contained an agreement to renew the lease with the same covenants and privileges for another term of five years, or until the lessors were prepared to convey the premises as agreed in the lease with a perfect title in fee simple.

From the time of the first lease in 1872, and under various leases thereafter, the company occupied the land, constructed part of its branch line thereon, and paid rent therefor up to 1888. On January 30 of that year a lease was made, which was signed by the trustees and by the president of the railroad company, though not by Mrs. Patterson. By the terms of that lease the premises were rented for five years from August 1, 1887, at the same rent and with the same covenants as to renewal and for the sale of the lands as contained in the first lease of 1872. The company continued in the occupation of the premises under this lease for the five years mentioned therein. Upon October 17, 1892, the company still being in occupation of the land, another instrument was executed in the form of a lease, signed by but one of the trustees, and purporting to lease the land for five years from August 1, 1892, at the same rental as the lease of 1888, and with the same covenants to sell at the same price ($12,592,) and to renew the lease for five years, as contained in the lease of 1888. This lease was signed by Winslow, alone, he then being one of the substituted trustees, but Jay, another of the substituted trustees, did not sign it, and, so far as appears, never saw it. These two substituted trustees had been duly appointed prior to or in the year 1883. The former trustee, Judge Cox, had resigned in June, 1892, and it does not appear that his successor had then been appointed.

The company retained possession of the property from August 1, 1892, up to August 1, 1897, and paid the amount of money mentioned in the paper of 1892, being at the same rate that had been paid since 1872, and as was provided in the lease of 1888. About the first of August, 1897, questions arose as to the terms of future occupation of the land. The trustees re-

fused to execute any further lease, denied any obligation to renew it for any term, and said they preferred to sell, but refused to do so on the old terms, the land having in the meantime largely appreciated in value. In September, 1897, Mr. Winslow, in a letter to the company, said they were prepared to convey the property with a perfect title, and that they also preferred to execute such conveyance to any renewal of the lease. The company, however, prepared a lease, which provided for again leasing the land to it on the same terms for a period of five years, commencing on August 1, 1897, and this lease also contained a provision for a renewal for another five years, or until the lessors could convey the premises in fee simple to the company. This lease was never signed. Negotiations continued in regard to the matter, the company insisting it had the right to a renewal of the lease by virtue of the instrument dated August 1, 1892, while the trustees denied that contention, and though willing to sell, were not willing to do so at the price named in the former lease, as they said that the value of the land had increased from $12,592 to over $30,000. During these negotiations and disputes the company retained possession of the land, and on or about February 1, 1898, (the dispute and the negotiations between the trustees and the company being still unsettled,) in accordance with the custom which it had followed during the running of the various instruments since 1872, of paying the rent semi-annually on the first days of February and August as it accrued, it sent the money that would have been due for rent, (if a lease were then in existence,) in the form of a money order payable to the order of Mr. Winslow, trustee of Eliza W. Patterson, and enclosed it in a letter addressed to Mr. Winslow, in care of Fisher & Co., agents, who sent it to Mrs. Patterson, as Mr. Winslow was then absent in Nicaragua as secretary of the Canal Commission. This money order was received by Mrs. Patterson, who thereupon wrote the following letter, under date of February 5, 1898, to one of the officers of the company:

"DEAR SIR: I returned to you a few days ago the draft which you sent me for the rent of my property on First street,

Washington, by the railroad company of Balto. & Ohio of $377.77. The draft was made out to Mr. Francis Winslow, trustee, and I could not draw it, as Mr. Winslow in Nicaragua, and I could not send it so far away to him, fearing it might be lost. I therefore return it to you, with the request that you would sign it, as you always have done heretofore, Cox, Jay & Winslow, trustees. Judge Cox & Mr. Jay are both here, so that they can sign it at once and I can have the money. By giving prompt attention to this small matter of business you will greatly oblige,

"ELIZA W. PATTERSON."

The statement in this letter, that Judge Cox could sign the draft or order, was evidently a mistake, as his resignation had been accepted by the court years prior to the date of the letter.

The company afterwards sent back the draft, and, under some arrangement between Mrs. Patterson and Fisher & Co., which it does not appear was known by the trustees, but which was consented to by the company, the same was endorsed "Francis Winslow, trustee, by Thomas J. Fisher & Co., attorneys," and on such endorsement the money on the voucher was obtained from the company and received by Mrs. Patterson.

On August 1, 1898, the company sent a draft or money order for $377.77, the amount of rent which would have been due if there had been a valid lease in existence, the draft being sent to Mr. Winslow, trustee, which he declined to negotiate, and insisted that the rights of the company had been terminated by his notice prior to and in September, 1897, and that since that time the company had been occupying the property as tenants by sufferance.

This voucher, and those which succeeded it, and which were forwarded to Mr. Winslow, as trustee, and made payable to his order, were retained by him until January, 1900, when they were returned to the company and a check given for the aggregate amount under an agreement that its acceptance should be without prejudice to the rights of the respective parties and their claims relating to the leasing of the land or

the renewal of the lease, or to any question or matter connected therewith.

The dispute between the parties continued, as also did the negotiations in regard to a settlement thereof, until some time in March, 1900, when Mr. Winslow, Mr. Jay and the American Security and Trust Company, the substituted trustees, took proceedings against the company before a justice of the peace to obtain possession of the premises, based upon a notice to quit, given under the statute. Judgment in favor of the trustees was rendered in that case by default, and an appeal by the company, as provided for by law, was prosecuted, and was undetermined at the time of the commencement of this suit. On August 15, 1900, the substituted trustees also commenced an action against the company for the use and occupation of the premises from August 1, 1897, to April 16, 1900, claiming $6500, with interest from the last-named date. Soon thereafter the company commenced this suit asking for a judgment that the company was entitled to a lease from August 1, 1897, for five years, and also for a judgment for specific performance of the contract to sell, and obtained an injunction restraining the prosecution of both of the proceedings above mentioned.

The trial court held that there had been no valid contract for a sale, and that there was then no valid lease in existence such as was required to be proved before a court of equity would decree specific performance. The court expressed no opinion as to the effect of continued occupation after the expiration of any lease under the facts in the case with reference to the amount of the rental to be paid. That was a matter which it was held could be determined on the law side of the court. A decree was therefore entered dismissing the bill and dissolving the injunction which had been granted.

The Court of Appeals reversed the judgment of the trial court, 18 App. D. C. 438, and remanded the case, and in its opinion it was stated as follows:

"In view of what has been said, we are of opinion that, under the provisions of the lease of 1892, executed by Francis Winslow, trustee, for and on behalf of the life tenant, Mrs. Eliza W. Patterson, the appellant was and is entitled to one

renewal of such lease for the term of five years from and after the first day of August, 1897, upon the terms and conditions of said lease as to the rents to be paid therefor; and that during the continuance of such term no suit for the dispossession of the appellant can be maintained. We are, also, of opinion that, for the time subsequent to the determination of said renewed lease for which the appellant shall require the use and occupation of said land, the appellant is entitled, and it is its duty to acquire the right to such use and occupation, under the exercise of the right of eminent domain conferred upon it by the act of Congress, by the ascertainment of the value of such use and occupation, and payment to the owners of the land of the just compensation so to be ascertained. And the bill of complaint in this cause may be retained for the purpose of such ascertainment of value and just compensation. It follows that the decree of the Supreme Court of the District of Columbia dissolving the injunction granted in this cause and dismissing the bill of complaint, must be reversed, with costs; and that the cause will be remanded to that court, with directions to vacate said decree, to restore the injunction and make the same perpetual, and for such further and other proceedings as may be just and proper, according to law and in conformity with this opinion. And it is so ordered."

Mr. William G. Johnson for appellants.

Mr. M. J. Colbert and *Mr. George E. Hamilton* for appellee.

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

It is quite plain that a lease containing a covenant to renew at its expiration with similar covenants, terms and conditions contained in the original lease is fully carried out by one renewal without the insertion of another covenant to renew. Otherwise a perpetuity is provided for. *Piggot* v. *Mason*, (1829) 1 Paige's Ch. 412; *Carr* v. *Ellison*, (1838) 20 Wend. 178;

Syms v. *Mayor*, (1887) 105 N. Y. 153; *Cunningham* v. *Pattee*, (1868) 99 Massachusetts, 248; Taylor's Landlord & Tenant, 8th ed. §§ 333, 334.

From the ordinary covenant to renew, a perpetuity will not be regarded as created. There must be some peculiar and plain language before it will be assumed that the parties intended to create it.

There is no question of the validity of the lease of 1888. It was for five years from the first of August of the year 1887, with a covenant of renewal, and that covenant would have been satisfied by giving a lease in 1892 for five years, up to August, 1897, without any covenant therein for a further renewal. In fact, however, the lease was not legally renewed in 1892, because the paper of that year was signed by one trustee only. In our opinion his signature did not make a valid lease. It required the signatures of all the trustees. A deed of land executed by one trustee does not convey his share as in the case of ordinary joint tenants. So where a deed of land was executed by two out of three trustees, the burden is upon the purchaser to prove the third trustee was dead. 1 Perry on Trusts, (2d ed.), sec. 411; 2 Perry on Trusts, secs. 499, 502; 2 Story Eq. Juris. (12th ed.) sec. 1280; *Brennan* v. *Willson*, 71 N. Y. 502–507.

The authorities cited by the counsel for the company, to the effect that one of several trustees may, when so authorized by his associates, act with regard to the execution of some portions of the trust, as their agent, and that when not previously so authorized a subsequent ratification of his act by his associates may bind them all, do not embrace the facts in this case. There is no evidence of any authority to one trustee to sign a lease. The granting of a lease was an important and material act in the way of carrying out the trust under the will, requiring an exercise of the judgment and discretion of all the trustees. It was therefore necessary for them all to act in order to make a valid instrument.

That one of several trustees can be entrusted by his associates with the transaction of the business of the trust may be, under certain circumstances, conceded, but those circumstances will not justify the doing of an act by one trustee on

his own responsibility which is of a nature to require the deliberate discretion and judgment of all the trustees. In the case of a lease of property, such as is presented herein, the signatures of all are necessary to the validity of the paper.

The case cited of *Insurance Company* v. *Chase*, 5 Wall. 509, relates to an insurance effected by one of several trustees, and the question was whether the policy covered the individual interest of the person taking out the insurance or his interest as a trustee; if the former, it was void because he had no interest as an individual, and the policy was therefore one in the nature of a wager. The court in the course of the opinion remarked:

"It is true, that in the administration of the trust, where there is more than one trustee, all must concur, but the entire body can direct one of their number to transact business, which it may be inconvenient for the others to perform, and the acts of the one thus authorized, are the acts of all, and binding on all. The trustee thus acting is to be considered the agent of all the trustees, and not as an individual trustee. If, within the scope of his agency, he procures an insurance, it is for the other trustees, as well as himself. If he does it without authority, still it is a valid contract, which the underwriter cannot dispute, if his co-trustees subsequently ratify it. In fact, so liberal is the rule on this subject, that where a part owner of property effects an insurance for himself and others, without previous authority, the act is sufficiently ratified, where suit is brought on the policy in their names."

The facts in this case do not bring it within the principle mentioned, and it is clear that to render the lease originally valid it must have been signed by all the trustees. Without it the instrument as a lease for five years was void under the statute of frauds. Comp. Stat. D. C. 231, sec. 4.

It is contended that the act of one of the trustees in signing the lease was subsequently ratified by the other by a recognition of its existence by long continued silence, if not by an express ratification. But an express ratification would consist of the signature of the other trustee to the paper, and of that there is no pretense. A ratification of an invalid instrument of this nature by recognition, we do not understand. The instrument

was void under the statute of frauds, because of the lack of those signatures which could alone render it valid as a lease for five years. Recognition could not take the place of the absent signature. Whether the conduct of the trustees, or of Mrs. Patterson, amounted to such a part performance of an invalid contract as would take the place of the otherwise necessary signatures is another question. It is difficult to see how there could be any technical ratification of this instrument without a signing thereof by the other trustee.

But assuming that something in the nature of a ratification might be based upon subsequent recognition, yet such recognition or ratification must be shown to have been founded upon a full knowledge of all the facts. There is no evidence of that kind in the case; none that the other trustee even knew of the existence either of the written paper of 1892 or that it contained a covenant to renew at all for any time. The possession by the company and the payment of rent were provided for by the covenant to renew contained in the lease of 1888, and hence there was a justification for that possession and for the payment of the money, which was entirely compatible with the non-existence of any written lease from 1892, or of any covenant to again renew for five years from August 1, 1897. This possession and payment cannot therefore be used as a basis for the presumption of knowledge on the part of the trustee of the existence of the so-called lease of 1892 or of the covenant contained therein.

Regarding the asserted part performance of the alleged contract of lease in 1892, or of the covenant contained in that lease, we think there was none such as to justify the contention that the covenant to renew in 1897 for five years was thereby so far rendered valid as to call for its recognition and enforcement. In this case there was reason, as we have said, without reference to any assumed part performance of, and aside from the alleged covenants in, the paper of 1892, for the possession by the company and for the taking of the rent of the land by the trustees up to 1897. This reason was based upon the obligation which existed under the valid lease of 1888. The remaining in possession from 1892 to 1897 and the payment of the money

need not, therefore, be referred to as a part performance of the invalid contract of lease and renewal contained in the paper of 1892. Without any reference to any paper of that character, possession and payment of rent were proper and amounted to nothing more than an acknowledgment of the obligations provided for in the before mentioned lease of 1888.

Acts of part performance which will take a case out of the statute must be referable solely to the contract. *Williams* v. *Morris*, 95 U. S. 444, 457; *Phillips* v. *Thompson*, 1 Johns. Chy. 131; *Byrne* v. *Romaine*, 2 Edwards Chy. 445; *Jervis* v. *Smith*, Hoff. Chy. 470; *Lord* v. *Underdunck*, 1 Sand. Chy. 46; *Wolfe* v. *Frost*, 4 Sand. Chy. 72.

And again, specific performance of a void contract will not be decreed because of part performance, unless fraud and injustice would be done if the contract were held inoperative. *Purcell* v. *Miner*, 4 Wall. 513; *Williams* v. *Morris*, 95 U. S. 444. Such would not be the result here.

Nor can the receipt of rent in February, 1898, by Mrs. Patterson, under the circumstances detailed in the foregoing statement of facts, amount to such part performance of the invalid covenant to renew as to authorize its enforcement. Neither trustee received the rent. The signing of the name of Mr. Winslow, one of the trustees, on the back of the draft from the company in February, 1898, was without the knowledge of or authority from such trustee, although the endorsement was made in perfect good faith by Fisher & Co., and the money was paid to and received by Mrs. Patterson. That signing was not a part performance of the contract of lease on the part of the trustees or either of them.

Mr. Winslow was at this time absent in Nicarauga. There is no proof in the case that Mrs. Patterson knew there was no valid covenant in existence for the granting of a further five-year lease from August 1, 1897. Her receipt of the money as beneficiary under the will of her mother would not bind the trustees to renew a lease under an invalid covenant to do so, or operate as a part performance of that invalid covenant. Especially would this be so where, as in this case, there had for months, or ever since August 1, 1897, been a substantial refusal

by the trustees to renew on the old basis or to sell at the old price, and negotiations were still in progress between the trustees and the company relative to the terms of a continued occupation of the lands. The trustees and the company were alone the parties who could agree upon a lease, and while negotiations were pending on the subject, the receipt, unknown at the time to the trustees, of the money by Mrs. Patterson, as stated, could not be equivalent to a part performance by the trustees or either of them, of an alleged covenant to renew contained in the paper of 1892, the validity of which was at the same time denied.

Subsequently when drafts were received by the trustees they were not cashed, and when they were finally paid it was under a specific agreement that the payment should not in any way affect the situation between the parties. Hence the receipt of these drafts constituted no part performance upon which to base the recognition of the covenant to renew from August 1, 1897, which was repudiated as invalid by the trustees and which was in fact invalid.

Upon the question of the alleged contract to sell, after carefully examining all the facts, we agree with the Court of Appeals in holding that the company was not entitled to a decree for the specific performance of that alleged contract, and, therefore, specific relief of that nature should be denied. Under the terms of the will it is plain the trustees had no general and absolute power of sale, and the conditions upon which it could be exercised did not exist.

Regarding the other relief, we are of opinion that the portion of the injunction prohibiting the further prosecution of the trustees' action to recover the rental value of the land occupied by the company from August 1, 1897, up to the time mentioned in the complaint in that action, should be dissolved.

As to that part of the injunction which prohibits the further prosecution of the proceedings to recover the possession of the land there is more to be said. We agree with the Court of Appeals upon the subject of ousting the company from such possession. That court held that the evidence showed the company entered upon the use and occupation of the property

in controversy with a view to its purchase when it could properly be effected. It was understood by all the parties what the character of the use and occupation of the land by the company was intended to be. Subsequently to its obtaining possession of the land in 1872 the railroad company constructed what is known as its Metropolitan branch, part of a highway between Washington city, the adjoining States and the West. This highway is not a merely private enterprise nor a matter of purely private concern. It is a public road, constructed for public purposes, under the sanction of the public authority, and over which the public have rights which cannot be permitted to be obstructed, much less destroyed, either by the company itself, to which the franchise has been granted as a public trust to construct and operate this road, or by antagonistic parties claiming the ownership of the land upon which it has been permitted to enter without previous payment therefor, or as the result of any private controversy between the railroad company and such parties. The company having entered by the license of the lessors, an action at law for the dispossession of the railroad company cannot be maintained if the company is willing to make compensation for its use and occupation of the land.

These views of the Court of Appeals we concur in, but we do not say that the company can take proceedings in this suit to condemn the land. The proceeding to condemn is otherwise provided for by law, and although the appellants contend that the company has no power under the law to do so, we are of opinion that by virtue of the various acts passed relative to the company, it has such power in this city with reference to this land. The court ought to keep in force for a reasonable time, say six months, that portion of the injunction prohibiting the trustees from continuing their proceeding to dispossess the company from the land, in order to enable it to condemn such land in proper proceedings for that purpose, which cannot be taken in the present suit. If more time is needed, the trial court may upon application, after notice, extend the time as to it may seem reasonably necessary. If no proceedings to condemn are taken within six months from the issuing of the

mandate from this court to the court below, then the injunction should be wholly dissolved.

Our judgment, therefore, will be to reverse the judgment of the Court of Appeals of the District of Columbia, with directions to remand the case to the Supreme Court of the District, with directions to that court to refuse specific performance of the alleged contract to sell the land, and to deny enforcement of any alleged covenant to lease the same from August 1, 1897, and also to dissolve that portion of the injunction enjoining the trustees from prosecuting their suit to recover the rental value of the land from August 1, 1897, and to retain that portion which enjoins further action on the part of the trustees to oust the company from the land, for six months from the date of the mandate of this court, and for further time, if the Supreme Court of the District shall be of opinion that it is proper. If no proceedings are taken to condemn the land within six months, then the injunction shall be dissolved. When the condemnation proceedings are concluded, or if not taken within the time stated, then, at the end of that time, application may be made to the trial court, and such judgment then entered as shall be consistent with this opinion, and with such provision in regard to costs incurred, subsequent to the mandate from this court, as shall to that court seem proper.

Reversed and remanded with directions to reverse the decree below and remand the case for further proceedings in conformity to this opinion.

CHICAGO THEOLOGICAL SEMINARY *v.* ILLINOIS.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

Nos. 140, 265. Argued and submitted January 20, 21, 1902.—Decided February 23, 1903.

Section 5 of the act of 1855 of the General Assembly of Illinois incorporating the plaintiff provides, "That the property of whatever kind or description belonging or appertaining to said seminary shall be forever free and exempt from all taxation for all purposes whatever." Section 2 provides, "That the seminary shall be located in or near the city of Chicago." Property of the incorporation other than the seminary buildings was taxed under the general taxing law of 1872. The Supreme Court of Illinois construed the statute of 1855 as meaning that the exemption was limited to property used in immediate connection with the seminary and did not refer to other property held by the institution for investment, although the income was used solely for school purposes.

Held, that as the rule of the Supreme Court of Illinois in construing an act exempting property from taxation under legislative property is that the exemption must be plainly and unmistakably granted and cannot exist by implication only—a doubt being fatal to the claim—and as the construction placed on the act is not such an unnatural, strained or unreasonable construction as shows it to be erroneous, this court will affirm the judgment even though it might be otherwise construed so as to affect a total exemption.

The act incorporating the seminary also provided that "It shall be deemed a public act and be construed liberally in all courts for the purposes therein expressed."

Held, that such provision should not be construed as a complete overthrow of the canon of construction adopted by the Supreme Court of Illinois in regard to exemption of property from taxation.

THESE cases, between the same parties, come here by writs of error to the Supreme Court of Illinois, which held certain property of the plaintiff in error not exempt from taxation. 189 Illinois, 439.

The case No. 140 involves taxes for the year 1899, and No. 265 for the year 1900.

The plaintiff in error claims exemption under its charter passed in 1855, entitled "An act to incorporate the Chicago

Theological Seminary," a copy of which is set forth in the margin.[1]

The Supreme Court of the State held that the provision granting the exemption from taxation in section 5 referred only to property used in connection with the seminary and did not include other property which might be owned, rented or held by the seminary as an investment, although the income thereof was used solely for school purposes. Accordingly property which was not so included and which is involved in these actions was taxed under the general taxing law of the State enacted in

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[1] SEC. 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly*, That Stephen Peet, (and twenty-three other persons, named in the act,) and their successors be and they hereby are created a body politic and corporate, to be styled "The Board of Directors of Chicago Theological Seminary," and by that name and style to remain and have perpetual succession, with full power to sue and be sued, plead and be impleaded; to acquire, hold and convey property, real and personal; to have and use a common seal; to alter and renew the same at pleasure; to make and alter a constitution and by-laws for the conducting and government of said institution, and fully to do whatever may be necessary to carry out the object of this act of incorporation.

SEC. 2. That the seminary shall be located in or near the city of Chicago. The object shall be to furnish instruction and the means of education to young men preparing for the gospel ministry, and the institution shall be equally open to all denominations of Christians for this purpose.

SEC. 3. That the board of directors shall consist of twenty-four members, nine of whom shall constitute a quorum for the transaction of business. The directors shall hereafter be elected in accordance with the provisions of the constitution under which they act, and shall hold their office until their successors are appointed.

SEC. 4. The board of directors shall have power to appoint an executive committee and such agents as they may deem necessary and such officers, professors and teachers as the government and instruction of the seminary may require, and prescribe their duties, to remove any of them for sufficient reasons, and prescribe and direct the course of studies to be pursued in the institution; also, to confer such degrees as are consistent with the object of the institution.

SEC. 5. That the property, of whatever kind or description, belonging or appertaining to said seminary, shall be forever free and exempt from all taxation for all purposes whatsoever.

SEC. 6. This act to take effect and be in force from and after its passage, and it shall be deemed a public act, and shall be construed liberally in all courts for the purposes therein expressed.

1872. In enforcing the taxation of the outside property of plaintiff in error under that act, it is claimed that the obligation of the contract contained in the act of 1855, the charter of the plaintiff in error, was impaired.

It is conceded that the charter of incorporation was duly accepted, and that acting on the faith of its provision the plaintiff in error has acquired by donation and purchase a part of the real estate on which the taxes in question were levied, and in addition has expended in the erection and purchase of buildings on the real estate owned by it an amount exceeding $200,000, and a large number of students have been and are being instructed by it in pursuance of its charter. The pieces of real estate upon which the taxes in these cases were levied were acquired by the plaintiff in error by gift or purchase, and were held by it to promote the objects for which it was incorporated, and the rentals received from such real estate are used for those purposes, although the property is not used in immediate connection with the seminary.

Mr. John J. Herrick, with whom *Mr. David Fales* was on the brief, for plaintiff in error.

I. This court has jurisdiction to review the judgment of the state court, and, in the exercise of that jurisdiction, has power to determine the question as to the construction to be given to the provision in the charter of plaintiff in error exempting its property from taxation. *University* v. *People*, 99 U. S. 309; *Asylum* v. *New Orleans*, 105 U. S. 362; *State Bank of Ohio* v. *Knoop*, 16 How. 378; *Home of the Friendless* v. *Rouse*, 8 Wall. 430; *The Washington University* v. *Rouse*, 8 Wall. 439; *Wilmington Railroad* v. *Reid*, 13 Wall. 266; *Humphrey* v. *Pegues*, 16 Wall. 244; *Pacific Railroad Co.* v. *Maguire*, 20 Wall. 36.

The determination of the Federal question presented, involves the decision of the question as to the proper construction of the exemption provision of the charter of plaintiff in error, and this court will, therefore, determine for itself, in the exercise of its appellate and revisory jurisdiction, the question of construction presented, irrespective of the decision made by the state Supreme Court. *Jefferson County Bank* v. *Skelly*,

1 Black, 443; *Bridge Proprietors* v. *Hoboken*, 1 Wall. 144; *Delmar* v. *Insurance Co.*, 14 Wall. 668; *Houston & Texas Central R. R. Co.* v. *Texas*, 177 U. S. 66; *Columbia Water Power Co.* v. *Columbia Electric Street Railway Co.*, 172 U. S. 475, 487.

In both the cases before the court, the state Supreme Court expressly decided the Federal question involved adversely to the plaintiff in error, and such decision was necessary to the judgment rendered.

Although its two previous decisions, (*People* v. *Chicago Theological Seminary*, 174 Illinois, 177, and *Chicago Theological Seminary* v. *People*, 189 Illinois, 439,) were referred to by the state Supreme Court, in the opinion in No. 265, as controlling on the question, the judgments in those cases were not in the record, and the decisions were referred to, not as *res adjudicata* but only as previous decisions of the same court on the particular question, binding on it under the doctrine of *stare decisis* It also appears from the opinion in *People* v. *Chicago Theological Seminary*, 174 Illinois, 177, that the particular case was reversed and remanded by the state Supreme Court "for further proceedings in accordance with the views herein (in the opinion) expressed," and for that reason, not being a final judgment, it was not subject to review by this court. *Brown* v. *Baxter*, 146 U. S. 619; *Rice* v. *Sanger*, 144 U. S. 197; *Johnson* v. *Keith*, 117 U. S. 199.

It also appears from the record in No. 140 that both at the time of the judgment in the County Court and of the decision by the state Supreme Court in No. 265, a writ of error had been sued out from this court to review the judgment, and the case was pending in this court.

II. The provision in the charter of plaintiff in error exempted from taxation the property in question, and, for that reason, the law under which the taxes were levied, impaired the obligation of the contract and the judgment should, therefore, be reversed.

The sole question presented by the decision of the state Supreme Court is: To what did the words "said seminary" in the exemption provision refer—to the institution incorporated

by the act, or to the place where instruction was to be given—the school buildings and grounds?

The words, "said seminary," in the exemption provision, referred to the corporation created by the act, and designated in the title as the Chicago Theological Seminary, and not to the school buildings and grounds, as held by the state Supreme Court, and this being so, the exemption provision indisputably exempted from taxation the property against which the judgments were rendered.

The first mention of "the seminary" in the act is in the title, "an act to incorporate the Chicago Theological Seminary." It is well settled that the title of an act may properly be referred to to ascertain the legislative intention. There can be no room for question that this first mention of the "Chicago Theological Seminary" referred to the institution incorporated by the act, and not "to the property," the school buildings, etc. *Holy Trinity Church* v. *United States*, 143 U. S. 457; *Smythe* v. *Fiske*, 23 Wall. 374; *Heirs of Emerson* v. *Hall*, 13 Pet. 409, at 413; *Bell* v. *Mayor*, 105 N. Y. 144; *President, etc., of St. Vincent's College* v. *Schaefer*, 104 Missouri, 261.

Similar corporate names are found in all the earlier charters; those creating railroad corporations, incorporated banks, etc., as well as charitable institutions, such as "the President and Board of Directors of," etc. But it was not therefore necessary or customary to always use the cumbersome full name when the corporation was referred to. Angel and Ames on Corporations, sec. 99.

On the contrary, instead of using the full corporate name, it was natural and appropriate to use the words "said seminary" to designate the incorporated institution referred to in the title of the act as "The Chicago Theological Seminary," and again in section 4 as "the seminary." *Marine Bank of Baltimore* v. *Bias*, 4 Har. & J. (Md.) 338; *Nobles* v. *Hamline University*, 46 Minnesota, 316.

This use of the shorter designation instead of the full, formal name, is illustrated in the title of the act; in the proceedings in the County Court, in the return of delinquent property and in the opinion of the Supreme Court of Illinois, in No. 140. In

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fact, that the general words "the Chicago Theological Seminary" were appropriate to designate the incorporated institution is recognized in the very name itself, "the Board of Directors of the Chicago Theological Seminary."

The seminary buildings had no board of directors. The Board of Directors referred to in this corporate name as "the Board of Directors of the Chicago Theological Seminary," were the directors of the incorporated institution created by the act and referred to in its title.

The precise word "located" is frequently used in charters and other statutes as applied to corporations. At common law it was an attribute of every corporation that it had a locality. Its locality was the place where it carried on its operations—where it did business. Angel and Ames on Corporations, sec. 103; *Sangamon & Morgan R. R. Co.* v. *County of Morgan*, 14 Illinois, 163; *Bristol* v. *Chicago & Aurora R. R. Co.*, 15 Illinois, 436; *Charlotte National Bank* v. *Morgan*, 132 U. S. 141.

Our construction of the exemption provision is forcibly confirmed by the adjudicated cases, in which like provisions were construed, and it was held, on grounds peculiarly pertinent to the case before the court, that similar general words, "belonging to" and "the college," "the institution," "the asylum," etc., referred to the corporation created by the act, and that all the property of the corporation was, therefore, exempt. *County of Nobles* v. *Hamline University*, 46 Minnesota, 316; *Asylum* v. *New Orleans*, 105 U. S. 362; *President and Faculty of St. Vincent's College* v. *Schaefer*, 104 Missouri, 261.

If the meaning is given to the words "said seminary," and "belonging to," in the exemption provision, which the state Supreme Court found it necessary to give to them to reach the conclusion it did, the result is that the provision, as a whole, is given an unreasonable, and, in fact, absurd meaning. It is familiar law that in giving construction to a statute an absurd or unreasonable meaning will not be attributed to the legislature if the language admits of any other construction. *Lau Ow Bew* v. *United States*, 144 U. S. 47, 59; *People ex rel.* v. *Gaulter*, 149 Illinois, 39.

The decision of the state Supreme Court, in both cases, is based on a construction of its previous decision in 174 Illinois, which gives to the exemption provision a meaning wholly different from the meaning given it by the same court in its opinion in 174 Illinois, and one which it is impossible to derive from the words of the provision.

The construction of the state Supreme Court is based wholly on the erroneous view that, instead of construing the provision of exemption in a fair and liberal sense, so as to promote the charitable object for which the corporation was formed, it should be construed narrowly by applying the rules of strict construction, and that the express provision of the charter that "this act shall be construed liberally in all courts," should be given a construction contrary to its plain intention, which would in fact render it wholly meaningless.

The rule of strict construction does not apply to exemptions in favor of charitable corporations, but such exemptions should be construed liberally, to promote the charitable object for which the corporation was created. *Yale University* v. *New Haven*, 71 Connecticut, 316; *Phillips Academy* v. *Andover*, 175 Massachusetts, 118; *Association for Colored Orphans* v. *Mayor*, 104 N. Y. 581; *People* v. *Sayles*, 50 N. Y. Supp. 8; *Long Branch Firemen's Relief Ass'n* v. *Johnson*, 62 N. J. L. 625; *Sisters of Charity* v. *Township of Chatham*, 52 N. J. L. 373; *State* v. *Fisk University*, 87 Tennessee, 233; *M. E. Church* v. *Hinton*, 92 Tennessee, 88.

Whatever the rule in the absence of an express provision in the charter—whether the rule of strict construction applies to an exemption provision in the charter of a charitable corporation or not—the legislature of Illinois, in granting this charter, expressed its intention (in section 6) not to leave the question open, by making the express provision on the subject, that the act should be "construed liberally in all courts." For cases in which under similar statutory provisions, either abolishing the rule of strict construction as to all statutes, or providing that it shall not apply to particular statutes, the rule of liberal construction was held to apply in giving a construction to criminal and penal statutes, see *Commonwealth* v. *Davis*, 12 Bush,

(Kentucky), 240; *People* v. *Soto*, 49 California, 67; *Hankins* v. *People*, 106 Illinois, 628; *Maxwell* v. *People*, 158 Illinois, 248; *Peterson* v. *Currier*, 62 Illinois App. 163.

For a case in which a similar charter provision was referred to as requiring a liberal construction of a provision in the charter of Brown University, exempting its property from taxation, see *Brown University* v. *Granger*, 19 R. I. 704.

The decision of the state Supreme Court is not only based on the erroneous view that the rules of strict construction apply, but on the wholly erroneous assumption, that under these rules "if the language (of a provision) is capable of a broader, or more restricted meaning, the latter must be adopted." Such is not the effect of the rules of strict construction, even on the assumption that they apply, but on the contrary, the words used, if "capable of" two meanings, should be given their primary and ordinary meaning in the absence of other language showing that a different meaning was intended, and such meaning as will best express the legislative intention.

The rule of strict construction does not require that if the language used "admits of two meanings," either one or the other of these two meanings "must be" adopted, or in any way change or override the other rules of construction, including the well settled rule that, where a word admits of two meanings, the natural and ordinary meaning should be adopted, in the absence of other provisions showing a contrary intention. Endlich on the Interpretation of Statutes, secs. 337, 466; *United States* v. *Winn*, 3 Summ. 209 (quoted with approval in Black on Interpretation of Statutes, p. 290); *United States* v. *Hartwell*, 6 Wall. 385, at p. 395; *Meadowcraft* v. *People*, 163 Illinois, 56, at p. 70.

The construction of plaintiff in error does not "extend the meaning of the words used, by implication," as erroneously held by the state Supreme Court.

It is proper to refer to other charters, passed by the same legislature, as an aid in ascertaining the meaning it was intended the words used in the particular provision should have. *Vane* v. *Newcombe*, 132 U. S. 220; 23 Am. & Eng. Ency. of Law, under the title "Statutes," p. 311; *Chase* v. *Lord* 77 N. Y. 1,

18; *Middleton* v. *Greeson*, 106 Indiana, 18; *Levering* v. *Philadelphia, Germantown & Norristown R. R. Co.*, 8 Watts & S. 459 at 463; *Reiche* v. *Smythe*, 13 Wall. 162.

On reference to the different charters passed by the same legislature, containing provisions for exemption from taxation, it will be seen that there are many passed at different sessions which provide by specific language for a partial exemption from taxation identical (or substantially so) with the exemption the state court holds was intended by the provision in question.

Mr. Edwin W. Sims, *Mr. Frank L. Shepard* and *Mr. William F. Struckmann*, for defendant in error, contended in their brief:

I. This court has no jurisdiction to review the judgment of the state court.

One of the grounds for the judgment of the state court is *res judicata*, and this is not a Federal question.

It is well settled law that where there are two grounds for the judgment of a state court, only one of which involves a Federal question and the other is broad enough to maintain a judgment sought to be reviewed, this court will not look into the Federal question but will dismiss the writ of error. *Bacon* v. *Texas*, 163 U. S. 207; *Eustis* v. *Bolles*, 150 U. S. 361; *Beaupre* v. *Noyes*, 138 U. S. 397; *Rutland* v. *Central Vermont R. R.*, 159 U. S. 630; *Gillis* v. *Stinchfield*, 159 U. S. 658; *Seneca Nation* v. *Christy*, 162 U. S. 283.

The state court did not give effect to and enforce a new rule of exemption established by the revenue act of 1872. It was not necessary to determine whether the act of 1872 changed the rule of exemption; the state court did not pass on any such question. *Knox* v. *Exchange Bank*, 12 Wallace, 383; *Railroad Co.* v. *Rock*, 4 Wallace, 177–181; *St. Paul, etc., Ry. Co.* v. *Todd Co.*, 142 U. S. 282; *Railroad Co.* v. *McClure*, 10 Wallace, 511–515.

II. The charter of plaintiff in error exempts only such property owned by it as is a part of or connected with its seminary located in the city of Chicago.

The exemption clause of the charter has been construed by

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the Supreme Court of Illinois in *Theological Seminary* v. *People*, 174 Illinois, 177, and this is *res judicata*.

It is the law of the State of Illinois, as it is the law adhered to by the Supreme Court of the United States, that all laws exempting property from taxation must be strictly construed. It is not to be presumed that the legislature intended to exempt property from taxation; that intention must appear affirmatively, and will be strictly construed.

As to the question of strict construction of contracts exempting property from taxation when there is involved a question of the alleged impairment of that contract contrary to the provisions of the Federal Constitution, reference is had to the following adjudicated cases: *Wilmington & Weldon R. R.* v. *Alsbrook*, 146 U. S. 279–293; *Delaware Railroad Tax*, 18 Wall. 206; *Farrington* v. *Tennessee*, 95 U. S. 679; *Ohio Life Ins. Co.* v. *Debolt*, 16 Howard, 416; *Railroad* v. *Dennis*, 116 U. S. 668; *Providence Bank* v. *Beattie*, 4 Peters, 514; *Charles River Bridge* v. *Warren Bridge*, 11 Peters, 544; *Chenango Bridge Co.* v. *Binghamton Bridge Co.*, 2 Wall. 51; *University* v. *The People*, 99 U. S. 309.

The Supreme Court of Illinois has consistently adhered to the same rule. *First M. E. Church of Chicago* v. *City*, 26 Illinois, 482; *Montgomery* v. *Wyman*, 130 Illinois, 17; *Theological Seminary* v. *The People*, 101 Illinois, 518; *In re Swigert*, 123 Illinois, 267.

The title of an act furnishes little aid in the construction of the provisions of the act itself, and can only be referred to when there is a doubt as to the meaning of the act itself, and when necessary to refer to the title that fact of itself is sufficient to defeat the claim of exemption. *Hadden* v. *The Collector*, 5 Wall. 107–110; *Yazoo R. R. Co.* v. *Thomas*, 132 U. S. 174–188.

A reasonable and consistent construction of the exemption clause of the charter of plaintiff in error calls for the following definitions of the words used, viz., the verb "belong" is to be defined as "to be a part of or connected with," as is given in Webster's International Dictionary. And the word "seminary" is to be defined, according to the same authority, as "a

place of education, as a school of a high grade, an academy, college or university."

Construing the exemption clause of the charter in this manner it will exempt all property owned by the corporation which is a part of or connected with the school, which the corporation has located and is maintaining in the city of Chicago.

MR. JUSTICE PECKHAM, after making the foregoing statement of facts, delivered the opinion of the court.

The Supreme Court of Illinois, by its decision in this case, has but followed its prior decision upon the same question between these parties, reported in 174 Illlnois, 177, decided in 1898. It there held that the exemption was limited to property used in immediate connection with the seminary, and did not include such property as is involved in these cases, which was not property used in immediate connection with the seminary, but was other property separate and apart therefrom, and owned or rented or held by the seminary as an investment, the income from which was nevertheless used solely for school purposes.

The rule of construction followed by the Supreme Court of Illinois in construing this act exempting property from taxation is so well established by this and other courts as scarcely to need the citation of authorities. One or two, however, from this court may be given. *Tucker* v. *Ferguson*, 22 Wall. 527; *New Orleans City & Lake Railroad* v. *New Orleans*, 143 U. S. 192, 195; *Bank of Commerce* v. *Tennessee*, 161 U. S. 134, 146.

The rule is that, in claims for exemption from taxation under legislative authority, the exemption must be plainly and unmistakably granted; it cannot exist by implication only; a doubt is fatal to the claim.

The reasoning of the Supreme Court of Illinois, 174 Illinois, *supra*, in refusing the exemption claimed, so far as relates to the property not connected with the seminary, is best stated in the language of the opinion of that court. After stating the rule of construction, as above mentioned, the court said (p. 181):

"If, however, taking the express words of the act, and with-

out extending their meaning by implication, they may be held to include all property belonging or appertaining to the 'seminary' mentioned in the second section, or to include all the property belonging or appertaining to the corporation, and there is reasonable ground for doubt which was intended by the legislature, that doubt must be resolved in favor of the State. In other words, if the language is capable of a broad or more restricted meaning, the latter must be adopted. The second section of the charter mentioning certain property to be located in or near the city of Chicago, and which is denominated 'the seminary,' we think the words in the fifth section, 'said seminary,' refer to that particular property, and to so hold seems to do no more than to give the language of the two sections their literal and ordinarily understood meaning. To say, as is contended by appellee, that 'said seminary' was intended to mean the corporation, is to extend the meaning of those words by implication, which is not permissible.

"It is said that the only entity mentioned in the charter capable of owning property is the corporation, and therefore it could not have been intended that property belonging or appertaining to the seminary was meant by section 5. We think this position is based upon a too limited meaning of the words 'belonging or appertaining,' as here used. Of course, if the language of section 5 had been that the property, of whatever kind or description, *owned* by the said seminary shall be forever free from all taxation, etc., or if, as counsel seem to assume, the words 'belonging or appertaining' here necessarily meant ownership of the property, then there would be force in this argument of counsel. It is undoubtedly true that the word 'belonging' may mean ownership, and very often does. But that is not its only meaning. Webster's International Dictionary defines it: '2. That which is connected with a principal or greater thing; an appendage; an appurtenance.' He also defines the word 'pertain' as meaning, 'to belong or pertain, whether by right of nature, appointment or custom; to relate, as "things pertaining to life."' Manifestly, the purpose of section 5 was to exempt property owned by the corporasion, but it does not follow that the intention was to include in

that exemption all property owned by it used for purposes of the school."

We think there is force in this reasoning, and we are disposed to concur in the result arrived at.

It is contended by counsel for plaintiff in error that the words "said seminary," contained in section 5 of the charter, referred to the corporation created by the act and not to the school buildings and grounds, and that, therefore, the exemption necessarily exempted from taxation all the property against which the judgments below were rendered.

Here are two different constructions of the exemption clause, each of which might be maintained with some plausibility. That view which limits the range of the exemption to property used in immediate connection with the seminary might seem to many to be the correct one, while in the opinion of others, the broader claim of total exemption would be the best founded. The judges of the Supreme Court of Illinois have unanimously taken the former view, while counsel for the plaintiff in error very strongly and very ably has taken and maintained the other. We can ourselves see that a construction either way would not be clearly erroneous, or, at any rate, either construction would not be so obviously erroneous as to leave no doubt upon the question. In such cases we think the rule as to the construction of statutes of exemption from taxation should be applied, and as there may be room for reasonable doubt whether a total or only a partial exemption was meant, the partial exemption should alone be recognized. Great weight ought also to be attached to the decision of a state court regarding questions of taxation or exemption therefrom under the constitution or laws of its own State. As is said in *Wilson* v. *Standefer*, 184 U. S. 399, 412:

"Especial respect should be had to such decisions when the dispute arises out of general laws of a State, regulating its exercise of the taxing power, or relating to the State's disposition of its public lands. In such cases it is frequently necessary to recur to the history and situation of the country in order to ascertain the reason as well as the meaning of the laws, and knowledge of such particulars will most likely be found in the

tribunals whose special function is to expound and interpret the state enactments."

We acknowledge and affirm the principle that this court in this class of cases must decide upon its own responsibility as to the existence and meaning of the contract, but in arriving at such meaning in a case like this, the decision of the state court is entitled to exercise marked influence upon the question this court is called upon to decide, and where it cannot be said that the decision is in itself unreasonable or in violation of the plain language of the statute, we ought, in cases engendering a fair doubt, to follow the state court in its interpretation of the statutes of its own State.

The case of *University* v. *People*, 99 U. S. 309, is no authority for the construction contended for by the plaintiff in error. In that case the charter provided "That all property, of whatever kind or description, belonging to or owned by said corporation, shall be forever free from taxation for any and all purposes." The difference between the two provisions is intrinsic and material. What is lacking in the case at bar is present in the case cited, namely, a provision exempting all the property "owned by said corporation." In the case before us it is the property "belonging or appertaining to said seminary," and the word "belonging" is construed by the Supreme Court as not synonymous with "owned by," nor is the word "seminary" regarded in this connection as the equivalent of the word "corporation."

But the plaintiff in error contends that however correct the construction adopted by the state courts might be if founded upon general rules of construction pertaining to claims for exemption from taxation, it is plainly erroneous under the provision of section 6 of the charter, providing that the act "shall be deemed a public act, and shall be construed liberally in all courts for the purposes therein expressed."

To adopt the construction contended for by the plaintiff in error would call for a reversal of the rules otherwise prevailing in and governing claims for exemption from taxation. But it is nevertheless urged that if in any way the language of exemption can by a liberal construction be said to cover the whole

property owned by the corporation, such construction must be adopted by reason of the provisions contained in section 6. We think this is claiming entirely too much for the language of that section.

As is therein stated, the act must be construed liberally for the purposes therein expressed. What are those purposes? In this respect the word "purposes" in section 6 is synonymous with the word "object" in section 2, as we think, and we find that the object or purpose is stated in section 2, "To furnish instruction and the means of education to young men preparing for the gospel ministry, and the institution shall be equally open to all denominations of Christians for this purpose." It is for the accomplishment of this purpose or object that the act is to be liberally construed. If a question should arise regarding the meaning of the language "to furnish instruction or the means of education," and how far the words should be extended and what they should include, the words should be liberally construed as provided for in the sixth section, because to furnish instruction or the means of education is the expressed purpose or object of the act. So in regard to the powers of the board of directors as provided for in the charter; those powers should be liberally construed for the furtherance of the object stated in the charter. To do so would not violate any well-settled rule of construction and would nevertheless be sufficient in case of doubt to turn the decision in favor of a construction more liberal in its nature than might otherwise be properly adopted. But we do not think it was intended by the language of the sixth section to provide a complete overthrow of a canon of construction such as the one in question, which has obtained for so many years and has been so universally and so strictly adopted and adhered to by the courts of the whole country. We again resort to the language of the opinion of the Illinois court for the presentation of its own reasons for the somewhat strict construction of the exemption clause adopted by it. After stating that it should not be presumed that the legislature intended to exempt property from taxation, but such intention must appear affirmatively, and it will be strictly construed, and

that any ambiguities must operate against the parties who claim the exemption, the court (p. 181) continued:

"That laws exempting property from taxation are generally subject to these rules of construction is not seriously questioned, but counsel for appellee say said rules do not apply here, because by section 6 of the charter it is provided that the act 'shall be construed liberally in all courts for the purposes therein expressed.' We do not think this language was intended to or could be held to change or qualify the general rules of construction applicable to the section under consideration. Here the very question to be determined is, what is the purpose expressed in that section? And to say that liberal rules of construction must, under section 6, be applied in favor of the contention that all property belonging or appertaining to the corporation is exempt would be to beg the whole question. In determining what purpose is expressed in the section, resort must necessarily be had to the general rules for considering such laws. When that purpose is ascertained, liberal rules of construction, if necessary, are to be resorted to, to give effect to such purpose. . . . We think this case turns upon whether or not the words 'said seminary,' used in the fifth clause, should be given the meaning of 'said corporation.' In our opinion the application of the rules of construction above referred to do not warrant such a construction."

This is not such an unnatural, strained or unreasonable construction of the act as shows it to be erroneous, and while it might be otherwise construed so as to effect a total exemption, we are not prepared to hold that the state court so clearly erred as to call upon us to reverse its determination. We, therefore, adopt, though we admit with some hesitation, the views of the state court, which lead to an affirmance of the judgments.

Affirmed.

MR. JUSTICE WHITE, with whom concur MR. JUSTICE BROWN and MR. JUSTICE HOLMES, dissenting.

The court, in stating the facts, refers to a previous opinion of

the Supreme Court of the State of Illinois, announced in a case between the same parties, involving a question of law like unto that which arises on this record. In that case, however, the Supreme Court of Illinois but reversed and remanded for a new trial, and hence the judgment was not final and not susceptible of being brought to this court to test the issues involving the constitutional right under the contract. After the record in the previous case reached the trial court the case was not further pressed by the plaintiff for such length of time as to cause it, under the Illinois statute, to be in effect abandoned. The question here now for review is not, therefore, controlled by the thing adjudged arising from the previous judgment. The court does not now decide to the contrary, but the matter is referred to by me lest a misconception be caused by the mention made of the subject in the opinion of the court.

I do not dispute the elementary proposition that exemptions from taxation are *stricti juris*, that is, not to be extended by implication. This, however, does not imply that a contract exemption is to be disregarded, simply because it may be possible for a subtle mind to suggest a possible doubt as to the exemption, however conjectural may be the assumption on which the doubt is rested. Nor does the rule mean that, because it is deemed that a particular contract exemption was an unwise one for the public interest, therefore the meaning of the contract is to be disregarded by a court in order to relieve the public from the burdens arising from the obligations of the contract. The rule, as understood by me, is this only, that the language from which an exemption is claimed to arise is to receive a literal construction, and is not to be extended so as to embrace a right not within the clear meaning of the contract. I do not, moreover, dispute the principle that where the contract which is asserted to have been impaired arises from a state law, it is the duty of the court, in case of doubt as to the meaning of the contract, to adopt the construction given to it by the state court. This rule does not imply that because the state court has decided against the contract right, therefore there is doubt and, hence, the resulting duty to affirm the action of the state court. If such were the case, the power of this court to review the action

of state courts concerning the alleged impairing of the obligations of a contract would be at an end wherever the contract took its origin in state law. The significance of the rule is this, that if, fairly considering the issue of contract arising from the state law and its alleged impairment, this court, in the exercise of its independent judgment, remains in doubt, the decision below construing the state law will be allowed to solve the doubt, and thus secure the affirmance of the judgment. The obligation on me as a member of the court is identical with that which rests on the court.

Coming to apply these rules to the case in hand, my mind has no doubt whatever as to the true meaning of the contract. Let me state what the contract is, in order to show why I do not doubt on the subject.

The first section of the act from which the contract arises creates a corporation for a religious and benevolent purpose, under the name of "The Board of Directors of the Chicago Theological Seminary." The second section provides as follows:

"That the seminary shall be located in or near the city of Chicago. The object shall be to furnish instruction and the means of education to young men preparing for the gospel ministry, and the institution shall be equally open to all denominations of Christians for this purpose."

The third section provides for the board of directors; the fourth relates to the powers of the board; and the fifth is as follows:

"That the property, of whatever kind or description, belonging or appertaining to said seminary, shall be forever free and exempt from all taxation for all purposes whatsoever."

The sixth section provides when the act shall take effect, and declares that it "shall be construed liberally in all courts for the purposes therein expressed." Does the exemption covered by the fifth section relate to the Theological Seminary, the corporation created by the act, or does it apply only to a building to be erected by the corporation? is the question at issue.

It is admitted that if the exemption applies to the Theolog-

ical Seminary, the contract has been impaired and the judgment should be reversed. It is now decided that the exemption relates only to the seminary, that is, to the buildings, and, therefore, the judgment is affirmed. Now, giving to the words of exemption their natural meaning, and construing them strictly, there does not seem to me to be a doubt that they relate to the Theological Seminary incorporated by the act, and referred to as such in its first section. My mind does not enable me to see what else the words can mean. If it was intended merely to exempt a building or buildings, language could have been employed which would have aptly conveyed such meaning. Instead of doing this, the language used in the act—as I understand it—excludes such construction, since it declares that the exemption shall relate to the property "belonging or appertaining to said seminary;" the word "belonging" clearly referring to the corporation created by the act and on whom was conferred the power to own and possess property. Emphasis is added to this view when the scope of the exemption is borne in mind; since it embraces not a mere building or its accessories, but the property of whatever kind or description, thus describing and referring to the power to own and acquire property of every kind and description, real or personal, conferred on the Theological Seminary by the act. It is further to be observed, as throwing light upon the subject, that in the fourth section, immediately preceding the grant of the exemption, the particular buildings or place of learning to be constructed by the Theological Seminary is twice referred to as the institution, thus showing that the legislative mind had immediately before it when the exemption was granted the distinction between the Theological Seminary as a corporate entity to which the exemption was granted, and the institution to be constructed and supported by the Theological Seminary. I cannot, moreover, conceive that the words of the statute, immediately following the section granting the exemption, commanding that the provisions of the contract "shall be liberally construed in all courts for the purposes therein expressed," should have what seems to me their plain meaning, disregarded, by causing them to refer, not to the act as a whole,

but to some particular provision in it. I find nothing in the language which lends itself to such a view.

I therefore dissent.

I am authorized to say that MR. JUSTICE BROWN and MR. JUSTICE HOLMES concur in this dissent.

INDIANA MANUFACTURING COMPANY *v.* KOEHNE.

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

No. 177. Argued October 24, 1902.—Decided February 23, 1903.

Certain taxes having been assessed against complainant, an Indiana corporation, pursuant to a law of Indiana upon the value of letters patent owned by it, an action was brought against the collector to enjoin the collection of such taxes, the appeal to equity being founded on the grounds: (1) That the assessment constituted a cloud upon title; (2) that there was no adequate remedy at law; (3) that a multiplicity of suits would be avoided; (4) that it would prevent irreparable injury to complainant. *Held:*

(1) That in the absence of any statute making the assessment upon shares a lien on the real estate and of any averment that the company owned any real estate, no cloud upon title is made apparent.

(2) That the statute of Indiana provides a proceeding for the recovery of taxes wrongfully assessed, and as it does not appear that such statute has been repealed, an adequate remedy at law exists.

(3) That the procedure under such statute would not involve a multiplicity of suits.

(4) That where a plain and adequate remedy is given for the recovery of taxes illegally assessed no irreparable injury can be inferred from general statements in the absence of the averment of specific facts from which the court can see that irreparable injury would be a natural and probable result.

Equitable jurisdiction of a Federal court cannot be maintained except on a ground recognized by the Federal courts, and the mere fact that the action involved the taxing of letters patent does not give the Federal courts jurisdiction in equity where no such recognized ground appears.

THE case is stated in the opinion of the court.

Mr. Chester Bradford for appellant. *Mr. F. Winter* was on the brief.

Mr. William L. Taylor for appellees. *Mr. Merrill Moores* and *Mr. Cassius C. Hadley* were on the brief.

Mr. Justice Peckham delivered the opinion of the court.

The complainant herein has appealed from the decree of the Circuit Court of the United States for the District of Indiana, which dismissed its bill. It was a suit in equity to enjoin the collection of taxes. It appears that certain taxes had been assessed against the complainant, a corporation of Indiana, and process had issued for the collection thereof which included all the years from 1893 to 1898, (both years inclusive,) and also for the year 1900 ; that such taxes, or the greater part of them, were (as averred) illegal, because they were, among other things, assessed pursuant to a law of the State of Indiana, upon the value of certain letters patent of the United States, for inventions, owned by the corporation, that such state law was in violation of the Federal Constitution, and was therefore void ; that the part of the taxes which complainant admitted to be legal it had paid, and notwithstanding such payment the tax officials were threatening to levy upon its property to collect the residue.

By reference to the general tax laws of Indiana of 1891 it will be seen that it is therein provided that each district assessor shall, commencing in April in each year, inquire of each person concerning his property, while as to corporations their officers are to deliver to the assessor a sworn statement of the property of such corporation in detail, and among the items to be reported is the " market value, or if no market value, then the actual value of the shares of stock " of the company. The statement made by the corporation to the assessor is by him delivered to the county auditor, who in turn delivers it to a board of review, which values and assesses the capital stock and all franchises and other property of the company. This board of review makes the original assessment. The corporation so assessed, or any taxpayer, may appeal from the assessment upon the corporation, to the state board of tax commissioners. Sec-

tion 125 of the tax law of 1891, as amended by the act of 1895, p. 79. Upon such appeal the state board decides as to the assessment, and may, if it decides that the property is assessable, make such an assessment, increasing or reducing it, as it may decide proper, and the auditor then certifies such changes in valuation made by the state board to the several counties, and provision is made for the collection of the same by the proper officials. By the act of 1853, Rev. Stat. of Indiana, ed. of 1881, secs. 5813, 5814; Rev. Stat. ed. of 1894, secs. 7915, 7916, provision is made that any person or corporation may appear before the board of commissioners of any county and establish by proper proof that such person or corporation has paid taxes which were wrongfully assessed against him or it, and it is thereby made the duty of the board to order the amount so proved to have been paid, to be refunded to the payer from the county treasury so far as the same was assessed and paid for county taxes. Where a portion of the amount so wrongfully assessed and paid shall have been paid for state purposes and shall have been paid into the state treasury, it is made the duty of the board to certify to the auditor of the State the amount so proved to have been wrongfully paid, and the auditor is directed to audit the same as a claim against the treasury, and the treasurer of the State is directed to pay the same out of any moneys not otherwise appropriated.

The further steps to be taken in case the authorities refuse, upon such application, to pay over the taxes wrongfully assessed, are adverted to hereafter.

The bill states that defendant Koehne is the treasurer of Marion County, where these taxes were assessed, and he is by law also the treasurer of the city of Indianapolis, and as the treasurer of the county of Marion and the city of Indianapolis he collects for them all taxes and makes distribution thereof, and also collects all taxes due the State from Marion County, and in fact he collected all taxes assessed for all purposes against appellant. There is no other treasurer of the city of Indianapolis, and the money for that city collected by tax remains in the hands of the county treasurer of the county of Marion until it is expended, the county treasurer thus retaining all taxes

in his hands belonging both to the county of Marion and the city of Indianapolis until those taxes are properly expended.

Other averments were contained in the bill, but none material to the case as we view it, and upon all the facts complainant comes into a court of equity for the purpose of enjoining the collection of the alleged illegal portion of these taxes which had been imposed on the letters patent mentioned, and it was claimed by the complainants that, excluding the value of such patents, the shares had no value above the indebtedness of the corporation, and therefore it was wholly exempt or exempt with the exception of a very small sum from taxation, and that sum it had paid.

The foundation of this appeal to equity, as averred by complainant, was (1) on the ground that the assessment constitutes a cloud upon title; (2) that there is no adequate remedy at law; (3) that a multiplicity of suits is avoided; and (4) that it prevents irreparable injury to complainant.

It has long been the settled doctrine of the Federal courts that the mere illegality of a tax, or the mere fact that a law upon which the tax is founded is unconstitutional, does not entitle a party to relief by injunction against proceedings under the law, but it must appear that the party has no adequate remedy by the ordinary processes of the law, or that the case falls under some other recognized head of equity jurisdiction, such as multiplicity of suits, irreparable injury, etc. See *Cruickshank* v. *Bidwell*, 176 U. S. 73, 80, where many of the authorities upon this subject are collected in the opinion which was delivered by Mr. Chief Justice Fuller. See also *Pittsburgh &c. Railway* v. *Board of Public Works*, 172 U. S. 32, where Mr. Justice Gray dealt with the subject quite fully. We must judge the case at bar under the rules laid down by the authorities cited.

We take the grounds in the order above stated.

(1.) In regard to the averment that the assessment constitutes a cloud upon title.

It is the ordinary case of an assessment upon the value of the capital stock of a corporation and its franchises. Our attention has not been called to any statute which makes the

assessment upon the shares a lien upon the real estate of a corporation, and if it were such lien, there is no averment that the company owned any real estate; hence, no cloud upon its title is made apparent, even if there could be a cloud cast upon the real estate merely by reason of an ordinary assessment, such as is made in this case. There is nothing in the objection.

(2.) There is the averment that the complainant is without any adequate remedy at law, and one of the grounds for such averment is stated in the bill as follows:

"And your orator further shows unto your honors that the defendant Armin C. Koehne is the treasurer of Marion County, Indiana, whose duty it is as such treasurer, under the laws of the State of Indiana, to receive and collect taxes for the said State of Indiana, and also for Marion County in said State, and also for the city of Indianapolis within said county, and also for the school board of the city of Indianapolis, Indiana. That a large proportion of the amounts received and collected by the said defendant as treasurer, as aforesaid, are for and on account of and for the benefit of the State of Indiana, a sovereign State, and one of the United States, and that under the Constitution and laws no suit can be maintained against the State of Indiana. That it is a part of the duty of the said defendant Armin C. Koehne, as aforesaid, to pay over into the treasury of the State of Indiana a large portion of the amounts so received and collected by him as taxes, and, therefore, that if said amounts are so collected and received and paid over, they will become mixed with the moneys of the said State, and thus be beyond reach of any process of this or any court, and irrecoverable, and that great and irreparable injury will result to your orator if such unlawful collection and paying over as aforesaid be not prevented."

The averment that a portion of the tax is to be paid to the State of Indiana and that the State cannot be sued is answered by the remedy provided by the law of Indiana for such a case. Under that law the complainant was bound in the first place to appeal from the decision of the board of review, which included the letters patent in the value of the shares of stock of the corporation. Such appeal would, by the provision of the

statute, be taken to the state board of tax commissioners, and if that board affirmed the decision of the board of review the corporation could pay the tax and immediately file a petition with the board of county commissioners to recover it back under the act of 1853, above referred to. An appeal is given from the refusal of that board to repay the tax. 3 Rev. Stat. Indiana, sec. 7917, ed. of 1894; *Shultz* v. *Board &c.*, 20 Indiana, 178; *State* v. *Board &c.*, 63 Indiana, 497, 501. This appeal would be taken to the Circuit Court, and by the general law an appeal lies from that court to either the appellate court or the Supreme Court of the State, according to the amount involved.

The fact that a portion of the money raised by the tax might be for state purposes is not material under the provisions of the act of 1853, *supra*. The courts of Indiana have held that the filing of a petition with the board of commissioners under that act was in itself notice to the county, and if thereafter the money was paid over to the State or to the city, it was no defence; that when the board of commissioners received notice, the county became a trustee for the claimant, and in the event the money was awarded to him the county was bound to refund the same, and a payment by the county authorities after such notice, or the commencement of an action, to the state or town authorities, was at its own risk and peril. The taxpayer could not be required to pursue such funds into the hands of the parties to whom they were wrongfully distributed, and the fact that the taxes were voluntarily paid constituted no defence under the statute cited. *Du Bois* v. *Board &c.*, 10 Ind. App. 347. It is also said in the above case that if the money had been paid over when the petition was filed, the statute provided that the commissioners should give the claimant a certificate to the state auditor for the repayment by the state treasurer, when taxes had been paid that were wrongfully assessed for state purposes. There was nothing, therefore, to prevent the complainant herein from paying the tax and immediately filing its petition with the board of county commissioners to have it refunded, and the payment to the State (if made) was immaterial and constituted no defence. The tax could be recovered back notwithstanding the payment to the State.

Opinion of the Court.

It has been urged, however, that the act of 1853 was not broad enough, inasmuch as it required that the taxes should have been wrongfully assessed and that mere illegality would not be sufficient in order to recover under the statute, citing *Commissioners &c.* v. *Armstrong*, 91 Indiana, 528. That case simply held that where property was legally taxable and the tax assessed was justly and equitably due, if through some irregularity or default it had not been legally assessed, it could not be said to have been "wrongfully" assessed within the meaning of the statute of 1853 and recoverable back under that statute; but that very case shows that if property which was not taxable was assessed and the money paid, such assessment was "wrongful" within the statute of 1853, being made upon property not liable to taxation, and therefore it could not be said that any tax so assessed was justly or equitably due.

In this case, if the complainant be right in its averment that the letters patent owned by it are property exempt from taxation by or under state authority, then such property is "wrongfully" assessed within that statute, and proceedings could be taken to recover back the tax so paid, upon complying with the provisions of the law of Indiana. *Donch* v. *Board of Commissioners*, 4 Ind. App. 374, decided in 1891, subsequently to the decision in 91 Indiana, *supra*; *Du Bois* v. *Board &c.*, 4 Ind. App. 138, and again reported, reaffirming the same doctrine, in 10 Ind. App. 347; *Newsom* v. *Board &c.*, 92 Indiana, 229; *Board &c.* v. *Senn*, 117 Indiana, 410.

Complainant could set forth in its petition to the county commissioners its claim under the Federal Constitution for the exemption of the letters patent owned by it from taxation, and it could make the same claim if the board refused to admit it, in its action in the Circuit Court and on appeal from an adverse decision in that court to either the appellate court or the Supreme Court of the State, and if either court to which the appeal was taken and before which the question was raised decided it adversely to the complainant, a writ of error would lie from this court and the subject could be reviewed and finally decided here. There is no doubt, therefore, of the adequacy of the remedy at law, provided the act of 1853 is in force.

It is argued that the act of 1853 is repealed by the general tax act of 1891 under which these assessments were made.

There is no specific repeal of the statute contained in the general tax act, and repeals by implication are concededly not favored. It would have to appear that the two acts were inconsistent with each other, or that the act of 1891 was a complete system in itself, and was really meant to cover the cases, and the method of recovery which was to be pursued, in matters of wrongful taxation, and to exclude all remedy except such as that act provided. This, we think, cannot be maintained.

And again, the act is contained in the edition of the Revised Statutes of Indiana, of the revision of 1894, by Burns, and is reproduced therein as sections 7915 and 7916, and it is not stated in that edition that there had been any claim that those sections, constituting the act of 1853, had ever been repealed, but on the contrary the act is treated as a valid and subsisting part of the Revised Statutes of the State. The sections are also cited in *Donch* v. *Board &c.*, *supra*, as sections 5813 and 5814 of the edition of the Revised Statutes of 1881, and there is no remark in that case that they had since been repealed by the act of 1891. See also *Du Bois* v. *Board &c.*, 4 Ind. App. *supra*. True, the questions discussed in these cases arose prior to the passage of the general tax act of 1891, but these decisions were made subsequently to the passage of that act, and the sections were not referred to in any of those opinions as if they had been repealed by the general tax act and were only applicable to cases happening before the passage of that act.

We see nothing in *Hart* v. *Smith*, recently decided by the Supreme Court of Indiana and reported in 64 N. E. Rep. 661, to support the claim of the repeal of the act of 1853. It was there held that, upon the mere matter of a valuation of the shares of the stock, the decision of the state board of tax commissioners was not reviewable by the court. Upon which counsel argues that, "if we could go before the county commissioners with a claim after the state board had passed upon it, then inevitably we could also go to the Circuit Court of Marion County, and thence to the appellate or Supreme Court of the State, according to the amount involved. Therefore, if the Supreme

Court 'has no power to review' the decisions of the state board of tax commissioners, then the county commissioners have no power to begin a course of proceedings which must inevitably, at its conclusion, come to a tribunal which has declared that it 'has no power to review,' " and it is therefore urged that if the court has no power to review this determination of the tax commissioners, it is because the act of 1853 has been repealed. But the decision of the tax commissioners upon a mere question of judgment as to the value of shares of stock is a decision of a question of fact upon which the judgment of the board would be final, even if the act of 1853 were not repealed. In that very case, however, the court did review a decision of the board as to valuation when it appeared that, in arriving at such decision, the board included property, as part of the value of the shares, which the law did not permit to be taxed, and an assessment for valuation thus arrived at was held illegal, and as it could not be determined how much of the total assessment depended upon the valuation of the property not taxable, the court held the whole assessment illegal, and gave judgment accordingly. We are not convinced that the act of 1853 has been repealed, and the remedy thereby provided being sufficient, we hold complainant had an adequate remedy at law.

(3.) The further ground of jurisdiction in equity, that it prevents a multiplicity of suits, cannot be sustained.

The remedy provided by the State of Indiana is in truth but one proceeding, and all the complainant had to do in order to avail itself of such remedy was to appear before the board of review when the assessment was first made and object to it, and if its objections were overruled, then to appeal to the state board, and if that board also overruled the objection, then to pay the tax. The proceeding thereafter is one suit commenced by application to the board of county commissioners to recover the tax wrongfully assessed, and if the claim were refused, then the party might go into the Circuit Court, and if refused again, it had the further right of appeal, and if still refused, it then had the right of review by writ of error from this court, if any Federal question had been decided against it. The right to come into a Federal court and invoke its

equitable jurisdiction in order to avoid the remedy thus provided by the State cannot, under these facts, be founded upon the alleged prevention of a multiplicity of suits. The claim on such ground is without foundation.

(4.) Nor is there any irreparable injury as averred.

There is a general averment that to enforce the tax by distraint and sale of complainant's property would result in irreparable injury, but there is no fact stated from which it could be inferred that irreparable injury would be likely to result from such enforcement, and where a plain and adequate remedy to recover the amount is given by statute no such irreparable injury can be inferred. Some averment of specific facts must be made from which the court can see that irreparable injury would be a natural and probable result. Nothing of the sort is shown here. Indeed, the averment of irreparable injury seems to be founded upon the other averment, that if the tax got into its treasury the State could not be sued to recover it back, and hence the necessity of appealing to equity. But the answer to that has already been given by referring to the act of 1853, which fully provides for such contingency.

The claim is also made that complainant had the right under section 1 of the act of 1888, 25 Stat. 433, chap. 866, amending the act of 1875, to resort to the Federal court on the ground that the case arose under the Constitution or laws of the United States, inasmuch as it was claimed that under such Constitution the letters patent were not taxable by or under state authority. But the right to resort to a Federal court as a court of equity must be founded upon some ground of equitable jurisdiction recognized by the Federal courts, and when, as here, no such ground appears, jurisdiction in equity cannot be maintained.

Whether the value of letters patent is in any way taxable by or under state authority, we have no occasion to now decide, because the question is not before us. We simply show a plain and adequate remedy at law, after paying the tax, to recover it back, in an action or proceeding where the question as to the exemption of this kind of property from taxation can be raised,

and if not admitted by the state court, it can be reviewed here on writ of error.

We see no ground for interfering with the judgment of the court below, and it is, therefore,

Affirmed.

HYATT *v.* PEOPLE &c. *ex rel.* CORKRAN.

ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

No. 492. Argued January 7, 1903.—Decided February 23, 1903.

A person, for whose delivery a demand has been made by executive authority of one State upon the executive authority of another State under clause 2 of section 2 of Article IV of the Constitution, and who shows conclusively, and upon conceded facts, that he was not within the demanding State at the time stated in the indictment, nor at any time when the acts were, if ever, committed, is not a fugitive from justice within the meaning of Rev. Stat. sec. 5278, and the Federal statute upon the subject of interstate extradition and rendition.

If the governor of the State upon whom the demand is made issues a warrant for the apprehension and delivery of such a person, the warrant is but *prima facie* sufficient to hold the accused, and it is open to him, on *habeas corpus* proceedings, to show that the charge upon which his delivery is demanded assumes that he was absent from the demanding State at the time the crime alleged was, if ever, committed.

THIS proceeding by *habeas corpus* was commenced by the relator, defendant in error, to obtain his discharge from imprisonment by the plaintiff in error, the chief of police in the city of Albany, State of New York, who held the relator by means of a warrant issued in extradition proceedings by the governor of New York. The justice of the Supreme Court of New York, to whom the petition for the writ was addressed, and also upon appeal, the Appellate Division of the Supreme Court of New York, refused to grant the relator's discharge, but the Court of Appeals reversed their orders and discharged him. 172 N. Y. 176. A writ of error has been taken from this court to review the latter judgment.

Statement of the Case.

The relator stated in his petition for the writ that he was arrested and detained by virtue of a warrant of the governor of New York, granted on a requisition from the governor of Tennessee, reciting that relator had been indicted in that State for the crime of grand larceny and false pretenses, and that he was a fugitive from the justice of that State; that the warrant under which he was held showed that the crimes with which he was charged were committed in Tennessee, and the relator stated that nowhere did it appear in the papers that he was personally present within the State of Tennessee at the time the alleged crimes were stated to have been committed; that the governor had no jurisdiction to issue his warrant in that it did not appear before him that the relator was a fugitive from the justice of the State of Tennessee, or had fled therefrom; that it did not appear that there was any evidence that relator was personally or continuously present in Tennessee when the crimes were alleged to have been committed; that it appeared on the face of the indictments accompanying the requisition that no crime under the laws of Tennessee was charged or had been committed. Upon this petition the writ was issued and served.

The return of the defendant in error, the chief of police, was to the effect that the relator was held by virtue of a warrant of the governor of New York, and a copy of it was annexed.

The governor's warrant reads as follows:

"STATE OF NEW YORK,
"*Executive Chamber.*

"The governor of the State of New York to the chief of police, Albany, N. Y., and the sheriffs, undersheriffs and other officers of and in the several cities and counties of this State authorized by subdivision 1 of section 827 of the Code of Criminal Procedure to execute this warrant:

"It having been represented to me by the governor of the State of Tennessee that Charles E. Corkran stands charged in that State with having committed therein, in the county of Davidson, the crimes of larceny and false pretenses, which the said governor certifies to be crimes, under the laws of the said State, and that the said Charles E. Corkran has fled therefrom

and taken refuge in the State of New York; and the said governor of the State of Tennessee having, pursuant to the Constitution and laws of the United States, demanded of me that I cause the said Charles E. Corkran to be arrested and delivered to Vernon Sharpe, who is duly authorized to receive him into his custody and convey him back to the said State of Tennessee; which said demand is accompanied by copies of indictment and other documents duly certified by the said governor of the State of Tennessee to be authentic and duly authenticated and charging the said Charles E. Corkran with having committed the said crimes and fled from the said State and taken refuge in the State of New York;

"You are hereby required to arrest and secure the said Charles E. Corkran wherever he may be found within this State and thereafter and after compliance with the requirements of section 827 of the Code of Criminal Procedure to deliver him into the custody of the said Vernon Sharpe, to be taken back to the said State from which he fled, pursuant to the said requisition; and also to return this warrant and make return to the executive chamber within thirty days from the date hereof of all your proceedings had thereunder, and of the facts and circumstances relating thereto.

"Given under my seal and the privy seal of the State, at the capitol in the city of Albany, this 13th day of March, in the year of our Lord one thousand nine hundred and two.

"[L. S.] B. B. ODELL, JR.

"By the Governor: JAMES G. GRAHAM,

"*Secretary to the Governor.*"

No other paper was returned by the chief of police bearing upon his right to detain the relator. Upon the filing of the return the relator traversed it in an affidavit, in which he denied that he had committed either the crime of larceny or false pretenses, or any other crime, in the State of Tennessee. He denied that he was within the State of Tennessee at the times mentioned in the indictment upon which the requisition of the governor was issued; he alleged that he had read the indictments before the governor of the State of New York, upon which

the warrant of arrest was issued, and that they charged him with the commission of the crime of larceny and false pretenses on the 20th and 30th days of April, the 8th day of May and the 17th and the 24th days of June, 1901. The relator in his affidavit also asserted that he was not in the State of Tennessee at any time in the months of March, April, May or June, 1901, or at any time for more than a year prior to the month of March, 1901, and he denied that he had fled from the State of Tennessee or that he was a fugitive from the justice of that State. He further therein stated that he had heard read the papers accompanying the requisition of the governor of Tennessee to the governor of New York, and that those papers did not contain any evidence or proof that he had been in the State of Tennessee at any stated time since the 26th and 27th days of May, 1899, and they contained no evidence or proof that he was in the State of Tennessee on any day in any of the months set forth in the indictments when the crime or crimes were alleged to have been committed.

Upon the hearing the following paper signed by the respective attorneys for the parties was filed:

"It is conceded that the relator was not within the State of Tennessee between the first day of May, 1899, and the first day of July, 1901. It is also conceded that the relator was in the State of Tennessee on the 2d day of July, 1901."

There is also another stipulation in the record, signed by the attorneys, and reading as follows:

"The following additional facts are hereby conceded, and the same shall be incorporated in the appeal record herein, as a part thereof, and shall constitute a part of the record upon which the Appellate Division may hear and determine the appeal herein; *i. e.*,—

"It is hereby stipulated by and between the parties to the above entitled special proceeding that three indictments were attached to the requisition papers sent by the governor of the State of Tennessee to the governor of the State of New York for the extradition of Charles E. Corkran; that each of the said indictments was found on the 26th day of February, 1902, and that the alleged crimes were charged in said indictments to

have been committed on the 1st day of May, 1901, on the 8th day of May, 1901, and on the 24th day of June, 1901, respectively."

Upon the hearing before the judge on March 17, 1902, the relator was sworn without objection, and testified that he had been living in the State of New York for the past fourteen months; that his residence when at home was in Lutherville, Maryland; that he was in the city of Nashville, in the State of Tennessee, on July 2, 1901, and (under objection as immaterial) had gone there on business connected with a lumber company in which he was a heavy stockholder; that he arrived in the city on July 2, in the morning, and left about half-past seven in the evening of the same day, and while there he notified the Union Bank and Trust Company (the subsequent prosecutor herein) that the resignation of the president of the lumber company had been demanded and would probably be accepted that day. That after such notification, and on the same day, the resignation was obtained, and the Union Bank and Trust Company was notified thereof by the relator before leaving the city on the evening of that day; that he passed through the city of Nashville on the 16th or 17th of July thereafter on his way to Chattanooga, but did not stop at Nashville at that time, and had not been in the State of Tennessee since the 16th day of July, 1901, at the time he went to Chattanooga; that he had never lived in the State of Tennessee, and had not been in that State between the 26th or 27th of May, 1899, and the 2d day July, 1901.

Upon this state of facts the judge, before whom the hearing was had, dismissed the writ and remanded the relator to the custody of the defendant Hyatt, as chief of police. This order was affirmed without any opinion by the Appellate Division of the Supreme Court, 72 App. Div. 629, but, as stated, it was reversed by the Court of Appeals, 172 N. Y. 176, and the relator discharged.

Mr. Robert G. Sherer and *Mr. J. Murray Downs* for plaintiff in error.

I. The requisition papers are sufficient. There is no claim here that they are defective in any respect; the warrant of the gov-

ernor is conclusive as to every fact stated in this case, because there is no denial of any of the facts stated in it. *Ex parte Dawson*, 83 Fed. Rep. 307–308; *People* v. *Donohue*, 84 N. Y. 438. There is no denial either in the petition or in the testimony, that the defendant is not guilty of the crime as charged, or that he was not regularly and properly indicted, or that the requisition papers forwarded by the governor of the State of Tennessee to the governor of the State of New York were not proper and sufficient in every particular. The sole defence is based upon this alleged claim, that, as there was no proof that the defendant was in the State of Tennessee at the times the crimes were committed, and that, as the proof was that he was without the State of Tennessee at the times charged in the indictments, he cannot be sent back for trial and punishment. Every material fact stated in the warrant for extradition is admitted except this one. Hence there can be no discussion here as to the guilt or innocence of defendant, nor of the sufficiency of the indictments and requisition papers. The whole issue is narrowed down to this one question, and for the reasons submitted herein it is immaterial where he was when the crime was committed.

II. The Constitution and laws of Congress provide for interstate rendition of fugitives, even in cases where the party charged was not actually present in the demanding State at the time the crime was committed. The Const. of the U. S. art. 4, sec. 2, subd. 2; Rev. Stat. U. S. § 5278, being laws of Congress, 1793, chap. 7.

It appears in Madison's notes of the convention debates (Elliot's Debates [Lippincott edition, 1881], vol. 5, pages 381, 487), that when this provision of the Constitution came before the convention, the following proceedings were had, on the 6th day of August, 1787: "Committee on detail rendered a report which contained the following clause:

"'Article XV. Any person charged with treason, felony, or high misdemeanor in any State, who shall flee from justice and shall be found in any other State, shall, on demand of the executive power of the State from which he fled, be delivered up and removed to the State having jurisdiction of the offence.'"

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On the 28th day of August, 1787, the convention took up for consideration article XV, and the following proceedings were had:

"Article XV being thus taken up, the words 'high misdemeanor' were struck out and the words 'other crime' inserted in order to comprehend all proper cases, it being doubtful whether 'high misdemeanor' had not a technical meaning too limited."

Thus, at the outset and in the convention it was the evident design of the framers of the Constitution to make this provision broad enough to include every possible crime committed within the borders of the United States, and that no State should be an asylum for fugitives committing crimes in other States.

The act of 1793 was passed by virtue of the power thus conferred by the Constitution, quoted as section 5278 of the Revised Statutes, and that act was entitled "An act respecting fugitives from justice, and persons escaping from the service of their masters."

III. The decision of the Court of Appeals was based upon the doctrine that a person was not a fugitive from justice and should not be surrendered upon demand, unless he was physically present in the demanding State at the exact time the crime was committed. The court followed the decisions of certain other courts and text writers, referred to in the opinion of Judge Cullen. Those decisions limit the constitutional provision to the smallest possible effect. As, if a man leaves New York city and crosses by ferry to Jersey City and while there steals the smallest trifle and then returns to New York city, he is a fugitive from justice and shall be surrendered on demand. If the same man, instead of using the ferry, uses the telephone and by fraud steals any amount of property from a resident of Jersey City, he is not a fugitive from justice and cannot be surrendered to New Jersey for trial and punishment.

These examples might be multiplied, since murder, assault, arson, larceny, forgery, perjury and any crime not requiring direct personal contact may be committed by use of the mails, express, telegraph, telephone or innocent messenger, or by one standing near the boundary line, in another State, although the

perpetrator never crosses the line into the State wherein the crime is consummated or committed.

If the decision is correct, then the insufficiency of the Constitution must be confessed, in this instance, and amendment resorted to.

The decision of the court below and the argument of the defendant in error is based upon a narrow construction of the preposition "from" as used in the Constitution, but see *Streep* v. *United States*, 160 U. S. 128, as to what a fugitive from justice is. It is immaterial whether the crime has been detected or not, or what the secret intent of the culprit may be; he becomes a fugitive from justice when he avoids the demands of justice. And he flees "from" the justice of the State when he avoids the justice of the State. *Roberts* v. *Reilly*, 116 U. S. 80; *In re Cook*, 49 Fed. Rep. 833; 146 U. S. 183; *Regina* v. *Jacobia*, 46 Law Times, New Series, 595.

IV. Reason for a broad construction. In *Kentucky* v. *Dennison*, 24 How. 66, a broad and comprehensive construction following the intent and purpose of the Constitution was declared; and the policy of surrendering all fugitives from justice, no matter what might be the character of the crime, nor where nor how it was committed, was indicated.

It was one of the necessities of the occasion that the Constitution should be drafted in general language. "The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence." *Martin* v. *Hunter*, 1 Wheaton, 326.

V. No right of asylum. It has also been the policy of the United States Supreme Court to adopt such a construction as would really establish justice and insure domestic tranquillity, provide for common defence and promote the general welfare. The uniform tendency of the decisions has been to place the doctrine of interstate rendition on the broadest possible basis. In the case of foreign extradition the courts have followed the treaties in the interest of peace and national honor. They have construed those treaties strictly because the treaty conditions required it, because the nation was bound in honor to

observe the terms of the treaties; but wherever an attempt has been made to limit the terms of the constitutional provision, with reference to interstate rendition, the court has steadily set its face against a strict construction. *Mahon* v. *Justice*, 127 U. S. 715; *Lascelles* v. *Georgia*, 148 U. S. 542; *Ex parte Reggel*, 114 U. S. 642.

"If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well-settled rule that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction." *Gibbons* v. *Ogden*, 9 Wheaton, 188.

VI. The constitutional provision should not be weakened and made only half effective by this narrow construction of the phrase "from which." The decision of the court below is a long step backwards, and is an adoption of the policy of strict construction. It is adopting a rule of construction which, if followed as to all the other provisions of the Constitution, would have weakened that charter to the point of uselessness.

VII. It is not the policy of the law to screen criminals from the legal consequences of their crimes. Courts should not, by strained construction, establish asylums for fugitive criminals. If the laws of a State have been violated and crime committed, the wrong-doer should be punished. He should be surrendered by the authorities in whose jurisdiction he has sought refuge to the demanding State for trial. It would be a monstrous doctrine that would make New York State an inviolable sanctuary for criminals who perpetrate their offences by false tokens, fraudulent paper or representations communicated by mail or innocent agents. Such a decision would afford to "bunco men," "green-goods dealers" and commercial swindlers a haven of refuge within this State and would be a security to them in plying their games and frauds. Safe within this State they could plan and carry into effect their criminal purposes, plunder the merchants, banks and tradesmen of other States.

There is no place in the law of interstate rendition for the doctrine that actual presence in the demanding State at the

time of the commission of the offence charged shall be *conditio sine qua non*. Frauds are attempted and committed by and through "endless chains of letters," advertisements of "get-rich-quick" schemes, sure methods of stock trading, betting on horse races and like schemes. "Community of interest" in trade and manufactures, with its attendant consolidation of interests widely scattered, opens a vast field for fraudulent operations. Such consolidations permit of the incorporation of companies in different States, false credit ratings, the fraudulent use of commercial paper and an ample opportunity to commit larceny by means of unwary and innocent clerks and agents. Is New York State to be made the haven of all those swindlers?

VIII. One offending against the laws of the United States may be sent to any part of the country. There is no reason why the court should be so tender of the feelings of the criminal. So far as offences against the laws of the United States are concerned, a man may be transported from Maine to California, or from Oregon to Florida and tried for crimes committed, even though he was the width of the continent from the scene of the crime at the time of its commission. Sec. 731 Rev. Stat. U. S.; *Horner* v. *United States*, 143 U. S. 207; *In re Palliser*, 136 U. S. 257.

Reference was made in argument to the question, often disputed, where an indictment for murder shall be tried, when a person mortally wounded in one jurisdiction afterwards dies in another jurisdiction? *Commonwealth* v. *Macloon*, 101 Massachusetts, 1, and authorities there cited; *The Queen* v. *Keyn*, 2 Ex. D. 63; 11 Am. Law Review, 615; *State* v. *Bowen*, 16 Kansas, 475; *United States* v. *Guiteau*, 1 Mackey, 498. But there the original unlawful act is not only done by the offender, but reaches the person at whom it is aimed, in one jurisdiction, and it is the subsequent effect only which takes place in another jurisdiction. We have no occasion now to consider such a case beyond observing that before the Declaration of Independence provision had been made by statute, both in England and Ireland, for trying such cases in either jurisdiction, and was never supposed to be inconsistent in principle with the

provision of Magna Charta (c. 14), for trial by a jury of the vicinage. (1 East P. C. 366; 1 Gabbett's Crim. Law, 501.) It is universally admitted that when a shot fired in one jurisdiction strikes a person in another jurisdiction, the offender may be tried where the shot takes effect, and the only doubt is whether he can be tried where the shot is fired. *Rex* v. *Coombes*, 1 Leach (4th ed.) 388; *United States* v. *Davis*, 2 Sumner, 482; *People* v. *Adams*, 3 Denio, 190, 207, and 1 N. Y. 173, 176, 179; *The Queen* v. *Keyn*, 2 Ex. D. 233, 234; Rev. Stat. sec. 731.

When an offence is committed by means of a communication through the post office, the sender has sometimes, as appears by the cases cited for the petitioner, been held to be punishable at the place where he mails the letter. *United States* v. *Worrall*, 2 Dall. 384; *United States* v. *Bickford*, 4 Blatchford, 337; *Rex* v. *Williams*, 2 Campbell, 506; *The King* v. *Burdett*, 3 B. & Ald. 717, and 4 B. & Ald. 95; *Perkin's Case*, 2 Lewin, 150; *Regina* v. *Cooke*, 1 Fost. & Finl. 64; *The Queen* v. *Holmes*, 12 Q. B. D. 23; *S. C.*, 15 Cox Crim. Cas. 343. But it does not follow that he is not punishable at the place where the letter is received by the person to whom it is addressed; and it is settled by an overwhelming weight of authority that he may be tried and punished at that place, whether the unlawfulness of the communication through the post office consists in its being a threatening letter, *The King* v. *Girdwood*, 1 Leach, 142; *S. C.*, 2 East P. C. 1120; *Esser's Case*, 2 East P. C. 1125; or a libel, *The King* v. *Johnson*, 7 East, 65; *S. C.*, 3 J. P. Smith, 94; *The King* v. *Burdett*, 4 B. & Ald. 95, 136, 150, 170, 184; *Commonwealth* v. *Blanding*, 3 Pick. 304; *In re Buell*, 3 Dillon, 116, 122; or a false pretence or fraudulent representation, *Regina* v. *Leech*, Dearsley, 642; *S. C.*, 7 Cox Crim. Cas. 100; *The Queen* v. *Rogers*, 3 Q. B. D. 28; *S. C.*, 14 Cox Crim. Cas. 22; *People* v. *Rathbun*, 21 Wend. 509; *People* v. *Adams*, 3 Denio, 190, and 1 N. Y. 173; *Foute* v. *State*, 15 Lea (Tenn.), 712; *In re Palliser*, 136 U. S. 265.

All throughout this country there are many cities, large and small, and villages on opposite sides of state boundaries, some separated by a river and others only by an imaginary boundary

line. A person may shoot and maim or kill another across the line, or hurl a lighted missile across the boundary and commit arson, send an innocent messenger and commit larceny by pretenses, or commit larceny by the use of the telephone or telegraph or mail, and be absolutely exempt from the trial and punishment in the State wherein the crime was committed, when, if the same person, by the same means, offended against the laws of the United States, he could be surrendered and sent into the other State or district for trial and punishment. Can it be possible that an invisible line of demarcation shall be regarded as an unsurmountable barrier against the just demands of the neighboring State, so far as crimes against the laws of the State are concerned, when, as to offences against the United States, the width of the continent is no protection?

IX. Tennessee is the State having jurisdiction of the crime. The crime charged in the indictments herein was the crime of grand larceny and false pretenses. The defendant in error could have "committed the crime within the State" of Tennessee, although never physically present within the State. *Adams* v. *People*, 1 N. Y. 173; *State* v. *Grady*, 34 Connecticut, 118; *Commonwealth* v. *White*, 123 Massachusetts, 430; *Commonwealth* v. *Smith*, 93 Massachusetts, 243; *Lindsey* v. *Smith*, 38 Ohio St. 507; *United States* v. *Davis*, 2 Sumner, 482; *Regina* v. *Barrett*, 22 Eng. Law & Eq. 611; *Regina* v. *Brisac*, 4 East, 164; *State* v. *Chapin*, 17 Arkansas, 565; *State* v. *Morrow*, 40 S. C. 211; *Noyes* v. *State*, 41 N. J. L. 418; *Simpson* v. *State*, 92 Georgia, 41; *Hatfield* v. *Commonwealth*, 12 S. W. Rep. 309.

"When the commission of an offence commenced without this State is consummated within its boundaries, the person committing the offence is liable to punishment therefor in this State, although he was out of the State at the commission of the offence charged; if he consummated it in this State through the intervention of an innocent or guilty agent, or by any other means proceeding directly from himself, and in such a case the jurisdiction is in the county in which the offence was consummated, unless otherwise provided by law." Sec. 5801, M. & V. Code, Tennessee.

X. The plaintiff in error returned only paper he had. There

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seems to be some criticism in the opinion of the court below of the plaintiff in error for the failure to return all the papers that were used before the governor, but the plaintiff in error should not be criticised for this, nor should any unfavorable presumption be indulged in as against him, for the reason that it is the invariable rule of the executive of the State of New York to refuse to return any paper in an extradition case other than the warrant, and this rule is based upon the opinion prevailing in the executive department that the courts of the State have no jurisdiction to review the governor's action. Larceny is a crime and the merits cannot be tried in *habeas corpus*.

It is said that it is hard to send a man from his home and friends to a distant jurisdiction for trial, but there is no real hardship in this. When a man commits a crime within another jurisdiction he thereby selects the jurisdiction wherein the trial shall be had, and there is no burden imposed when the courts compel him to abide by his own selection. It would be a greater hardship to require prosecuting authorities to go to the distant place of his home and appear, first, before a committing magistrate, second, before a grand jury, and lastly, in a trial court, and to bring on these three occasions all the witnesses and documents.

Mr. William S. Bryan, Jr., with whom *Mr. A. de R. Sappington* was on the brief, for defendant in error.

I. Whether the decision of the governor of the asylum State shall be final on the question as to whether the person sought to be extradited was in fact a fugitive from the justice of the demanding State, is a question proper to be determined by the courts of that State. *Cook* v. *Hart*, 146 U. S. 193. That in New York such inquiry is open to the courts of that State on *habeas corpus*, appears from the decision below in the case at bar.

Judge O'Brien in his opinion said: "The warrant did not conclusively establish the facts recited. It was so held by this court, *People ex rel. Lawrence* v. *Brady*, 56 N. Y. 182, and the law as laid down in that case has never been modified but has been repeatedly approved. Indeed I do not understand that

there is now any difference of opinion as to the legal effect of the warrant as evidence. It raised a presumption, but nothing more."

The view of the Court of Appeals of New York that the recitals in the warrant of the governor are only *prima facie* and are liable to be rebutted by proof on *habeas corpus* is the prevailing view. *Ex parte Todd*, 47 L. R. A. 566; *Matter of Cook*, 49 Fed. Rep. 823; *Ex parte Hart*, 63 Fed. Rep. 260; *Work* v. *Conington*, 34 Ohio St. 64; *Matter of Manchester*, 5 California, 237; 15 Am. & Eng. Ency. of Law (2d ed.), 205.

Whether the accused is a fugitive from justice is a question of fact. *Roberts* v. *Reilly*, 116 U. S. 80.

We have just seen that this question of fact was decided by the court below against the plaintiff in error, and that that finding is not reviewable by this court.

II. If the facts were open for review, there was obviously no error in the conclusion reached by the court below. But the finding of that court on the facts is not open for review in this proceeding. Nothing is open for review on this writ of error, but such rulings in law as erroneously decide some Federal question against the plaintiff in error.

It is well settled that on a writ of error, this court will confine itself to an examination of such of the questions of law decided by the court below as are properly reviewable here, and that it cannot, and will not, review the findings of that court on questions of fact. *In re Neagle*, 135 U. S. 42; *Gardner* v. *Bonestell*, 180 U. S. 370; *Dower* v. *Richards*, 151 U. S. 658; *In re Buchanan*, 158 U. S. 36; *Hedrick* v. *Atchison, Topeka etc. R. R.*, 167 U. S. 677; *Turner* v. *N. Y.*, 168 U. S. 95; *West. Union Tel. Co.* v. *Call Pub. Co.*, 181 U. S. 103; *Egan* v. *Hart*, 165 U. S. 189; *Chicago, Burlington etc. Rd.* v. *Chicago*, 166 U. S. 246.

It cannot be denied that this court has the power to examine the opinions in the court below to ascertain the grounds of that court's decision. *Kreiger* v. *Shelly R. R.*, 125 U. S. 44; *Dibble* v. *Bellingham Co.*, 163 U. S. 69. It cannot be contended successfully that the decision below was against the validity of the authority and power exercised under the Constitution of

the United States and under section 5278 of the Revised Statutes. *Cook County* v. *Calumet etc. Canal*, 138 U. S. 653; *Balto. & Pot. R. R.* v. *Hopkins*, 130 U. S. 224; *Brooks* v. *Missouri*, 124 U. S. 394.

Stated shortly, the case is this:

(*a*) The legality of Corkran's detention under the governor's warrant of extradition was a question into which the state and Federal courts in New York had concurrent jurisdiction to enquire. *Robb* v. *Connolly*, 111 U. S. 639.

(*b*) The state court in the exercise of this rightful jurisdiction decided the question of fact, *i. e.*, that Corkran was not a fugitive from justice, against the plaintiff in error. This decision, as already stated, did not in any way impugn the statute nor any right conferred by it, and the writ of error should be dismissed for want of jurisdiction.

III. There was no authority in the governor of New York to order the extradition of Corkran for trial for an offence claimed to have been committed when he was not corporeally present in the State of Tennessee.

The Constitution of the United States (Art. 4, sec. 2, subd. 2,) reads: "A person charged in any State with treason, felony, or other crime, *who shall flee from justice*, and be found in another State, shall, on demand of the executive authority of the State *from which he fled*, be delivered up, to be removed to the State having jurisdiction of the crime."

Flight—being a fugitive from justice—is the jurisdictional fact. In speaking of the necessity for an actual flight or *departure* from the demanding State of the accused before he can be said to be a fugitive from justice, Judge Seevers in delivering the opinion of the court in *Jones* v. *Leonard*, 50 Iowa, 108, said: "It is difficult to see how one can flee who stands still. That there must be *an actual fleeing* we think is clearly recognized by the Constitution of the United States. The words, 'who shall flee' do not include a person who never was in the country from which he is said to have fled."

A great cloud of state decisions enforce the construction of the Constitution that the accused must have been physically present in the demanding State at the time when the assumed

crime is alleged to have been committed. *Wilcox* v. *Nolze*, 34 Ohio St. 520; *In re Manchester*, 5 California, 237; *Jones* v. *Leonard*, 50 Iowa, 106; *In re Tod*, 12 South Dakota, 386; *In re Mohr*, 73 Alabama, 503, 514; *In re Fetter*, 23 N. J. L. 311; *In re Voorhees*, 32 N. J. L. 150; *Hartman* v. *Aveline*, 63 Indiana, 345; *Ex parte Knowles*, 16 Ky. L. Rep. 263; *In re Greenough*, 31 Vermont, 279; *Kingsbury's Case*, 106 Massachusetts, 223; *Re Heyward*, 1 Sandf. 701; *State* v. *Hall*, 115 N. C. 811.

The same interpretation of the constitutional provision was followed by the governor of Illinois in the attempt to extradite Mr. Storey, editor of the Chicago Tribune into Wisconsin (3 Central Law Journal, 636); and by the governor of Maryland in the case of Max Juhn, attempted to be extradited into New York (2 Moore on Extradition, sec. 585); and by the governor of New York in the case of Mitchell, attempted to be extradited into New Jersey (4 New York Crim. Rep. 596).

The law is declared in the leading text books to the same effect. 2 Moore on Extradition, sec. 581; Spear on Extradition, pages 397, 499; 7 Am. & Eng. Ency. of Law (1st ed.), 646 and note 1; 12 Am. & Eng. Ency. of Law (2d ed.), 603 and note 3.

And the same rule, that there must have been an actual presence in and departure from the demanding State is adopted in the Federal courts. *In re Samuel Jackson*, 2 Flipp. 183, 186; *S. C.*, Fed. Cas. No. 7125; *Ex parte Jos. Smith*, 3 McLean, 121; *S. C.*, Fed. Cas. No. 12,968; *Ex parte McKean*, 3 Hughes, 25; *United States* v. *Fowkes*, 49 Fed. Rep. 52; *Tennessee* v. *Jackson*, 36 Fed. Rep. 258; *In re White*, 55 Fed. Rep. 54; *S. C.*, 5 C. C. A. 29; *Ex parte Reggel*, 114 U. S. 651; *Roberts* v. *Reilly*, 116 U. S. 97. *Regina* v. *Jacobi*, 46 L. T. N. S. 595, and *Regina* v. *Nillens*, 53 L. S. Mag. Prob. Div. & Adm. 158, distinguished as the English decisions on international extradition where persons have been surrendered who were charged with the crime of obtaining money under false pretenses by letters written from beyond the jurisdiction of the demanding country, have no bearing on the question of the right to an interstate extradition in this country under the Constitution and act of Congress, because the language of the English Extradition Act,

33 Victoria, chapter 52, is very different from the language of the Constitution and of the act of Congress.

Nor are cases in the courts of this country on international extradition precedents in point. Whether a person apprehended in this country and sought to be extradited to some foreign country shall be delivered up depends, of course, upon the terms of the treaty with that country which are seldom, if ever, in the language of the Constitution providing for interstate extradition.

The doctrine that there can be a constructive presence in a State and a constructive flight therefrom has no more foundation in law, than has the theory that there is any charge of a crime committed by the defendant when not physically and actually present in the State of Tennessee, any foundation in the facts of this case, as disclosed by the record. Both are mere presumptions, without anything to support them.

As to the point that public policy required that there should be some means of arresting persons in one State charged with having by the use of the mail or the telegraph obtained fraudulently money, goods or credits from persons in another State, it is respectfully suggested that the question is not one of public policy, but of power under the Constitution and act of Congress.

This must, of course, be ascertained by turning to the words of the Constitution and of the act of Congress, and ascertaining what they meant; not what we may now consider they ought to have meant. *United States* v. *Chase*, 135 U. S. 262; *Jones* v. *Smart*, 1 T. R. 51; *The Queensborough Cases*, 1 Bligh, 497.

If, however, the question of supposed public policy were entitled to any weight in discussing a question of the meaning of a clause in the Constitution affecting the liberty and safety of the citizen, it might be urged that the collection of civil debts by a threat of criminal prosecution, is a practice not infrequently indulged by attorneys of the baser sort, and by business men of not very high principle, and that any rule which rendered possible the transportation of persons for trial to a distant portion of the Union, whenever there is a business dis-

pute as to the truth of a warranty or representation made in correspondence, would vastly encourage this species of blackmail. That compounding a felony is a crime, seems to be an obsolete rule of law, in certain enterprising commercial centers. *Tennessee* v. *Jackson*, 36 Fed. Rep. 260.

This is a most remarkable case. The warrant nowhere states that the governor of New York *found as a fact* that the defendant was a fugitive from justice; nor that any *sworn evidence* of that fact was submitted to him; nor that he had any definite or satisfactory evidence on this subject of any sort before him. All that a fair reading of the warrant discloses on the subject of any flight from justice by defendant is that the governor of Tennessee "represents" him to be a fugitive and that copies of an indictment "and other documents" "charge" him with being such a fugitive. A governor of a State causes the arrest of a man upon a warrant, which does not charge that the fact exists which would make him liable to arrest, *i. e.*, that he is a fugitive from justice. In the course of the proceedings this fact is nowhere even indicated, and the court competent to decide the question finds that it is disproved. Yet the record is brought to this court.

This writ of error should be dismissed for want of jurisdiction; and that failing this, the judgment should be affirmed on the merits.

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

By clause 2 of section 2 of Article IV of the Constitution of the United States it is provided:

"A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime."

It was held in *Commonwealth of Kentucky* v. *Dennison, Governor*, 24 How. 66, 104, that this provision of the Constitution was not self-executing, and that it required the action of

Congress in that regard. Congress did act by passing the statute, approved February 12, 1793. 1 Stat. 302. The substance of that act is reproduced in section 5278 of the Revised Statutes, as follows:

"SEC. 5278. Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, it shall be the duty of the executive authority of the State or Territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing, and transmitting such fugitive to the State or Territory making such demand shall be paid by such State or Territory."

The proceedings in this case were under this section, and the warrant issued by the governor was sufficient *prima facie* to justify the arrest of the relator and his delivery to the agent of the State of Tennessee. Certain facts, however, must appear before the governor has the right to issue his warrant. As was said in *Roberts* v. *Reilly*, 116 U. S. 80, 95, it must appear to the governor, before he can lawfully comply with the demand for extradition, that the person demanded is substantially charged with a crime against the laws of the State from whose justice he is alleged to have fled, by an indictment or an affidavit, etc., and that the person demanded is a fugitive from the justice of the State the executive authority of which makes the demand. It was also stated in the same case that the question whether the person demanded was substantially charged

with a crime or not was a question of law and open upon the face of the papers to judicial inquiry upon application for a discharge under the writ of *habeas corpus;* that the question whether the person demanded was a fugitive from the justice of the State was a question of fact which the governor upon whom the demand was made must decide upon such evidence as he might deem satisfactory. How far his decision might be reviewed judicially in proceedings in *habeas corpus*, or whether it was conclusive or not, were, as stated, questions not settled by harmonious judicial decisions nor by any authoritative judgment of this court, and the opinion continues as follows:

"It is conceded that the determination of the fact by the executive of the State in issuing his warrant of arrest, upon a demand made upon that ground, whether the writ contains a recital of an express finding to that effect or not, must be regarded as sufficient to justify the removal until the presumption in its favor is overthrown by contrary proof."

In *People* v. *Brady*, 56 N. Y. 182, it was held that the courts have jurisdiction to interfere by writ of *habeas corpus* and to examine the grounds upon which an executive warrant for the apprehension of an alleged fugitive from justice from another State is issued, and in case the papers are defective and insufficient, to discharge the prisoner.

In the case before us the New York Court of Appeals held that if upon the return to the writ of *habeas corpus* it is clearly shown that the relator is not a fugitive from justice, and there is no evidence from which a contrary view can be entertained, the court will discharge the person from imprisonment, but that mere evidence of an alibi, or evidence that the person demanded was not in the State as alleged, would not justify his discharge, where there was some evidence on the other side, as *habeas corpus* was not the proper proceeding to try the question of the guilt or innocence of the accused. And the court also held that the conceded facts showed the absence of the accused at the time when the crimes, if ever, were committed, and that the demand was in truth based upon the doctrine that a constructive presence of the accused in the demanding State

at the time of the alleged commission of the crime was sufficient to authorize the demand for his surrender.

We are of opinion that the warrant of the governor is but *prima facie* sufficient to hold the accused, and that it is open to him to show by admissions, such as are herein produced, or by other conclusive evidence, that the charge upon which extradition is demanded assumes the absence of the accused person from the State at the time the crime was, if ever, committed. This is in accordance with the authorities in the States, cited in the opinion of Judge Cullen in the New York Court of Appeals, and is, as we think, founded upon correct principles. *Robb* v. *Connolly*, 111 U. S. 624, recognizing authority of States to act by *habeas corpus* in extradition proceedings.

If upon a question of fact made before the governor, which he ought to decide, there were evidence *pro* and *con* the courts might not be justified in reviewing the decison of the governor upon such question. In a case like that, where there was some evidence sustaining the finding, the courts might regard the decision of the governor as conclusive. But here as we have the testimony of the relator (uncontradicted) and the stipulation of counsel as to what the facts were, we have the right and it is our duty on such proof and concession to say whether a case was made out within the Federal statute justifying the action of the governor. It is upon the statute that the inquiry must rest.

In the case before us it is conceded that the relator was not in the State at the various times when it is alleged in the indictments the crimes were committed, nor until eight days after the time when the last one is alleged to have been committed. That the prosecution on the trial of such an indictment need not prove with exactness the commission of the crime at the very time alleged in the indictment is immaterial. The indictments in this case named certain dates as the times when the crimes were committed, and where in a proceeding like this there is no proof or offer of proof to show that the crimes were in truth committed on some other day than those named in the indictments, and that the dates therein named were erroneously stated, it is sufficient for the party charged to show that he was not in the

State at the times named in the indictments, and when those facts are proved so that there is no dispute in regard to them, and there is no claim of any error in the dates named in the indictments, the facts so proved are sufficient to show that the person was not in the State when the crimes were, if ever, committed.

The New York Court of Appeals has construed the stipulation as conceding these facts, and we think that its construction of the stipulation is the correct one.

It is, however, contended that a person may be guilty of a larceny or false pretense within a State without being personally present in the State at the time, therefore the indictments found were sufficient justification for the requisition and for the action of the governor of New York thereon. This raises the question whether the relator could have been a fugitive from justice when it is conceded he was not in the State of Tennessee at the time of the commission of those acts for which he had been indicted, assuming that he committed them outside of the State.

The exercise of jurisdiction by a State to make an act committed outside its borders a crime against the State is one thing, but to assert that the party committing such act comes under the Federal statute, and is to be delivered up as a fugitive from the justice of that State, is quite a different proposition.

The language of section 5278, Rev. Stat., provides, as we think, that the act shall have been committed by an individual who was at the time of its commission personally present within the State which demands his surrender. It speaks of a demand by the executive authority of a State for the surrender of a person as a fugitive from justice, by the executive authority of a State *to which such person has fled*, and it provides that a copy of the indictment found, or affidavit made before a magistrate of any State, charging the person demanded with having committed treason, etc., certified as authentic by the governor or chief magistrate of the State or Territory *from whence the person so charged has fled*, shall be produced, and it makes it the duty of the executive authority of the State *to which such person has fled* to cause him to be arrested and se-

cured. Thus the person who is sought must be one who has fled from the demanding State, and he must have fled (not necessarily directly) to the State where he is found. It is difficult to see how a person can be said to have fled from the State in which he is charged to have committed some act amounting to a crime against that State, when in fact he was not within the State at the time the act is said to have been committed. How can a person flee from a place that he was not in? He could avoid a place that he had not been in; he could omit to go to it; but how can it be said with accuracy that he has fled from a place in which he had not been present? This is neither a narrow nor, as we think, an incorrect interpretation of the statute. It has been in existence since 1793, and we have found no case decided by this court wherein it has been held that the statute covered a case where the party was not in the State at the time when the act is alleged to have been committed. We think the plain meaning of the act requires such presence, and that it was not intended to include, as a fugitive from the justice of a State, one who had not been in the State at the time when, if ever, the offence was committed, and who had not, therefore in fact, fled therefrom.

In *Ex parte Reggel*, 114 U. S. 642, 651, it was stated by Mr. Justice Harlan, in speaking for the court:

"The only question remaining to be considered, relates to the alleged want of competent evidence before the governor of Utah, at the time he issued the warrant of arrest, to prove that the appellant was a fugitive from the justice of Pennsylvania. Undoubtedly, the act of Congress did not impose upon the executive authority of the Territory the duty of surrendering the appellant, unless it was made to appear, in some proper way, that he was a fugitive from justice. In other words, the appellant was entitled, under the act of Congress, to insist upon proof that he was within the demanding State at the time he is alleged to have committed the crime charged, and subsequently withdrew from her jurisdiction, so that he could not be reached by her criminal process. The statute, it is to be observed, does not prescribe the character of such proof; but that the executive authority of the Territory was not required,

by the act of Congress, to cause the arrest of appellant, and his delivery to the agent appointed by the governor of Pennsylvania, without proof of the fact that he was a fugitive from justice, is, in our judgment, clear from the language of that act. Any other interpretation would lead to the conclusion that the mere requisition by the executive of the demanding State, accompanied by the copy of an indictment, or an affidavit before a magistrate, certified by him to be authentic, charging the accused with crime committed within her limits, imposes upon the executive of the State or Territory where the accused is found, the duty of surrendering him, although he may be satisfied, from incontestible proof, that the accused had, in fact, never been in the demanding State, and, therefore, could not be said to have fled from its justice. Upon the executive of the State in which the accused is found rests the responsibility of determining, in some legal mode, whether he is a fugitive from the justice of the demanding State. He does not fail in duty if he makes it a condition precedent to the surrender of the accused that it be shown to him, by competent proof, that the accused is, in fact, a fugitive from the justice of the demanding State."

To the same effect is *Roberts* v. *Reilly*, 116 U. S. 80, *supra*. In that case the issue was made about the presence of the party in the demanding State at the time the act was alleged to have been committed, and there was direct and positive proof before the governor of Georgia, upon whom the demand had been made, and there was no other evidence in the record which contradicted it. It was said (p. 97):

"The appellant in his affidavit does not deny that he was in the State of New York about the date of the day laid in the indictment when the offence is alleged to have been committed, and states, by way of inference only, that he was not in that State on that very day; and the fact that he has not been within the State since the finding of the indictment is irrelevant and immaterial."

It is clear that it was regarded by the court as essential that the person should have been in the State which demanded his surrender at the time of the commission of the offence alleged

in the affidavit or indictment, and that it was a fact jurisdictional in its nature, without which he could not be proceeded against under the Federal statute.

Cook v. *Hart*, 146 U. S. 183, decides nothing to the contrary. In that case the party was arrested in Illinois on account of a crime which, it was alleged, had been committed by him in Wisconsin. He sued out a writ of *habeas corpus* in Illinois to test the legality of his arrest under the circumstances appearing in the case. Upon the hearing the court decided the arrest to be legal, and the party arrested acquiesced in this disposition of the case and made no attempt to obtain a review of the judgment in a superior court. It was not until after his arrival in Wisconsin, whither he was taken by virtue of the warrant issued by the governor of Illinois, and after his trial had begun in Wisconsin, that he made application to the Circuit Court of the United States in Wisconsin to be released upon *habeas corpus*, upon the ground he had originally urged, that he was not a fugitive from justice within the meaning of the Constitution and laws of the United States. That court decided against him, holding that he had been properly surrendered. This court said that, assuming that the question might be jurisdictional when raised before the executive or the courts of the surrendering State, that it was presented in a somewhat different aspect after the person had been delivered to the agent of the demanding State, and had actually entered the territory of that State and was held under the process of its courts. And it was said that the authorities tended to support the theory that the executive warrant has spent its force when the accused has been delivered to the demanding State; that it is too late for him to object even to jurisdictional defects in his surrender, and that he was rightfully held under the process of the demanding State. Whether the claim made by the party brought to Wisconsin that he was illegally arrested in Illinois was well founded or not, this court did not feel called upon to consider, or to review the propriety of the decision of the court below, and this on the ground that it was proper to await until the state court had finally acted upon the case, and then to require the accused to sue out his writ of error from this court to

the highest state court, where a decision could be had, instead of determining the question summarily on *habeas corpus*.

It is contended, however, that there are cases in this court which sustain the proposition maintained by the plaintiff in error herein, and *Kentucky* v. *Dennison*, 24 How. 66, *supra*, is referred to as authority. It is therein held that the words "treason, felony, or other crime," spoken of in the Constitution, included every offence forbidden and made punishable by the laws of the State where the offence is committed, and it is therefore argued that as an act committed outside its borders may, under certain circumstances, become a crime against the State, a person thus committing such an act comes within the meaning of the Constitution, and should be surrendered upon demand of the governor of the State whose law he is alleged to have violated.

On looking at that case it is seen that the facts were wholly different, and the court had no such case as the one before us in mind. The party against whom the demand was made had committed the crime, as alleged, within the State of Kentucky, and no question arose as to his liability to be returned to Kentucky for any act done by him outside its borders. The governor of Ohio, upon whom the demand was made, acting under the advice of his attorney general, refused to surrender the fugitive because the crime alleged was neither treason nor felony at common law, nor was it one which was regarded as a crime by the usages and laws of civilized nations, and the governor was advised that obviously a line must be somewhere drawn distinguishing offences which did, from offences which did not, fall within the scope of the power granted by the Constitution. It was in regard to this contention that this court held as stated. Mr. Chief Justice Taney, delivering the opinion of the court said (page 99):

"The words, 'treason, felony, or other crime,' in their plain and obvious import, as well as in their legal and technical sense, embrace every act forbidden and made punishable by a law of the State. The word 'crime' of itself includes every offence, from the highest to the lowest in the grade of offences, and includes what are called 'misdemeanors,' as well as treason and

felony. 4 Bl. Com. 5, 6, and note 3, Wendall's edition. But as the word 'crime' would have included treason and felony, without specially mentioning those offences, it seems to be supposed that the natural and legal import of the word, by associating it with those offences, must be restricted and confined to offences already known to the common law and to the usage of the nations, and regarded as offences in every civilized community, and that they do not extend to acts made offences by local statutes growing out of local circumstances, nor to offences against ordinary police regulations. This is one of the grounds upon which the governor of Ohio refused to deliver Lago, under the advice of the attorney general of that State.

"But this inference is founded upon an obvious mistake as to the purposes for which the words 'treason and felony' were introduced. They were introduced for the purpose of guarding against any restriction of the word 'crime,' and to prevent this provision from being construed by the rules and usages of independent nations in compacts for delivering up fugitives from justice.

* * * * * * * *

"This compact engrafted in the Constitution included, and was intended to include, every offence made punishable by the law of the State in which it was committed, and that it gives the right to the executive authority of the State to demand the fugitive of the executive authority of the State in which he is found; that the right given to 'demand' implies that it is an absolute right; and it follows that there must be a correlative obligation to deliver, without any reference to the character of the crime charged, or to the policy or laws of the State to which the fugitive has fled."

The court, however, held that while it was the duty of the executive authority of Ohio under the circumstances to deliver the person demanded, and that such duty was merely ministerial and the governor had no right to exercise any discretionary power as to the nature or character of the crime charged in the indictment, yet it was also held that the Federal courts had no means to compel the governor to perform the moral obligation of the State under the compact in the Constitution,

and that the courts could not coerce the state executive or other state officer as such to perform any duty by act of Congress. On that ground the motion for a mandamus to compel the governor of Ohio to issue his warrant was refused. Nothing in that case can be regarded as any authority for the proposition contended for here. The case assumed the presence of the party in the State at the time of the alleged commission of the crime. The question was whether upon such assumption the executive of the State upon whom the demand was made could examine as to the character of the crime and refuse to deliver up, in his discretion.

To the same effect is *Ex parte Reggel*, 114 U. S. 642, *supra*. In that case the objection was made in the court of original jurisdiction that there could be no valid requisition based upon an indictment for an offence less than a felony. It was held that such view was erroneous, and *Kentucky* v. *Dennison*, *supra*, was cited in support of that proposition, yet it was in this very case of *Reggel* that the remarks already quoted were made, that the person demanded was entitled to insist upon proof that he was within the demanding State at the time that he is charged to have committed the crime, and subsequently withdrew therefrom to another jurisdiction, so that he could not be reached by the criminal process of the State where the act was committed.

Many state courts before whom the question has come have held that a merely constructive presence in the demanding State at the time of the alleged commission of the offence was not sufficient to render the person a fugitive from justice; that he must have been personally present within the State at the time of the alleged commission of the act, or else he could not be regarded as a fugitive from justice. Spear and also Moore on Extradition are to the same effect. Those authorities and text writers are referred to in the margin.[1]

[1] *Wilcox* v. *Nolze*, (1878) 34 Ohio St. 520, 524; *Jones* v. *Leonard*, (1878) 50 Iowa, 106; *In re Mohr*, (1883) 73 Alabama, 503, 514; *In re Fetter*, (1852) 23 N. J. L. 311; *Hartman* v. *Aveline*, (1878) 63 Indiana, 344; *Ex parte Knowles*, (1894) 16 Ky. Law Rep. 263; *Kingsbury's Case*, (1870) 106 Massachusetts, 223, 227; *State* v. *Hall*, (1894) 115 N. C. 811; 2 Moore on Extradition, secs. 579, 581, 584; Spear on Extradition, 310 *et seq.*; Cooley's Const. Lim. 4th ed. 21, note 1; 3 Crim. Law Rep. 806 *et seq.* published, 1882.

Opinion of the Court.

In the case of *In re White*, 55 Fed. Rep. 54, 58, in the United States Circuit Court of Appeals for the Second Circuit, it was said by Lacombe, circuit judge, that it was proper to inquire upon *habeas corpus* whether the prisoner was in fact within the demanding State when the alleged crime was committed, for if he were not it could not be properly held that he had fled from it.

The subsequent presence for one day (under the circumstances stated above) of the relator in the State of Tennessee, eight days after the alleged commission of the act, did not, when he left the State, render him a fugitive from justice within the meaning of the statute. There is no evidence or claim that he then committed any act which brought him within the criminal law of the State of Tennessee, or that he was indicted for any act then committed. The proof is uncontradicted that he went there on business, transacted it and came away. The complaint was not made nor the indictments found until months after that time. His departure from the State after the conclusion of his business cannot be regarded as a fleeing from justice within the meaning of the statute. He must have been there when the crime was committed, as alleged, and if not, a subsequent going there and coming away is not a flight.

We are of opinion that as the relator showed without contradiction and upon conceded facts that he was not within the State of Tennessee at the times stated in the indictments found in the Tennessee court, nor at any time when the acts were, if ever committed, he was not a fugitive from justice within the meaning of the Federal statute upon that subject, and upon these facts the warrant of the governor of the State of New York was improperly issued, and the judgment of the Court of Appeals of the State of New York discharging the relator from imprisonment by reason of such warrant must be

Affirmed.

THE MANGROVE PRIZE MONEY.[1]

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

Nos. 24, 34. Argued January 7, 8, 9, 1903.—Decided February 23, 1903.

Vessels more than five miles apart *held* not to be within signal distance so as to be entitled to share in prize under the circumstances of this case. Vessels not within signal distance are not "vessels making the capture" within Rev. Stat. § 4630, although they may have contributed remotely to this result. They cannot be taken into account in estimating the relative force of capture and prize. In estimating the relative strength of the captured and capturing vessels, the means possessed by the captured vessel, and not the use made of them, must be considered.

THE case is stated in the opinion of the court.

Mr. Assistant Attorney General Hoyt for the United States.

Mr. William B. King, with whom *Mr. George A. King* was on the brief, for the officers and crew of the Indiana.

Mr. James H. Hayden, with whom *Mr. Joseph K. McCammon* was on the brief, for the officers and crew of the New York.

Mr. Benjamin Micou and *Mr. Hilary A. Herbert*, with whom *Mr. Jefferson B. Browne* was on the brief, for the officers and crew of the Mangrove.

MR. JUSTICE HOLMES delivered the opinion of the court.

These are appeals from a decree of the United States District Court distributing the proceeds of the Spanish steamer Panama, condemned by an earlier decree as prize of war. 176 U. S. 535. The District Court awarded the whole net proceeds to the officers and crew of the United States steamer Mangrove, on the ground that the Mangrove was the sole capturing

[1] Docket titles—No. 24. *United States* v. *Officers and Crew of the U. S. Steamer Mangrove.* No. 34. *Officers and Enlisted men of the U. S. Ships New York, Indiana and Wilmington* v. *Officers and Crew of the U. S. Steamer Mangrove.*

vessel, that the prize was of superior or equal force, and that no other vessel was within signal distance. U. S. Rev. Stat. § 4630 (repealed by act of March 3, 1889, c. 413, § 13, 30 Stat. 1007), § 4632. The United States appeals, contending that the Mangrove alone was of force superior to the Panama, and also that the Indiana, Wilmington and New York were within signal distance, and that the Indiana at least was a joint captor, and that therefore, by § 4630, one half the proceeds should go to the United States. The Indiana appeals, taking the ground that the Mangrove was the sole captor and of force inferior to the Panama, but that the Indiana was within signal distance and in such condition as to be able to render effective aid if required, and therefore entitled to share in the prize by § 4632. The New York and the Wilmington appeal on like ground.

The case turns upon findings of fact, and the question is whether it is clear that the District Court and the experienced naval prize commissioner were wrong. *The Grace Girdler*, 7 Wall. 196, 204. But of course we do not leave out of sight the fact that much additional evidence has been put in since the trial below. We take up first the case of the Indiana. Without discussing the details of the contradictory testimony, we will state the facts that seem to us proved.

At seven minutes after six in the evening of April 25, 1898, off Havana, the Panama, having been brought to by a shot across her bow and notice that she would be fired into if she did not stop, was boarded by Ensign Dayton from the Mangrove. At this moment the capture was complete. *The Grotius*, 9 Cranch, 368, 370. The Panama did not attempt or, so far as appears, intend, resistance or escape. The captain was told that he was a prize, war having been declared between the United States and Spain, and he acquiesced. Thereafter the Panama proceeded, with Ensign Dayton on board, under orders from the Mangrove. Her colors were not hauled down, or a prize crew put aboard until later, but under the circumstances these facts seem to us controlled by others which we have mentioned. It may be added that the officers of the Mangrove seem to have considered it usual for prizes to fly their ensign until they were adjudicated by the prize court, which would

account for their not ordering the flag lowered.—Thirty-eight minutes later, at forty-five minutes after six, the Indiana, which had been approaching from an opposite direction, fired a shot across the bow of the Panama and sent a prize crew aboard. (We should remark in passing that this crew was subject to the orders of Ensign Dayton, the prize master, and seems to have been put aboard at the request of the Mangrove, which had not men enough to spare.) The officer who fired the gun says that he estimated the range at forty-five hundred yards, and that the shot being accurate, the distance from the Panama was about forty-eight hundred yards. This was the estimate formed by the expert on the spot, at the time, for purposes of immediate action, when it was necessary to be accurate. Whatever it was, it was verified by the result of the shot, so that really the only question is whether it is remembered correctly, which there is no reason to doubt. It seems to us to outweigh all other estimates formed after the event by witnesses who had no similar duty. At this time the Mangrove was abreast or a little astern of the Panama.

The previous situations of the ships were as follows: All the United States vessels concerned in this cause were on blockade off Havana. At 4.30 P. M. the Indiana signaled the Mangrove and gave her orders to proceed to Key West after receiving mail. The Mangrove started for Key West before five. At five or ten minutes after five, and until 5.48, when her speed slackened, the Indiana went ahead at full speed toward the flagship New York, in an almost opposite direction from that taken by the Mangrove. At a quarter past five she sighted a strange vessel, which turned out to be the Panama, to the northeast. At 5.52 the flagship signaled "What colors does strange vessel carry?" and was answered at 5.55 "Cannot see." At about six the Indiana was turned toward the Panama and went at full speed, and later at best speed possible until 6.45, when she fired the shot and stopped. The Indiana when she turned at six did not attempt to signal the Mangrove, and five minutes earlier could not see the colors of the Panama, although the Spanish flag was three times the size of the Mangrove's signal flag. It appears from the steam log of the Indiana that a few

days later she made 10.15 knots per hour for two consecutive hours. Taking the time during which the Indiana and Mangrove had been moving away from each other, and their probable speed, or, again, taking the distance at which the Indiana was from the Panama and Mangrove when she fired her shot, and the fact that she had been making for them at full speed for the greater part of forty-five minutes, while they during a part of the same time were sailing toward her at a rate of eight knots, we think it probable, without going into nice calculations, that at six o'clock she must have been twelve or fifteen miles away at the least, as was found by the District Court. From six, when she turned, to seven minutes past six, when the Panama was taken, the Indiana cannot have got to full speed or gone far. The Panama had been stopped.

There is much testimony that the capture was seen from the Indiana, while the officers of the Mangrove say that the Indiana could not be seen by them. We do not attempt to determine precisely how much could be seen or was seen from the higher ship. That testimony must reconcile itself as best it may with the foregoing facts, which we deem not open to dispute. And on those facts we are of opinion that the Indiana was not within signal distance of the Mangrove when the capture took place. We agree with the counsel for the appellees that this view is confirmed by the log of the Indiana and by her claim as first filed, which indicates that at that time her rights were supposed to be founded on the shot fired by her, and the hauling down of the Panama's colors thereupon. It is unnecessary to advert to further confirmatory details.

We need not consider whether, in order to bring a claimant within signal distance, mutual communication must be possible, or whether it is enough if signals from the vessel making the capture could be seen by the claimant. Taking it the latter way, still the words "within signal distance" must be read in connection with the further words "under such circumstances and in such condition as to be able to render effective aid, if required." The whole sentence refers to the actual conditions of this particular case, not to an abstract objective criterion of ideal signal distance in general. See *The Ella and Anna*, 2

Sprague, 267, 273; *S. C.*, 8 Fed. Cas. No. 4368. The Mangrove had no signal flags but boat flags, about three feet by four, the usual signal flags being about eight feet by eleven. Under such circumstances we think it probably would be safe to assume five miles as an outside limit of signal distance in this instance, if the facts heretofore found by us rendered it necessary to be so nice. It is argued, to be sure, that gun signals would have been possible. As to this suggestion we deem it enough to say that we see no reason to believe that it was a practical working possibility under the circumstances, and therefore need not consider whether this statute would be satisfied by anything less than the possibility of reading the ordinary day signals, in the case at bar.

The claims of the New York and the Wilmington fall with that of the Indiana. If she was not within signal distance of the Mangrove they were not, and, as we are about to show, can make no claim on the ground that the Indiana was a joint captor and that they were within signal distance of her.

A part of the argument for the United States also is disposed of by what we have said. If none of the other vessels were within signal distance of the Mangrove none of them were "vessels making the capture" within the meaning of § 4630. The phrase must be taken to be used in that section in the same sense in which it is used in § 4632, where it is opposed to vessels within signal distance and is defined as meaning "vessels present at and rendering actual assistance in the capture." It cannot be contended that vessels too far away to share in the prize as being within signal distance can share under the more immediate title of vessels making the capture, on the ground of some more remote contribution to the result. Vessels within signal distance and able to render effective aid are let in, it is true, presumably because they are taken to contribute to the result, but a more remote contribution is excluded. See *The Cherokee*, 2 Sprague, 235; *The Atlanta*, 2 Sprague, 251; *S. C.*, 3 Wall. 425; *The Ella and Anna*, 2 Sprague, 267; *S. C.*, 8 Fed. Cas. No. 4368 and *n.*

It follows that these vessels cannot be taken into account in estimating the relative force of captor and prize. Undoubtedly

it is likely that the Panama must have known when it left New York that war and a blockade of Havana were probable, and when it was stopped by the Mangrove, whatever it saw or did not see, it may have conjectured that other vessels were not far off. But, as we have said, these less immediate influences are laid out of account by the act.

We may admit with regard to the question just discussed and that to which we now address ourselves, that it is impossible not to feel that the prize law had in mind a different kind of case from this. To catch a blockade runner or a vessel not even informed of the blockade, in either case a vessel not expecting to fight and having shrewd ground to believe that to do so would be to bring down upon herself an overwhelming force, is not the desperate venture which the statute was framed to encourage. But some rather weak cases must fall within any law which is couched in general words. There is no denying that the Pamana was of force superior to the Mangrove. She was of 1432 tons register, with a crew of seventy-one. She had substantially what was required by her contract as a mail steamship with the Spanish government, viz., two Hontoria nine centimetre guns with thirty round of shot for each, one Maxim gun on the bridge, two signal guns, twenty Remington rifles and ten Mauser rifles, all with ammunition, also bayonets and swords. The Mangrove was a steel screw lighthouse tender of not more than eight hundred tons, with a crew of thirty men, and with two six-pound guns, and no small arms or cutlasses. The Panama also was much the faster boat of the two.

The Panama's armament was taken on board under contract with the Spanish government for her own defence, and was fit for hostile use. *The Panama*, 176 U. S. 548, 549. We must assume that if the master had thought that there was a fair chance of success, he would have shown fight. The fact that he did not, and that he probably had made up his mind not to before he saw the Mangrove, and therefore was not ready for action at the moment, does not change the result. If we cannot take the blockading squadron or the battleship Indiana in account as part of the capturing force, we cannot

take them into account as motives. If the master was a timid man, who would not have dared to fight under any circumstances, there would have been the same certainty of surrender to one who knew the whole situation, but the law would have looked only to the force, and would not have gone into psychology. It would not matter that, because of his timidity, the breech blocks of the guns were left stowed below. If he had the materials for resistance and the chance to use them, that is as far as the law would inquire. So here. As was said by Judge Sprague, we must "consider the means the vessels possessed, and not the use they made of them." *The Atlanta*, 2 Sprague, 251, 258. The adventure of the Mangrove may not have been a brilliant event that will live in story, but it was sufficient to give its officers and crew the profit of the law. It is decided that the Panama was lawful prize, and the case does not fall within the class in which the United States takes half.

Decree affirmed

HOME LIFE INSURANCE COMPANY *v.* FISHER.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA.

No. 121. Submitted December 17, 1902.—Decided February 23, 1903.

The company defended an action on a policy of life insurance on the ground that statements of the insured as to his use of liquor and spirits in the application and in the declaration to the medical examiner were false and amounted to a breach of warranty; but it appeared that the warranty did not extend to the medical declaration; the jury were instructed that if they found either that before the insured made application he drank liquors either freely or to excess, or at the time that he made the application he had a habit of drinking liquor, they were to find for the company, the declaration and the application thus being put on the same footing; the jury found for the plaintiff; *Held*, that the jury must be taken to have found categorically that all of the answers were correct, and the question whether they were warranties or not became immaterial, and the verdict could not be reviewed except for improper instructions duly excepted to.

Opinion of the Court.

THE case is stated in the opinion of the court.

Mr. W. A. Blount for plaintiff in error.

Mr. John C. Avery, *Mr. R. M. Mahon* and *Mr. Benjamin C. Tunison* for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action on a policy of life insurance, brought in the United States Circuit Court. The policy was taken out by one Maclean, the plaintiff's testator, on his own life. By a statute of Florida, if the plaintiff recovered, reasonable attorneys' fees were to be found by the jury and added to the judgment. Evidence was offered as to the proper fee, and was objected to on the ground that the statute was contrary to the Fourteenth Amendment. The evidence was admitted subject to exception, the plaintiff got a verdict and judgment, and the case was brought here by writ of error.

In view of the decision in *Fidelity Mutual Life Association* v. *Mettler*, 185 U. S. 308, the assignment of error in the ruling just stated is not pressed. But although it was that on which the case came up and which gives us jurisdiction, other errors are assigned, which are relied upon and which we must consider. *Horner* v. *United States*, *No. 2*, 143 U. S. 570, 577.

The policy purports to be made "in consideration of the statements and agreements made in the application for this policy, which are hereby made a part of this contract." The application "warrants" that the statements in it "are true, full and complete, . . . and are offered to the company, together with those contained in the declaration to the Home Life Insurance Company's medical examiner, as a consideration for, and as the basis of the contract with said company." The application contained the following questions and answers: "Q. Do you drink wine, spirits, or malt liquors? A. Yes. Q. If so, which of these, and to what extent? A. Moderately. Q. Have you ever used them freely or to excess? A. No." The declaration to the medical examiner contained the following questions and answers: "Q. Do you drink wine, spirits, or

malt liquors, daily or habitually? A. No habit of drinking liquors. Q. If so, which of these, and to what extent daily? NOTE.—State the daily amount. General terms, such as temperately, 'moderately,' 'occasionally,' will not be accepted, and will necessitate correspondence." The second of these questions was not answered. The defendant, with superfluous multiplicity of pleas, set up that these answers were warranties, and again that they were material representations, and that they were false.

Demurrers to the pleas of breach of warranty and some pleas of false representation were sustained, mainly we presume on the authority of *Moulor* v. *American Life Insurance Co.*, 111 U. S. 335. So far as the declarations to the medical examiner are concerned, it will be seen that the word "warrant" does not extend to them. Grammatically, the meaning of the sentence, as it stands, is that the applicant warrants the statements in the application, and warrants that they are offered to the company, together with those in the declaration to the medical examiner, as the basis of the contract. If the sentence is taken a little more intelligently, we should assume that the word "they" has dropped out between "and" and "are offered," and that "warrant" does not govern that part of the clause. However read, the meaning is the same. With regard to the answer in the application, denying that the applicant ever had used spirits, etc., to excess, the strong language of the policy, making the application "part of the contract," affords ground for argument, at least, that the authority cited does not apply, and that this answer was warranted by the assured. But it is not necessary to decide that question in view of the trial and the subsequent ruling of the court.

The case went to trial on the seventeenth, twenty-first, twenty-sixth and twenty-seventh pleas. The seventeenth set up the last-mentioned answer, denying the use of spirits freely or to excess, and averred that it was material, induced the issuing of the policy, and was false in that the applicant had a habit of using spirits freely. The twenty-first was similar, except that the falsity alleged was that the applicant used spirits to excess.

The twenty-sixth set up the answers to the medical examiner; averred that the applicant did have a habit of drinking spirits; that the answer was material, and induced the making of the policy. The twenty-seventh plea was *non assumpsit.* Thus it will be seen that the facts relied on in the pleas held bad were in issue before the jury. This being so, it is questionable whether the plaintiff in error could complain, unless it could point out a mistaken instruction with regard to them at the trial. *Pollak* v. *Brush Electric Association of St. Louis*, 128 U. S. 446, 452, 453; *Lloyd* v. *Preston*, 146 U. S. 630, 644; *Hudmon* v. *Cuyas*, 57 Fed. Rep. 355, 358, 360. Clearly, if, under proper instructions, the jury found the facts not to be as charged, the plaintiff in error suffered no wrong. That was what happened in this case.

The jury were instructed that, if they found "either one to be true, that before Maclean made application, he drank liquors either freely or to excess, or at the time that he made the application he had a habit of drinking liquor," they were to find for the defendant, the declaration to the medical examiner thus being put upon the same footing as the application. The jury found for the plaintiff. Therefore they must be taken to have found categorically that no one of the supposed facts was true, or, in other words, that all of the above recited answers were correct. If so, it does not matter whether they were warranties or not. There is a suggestion, to be sure, that, in the latter case, the defendant would have had to prove only the "literal" falsity of the statement, whereas, in the other, proof of its substantial falsity was required. *Phœnix Life Insurance Co.* v. *Raddin*, 120 U. S. 183, 189. But the plain question of fact was put to the jury with no such niceties of discrimination. They found a plain answer, and the distinction comes too late now. It is said, also, that the charge in other parts did away with the requirement which we have quoted, and that, under the pleas of misrepresentation, the defendant had the burden of proving other facts. It does not appear to us that the requirement was done away with. On the contrary, it was reiterated. The burden of proving other facts was largely cut down by further instructions unnecessary to repeat, and

the burden of proving them did the defendant no harm when the jury found as they did with regard to Maclean's drinking. The alleged warranty that he drank moderately was satisfied by the findings, apart from other answers to the point made with regard to that. We see no reason to assume that the defendant was taken by surprise by the rulings in its favor and put in less evidence than it would have put in had the demurrers been overruled.

We see no ground for reversing the judgment in the other instructions to the jury. Moreover, the other questions raised are made immaterial by what we have said.

Judgment affirmed.

KIDD *v.* ALABAMA.

ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

No. 158. Submitted January 27, 1903.—Decided February 23, 1903.

Section 453, cl. 13, of the Code of 1886, and section 3911, cl. 14, of the Code of 1896 of Alabama taxing stocks of railroads incorporated in other States held by citizens of Alabama are not unconstitutional under the Fourteenth Amendment because no similar tax is imposed on the stock of domestic railroads or of foreign railroads doing business in Alabama; the property of the former class of railroads being untaxed, and that of the latter two classes being taxed, by the State.

THE case is stated in the opinion of the court.

Mr. W. A. Gunter for plaintiff in error.

Mr. Francis G. Caffey and *Mr. John C. Breckenridge* for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action for taxes brought by the State of Alabama against the executrix of the will of a citizen of Alabama. It appears on the record that the property in dispute is stock in

railroads incorporated in other States than Alabama, and that the objection was taken seasonably by plea and by requests for instructions to the jury that the tax was unconstitutional under the Fourteenth Amendment, because no similar tax was levied on the stock of domestic railroads or of foreign railroads doing business in that State. Demurrers to the pleas were sustained, there was a verdict for the plaintiff and judgment, which latter was affirmed by the Supreme Court of the State without discussion, on the authority of its decision at an earlier stage, *State* v. *Kidd*, 125 Alabama, 413, and the case is brought here by writ of error.

The statutes levying the tax in question are the Code of 1886, § 453, cl. 13, and the Code of 1896, § 3911, cl. 14. They are general clauses, which need not be set forth, as their effect is not disputed under the construction given to them by the Supreme Court of the State. The exemption by the Code of 1886 of stock in domestic railroads, and in others that list substantially all their property for taxation, *Sturges* v. *Carter*, 114 U. S. 511, 522, is not denied, and while it is denied by the defendant in error that there is a similar exemption by the Code of 1896, for the purposes of decision we shall assume, without examination, that it is granted. *State* v. *Kidd*, 125 Alabama, 413, 422. On this assumption the argument for the plaintiff in error is that if foreign stock is treated for purposes of taxation as present by fiction in the domicil, it must be treated as present also for purposes of protection, that the tax is a tax on values, and that net values of similar articles must be treated alike. It is said that you cannot look further back.

If the argument went further and denied the right to tax on fiction at all, and therefore denied the right to tax foreign stocks, it would seem to us to have more logical force, although we are far from implying that it would be unanswerable or that it can be regarded as open. Very likely such taxes can be justified without the help of fiction. *Sturges* v. *Carter*, 114 U. S. 511; *Dwight* v. *Boston*, 12 Allen, 316; *Dyer* v. *Osborne*, 11 R. I. 321. But the argument does not go to that extent, and, limited as it is, the proposition that the plaintiff in error is denied the equal protection of the laws for the reason which we have stated,

strikes us as wholly without force. We see nothing to prevent a State from taxing stock in some domestic corporations and leaving stock in others untaxed on the ground that it taxes the property and franchises of the latter to an amount that imposes indirectly a proportional burden on the stock. When we come to corporations formed and having their property and business elsewhere, the State must tax the stock held within the State if it is to tax anything, and we now are assuming the right to tax stock in foreign corporations to be conceded. If it does tax that stock it may take into account that the property and franchise of the corporation are untaxed, on the same ground that it might do the same thing with a domestic corporation. There is no rule that the State cannot look behind the present net values of different stocks. See *American Refining Co.* v. *Louisiana*, 179 U. S. 89.

We say that the State in taxing stock may take into account the fact that the property and franchises of the corporation are untaxed, whereas in other cases they are taxed; and we say untaxed, because they are not taxed by the State in question. The real grievance in a case like the present is that, more than probably, they are taxed elsewhere. But with that the State of Alabama is not concerned. No doubt it would be a great advantage to the country and to the individual States if principles of taxation could be agreed upon which did not conflict with each other, and a common scheme could be adopted by which taxation of substantially the same property in two jurisdictions could be avoided. But the Constitution of the United States does not go so far. *Coe* v. *Errol*, 116 U. S. 517, 524; *Knowlton* v. *Moore*, 178 U. S. 41; *Dyer* v. *Osborne*, 11 R. I. 321, 327; Cooley, Taxation, 2d ed. 221, *n.* One aspect of the problem was touched in the case of *Blackstone* v. *Miller*, at the present term. 188 U. S. 187. The State of Alabama is not bound to make its laws harmonize in principle with those of other States. If property is untaxed by its laws, then for the purpose of its laws the property is not taxed at all.

It is said that the State may not tax a man because by fiction his property is within the jurisdiction, and then discriminate against him upon the fact that it is without. The State does

nothing of the kind. It adheres throughout to the fiction, if it be one, that the stock, the property of the plaintiff in error, is within the jurisdiction. There is no inconsistency in the State's recognizing at the same time that the property of the corporation, that which gives the plaintiff's stock its value, is taxed or untaxed, as the case may be. There is no inconsistency in recognizing that it is untaxed because it cannot be reached. Shares of stock may be within a State, and the property of the corporation outside it.

We need not repeat the commonplaces as to the large latitude allowed to the States for classification upon any reasonable basis. *Pacific Express Co.* v. *Seibert*, 142 U. S. 339, 351, 352; *Gulf, Colorado & Santa Fé Railway Co.* v. *Ellis*, 165 U. S. 150, 155; *Nicol* v. *Ames*, 173 U. S. 509, 521; *Atchison, Topeka & Santa Fé Railroad Co.* v. *Matthews*, 174 U. S. 96; *American Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89. What is reasonable is a question of practical details, into which fiction cannot enter.

Practically the law before us, in the broad aspect in which alone we are asked to consider it, seems to us to work out substantial justice and equality, if we leave on one side the probable taxation by other States, which does not affect the State of Alabama's rights.

Judgment affirmed.

Justices Harlan and White dissented.

Kidd v. Alabama, No. 157. This case was to abide the result of the foregoing.

Judgment affirmed.

FOURTH NATIONAL BANK *v.* ALBAUGH.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 159. Argued January 29, 30, 1903.—Decided February 23, 1903.

Cross, who was president of a bank and had been misusing its funds, gave to Martindale two instruments of assignment, providing that Martindale should pay himself for any paper on which Cross and Martindale were mutually makers or indorsers. The bank and other parties held such paper. Cross killed himself the day after the assignment was given. There was an earlier assignment to Martindale as trustee. The receiver of the bank alleged that the earlier assignment was made to protect the bank. Martindale was the only witness as to delivery of the assignment and admitted that it was for the benefit of the bank but only to a limited amount. *Held*, in an action in which other holders of paper made by Cross and Martindale sought to obtain the proceeds of sale of the property assigned, that it was not error to admit testimony that Martindale had stated that the earlier assignment had been made to secure the bank generally for Cross's liability thereto.

THE case is stated in the opinion of the court.

Mr. T. F. Garver for appellants. *Mr. J. B. Larimer*, *Mr. Frank Hagerman* and *Mr. C. N. Sterry* were on the brief.

Mr. Joseph R. Webster for appellees. *Mr. J. Jay Buck* was on the brief.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity brought to require the defendant Albaugh to apply a certain fund to payment of debts due to the Fourth National Bank of St. Louis from one Cross, of whose estate the defendant Newman is administrator, and from the defendant Martindale. By cross bill and intervening petitions the other appellants set up similar claims. The fund is the proceeds of property of Cross sold by agreement. The appellants claim under an alleged assignment of the property by Cross to Martindale as trustee, dated July 15, 1898, and

another assignment to Martindale dated November 15, 1898. The former instrument contains the provision "the said Martindale . . . is to pay himself for any paper upon which he and I are mutually makers or indorsers." The debts due to the appellants were on paper of this description, and they claim the benefit of the security on this ground. The later assignment was given to Martindale, according to his testimony, also as security for similar liabilities. It needs no special mention.

The defendant Albaugh, as receiver of the First National Bank of Emporia, claims the fund under an earlier assignment to Martindale as trustee, dated March 4, 1898. Cross was president of this bank and had been misusing its funds. Albaugh contends that this assignment was made for the purpose of securing the bank, and if that fact is established there will be nothing left for the appellants, assuming that otherwise they make out their case. Only Cross and Martindale were present when the assignment was delivered, and as Cross killed himself on November 16, 1898, Martindale alone could testify as to the delivery and purposes of the instrument. He was put on as a witness for the plaintiffs, and on cross-examination testified to the delivery of the paper and by implication to the trust being in favor of the bank, but he limited it to a sum of $7500, which amount he testified that Cross said he wanted to use in a particular manner. Exceptions were taken to allowing the cross-examination to be extended to these facts. Subsequently other witnesses were allowed to testify, subject to exceptions, that at different times out of court Martindale had stated that the assignment of March 4 was made to secure the Emporia bank generally for Cross' liability to it. There was a decree for the defendant Albaugh in the Circuit Court, which was affirmed on appeal by the Circuit Court of Appeals. 107 Fed. Rep. 819. An appeal then was allowed to this court.

The only error alleged which it is necessary to consider is the admission of the above evidence. Indeed, that is the only ground on which the appeal can be based. If that evidence was competent and Martindale's declarations were believed, the receiver's case was proved. If it should have been excluded,

the decree would be hard to support either on the other evidence to the same point or on the suggestion that the appellants had not proved what the burden lay on them to prove.

So far as the cross-examination of Martindale goes, we see no occasion for reversing the decision of the court. *Wills* v. *Russell*, 100 U. S. 621, 626. Nor do we think the suggestion material that the defendant thereby made Martindale his own witness. The evidence of Martindale's declarations was put in not merely to contradict what he said on the stand, but as evidence largely relied on to prove the facts which he declared.

It is said that as soon as the appellants' interest under the later assignment had vested Martindale could do nothing to destroy it; that he could not release it, and that therefore he could not end it obliquely by a declaration. The conclusion does not follow from the premises, granting those premises for the purpose of argument, although they presuppose the rights of the appellants under the later instruments to be established. To destroy by release is one thing, to destroy in the sense of disproving or qualifying by proof is another. The latter is free to any one who knows the facts. There is no doubt, of course, that Martindale had a right to testify to what he was shown to have declared, however bad it might be for the appellants. Therefore the only question is whether his declaration was some evidence as against them of facts which certainly might have been established by his oath.

If ever a declaration not made under oath is to be admitted against any other than the person making it, it should be admitted in this case. The declaration was obviously against interest. It was the only evidence in the nature of things that could be had, when Martindale haltingly denied the fact upon the stand. If we were to take it very nicely, it simply did away with a qualification engrafted by Martindale upon his testimony that the instrument was security for the bank, and made it easier to accept the principal fact without the qualification. The appellants say that they have a standing under the instrument independent of Martindale. So no doubt they have for some purposes, if we follow the somewhat sweeping and undiscriminating notion of equity embodied in many decisions to be

found. Nevertheless, they claim in Martindale's right as against the estate of Cross or any prior assignee. The fact that equity gives them a right to have the security applied does not enlarge or change the character of the security, and that was, as we have quoted, to enable Martindale "to pay himself for any paper" on which he was liable with Cross. The appellants get their rights from and through Martindale. Their right is only to have Martindale's right enforced as it was on July 15 or November 15. *Cunningham* v. *Macon & Brunswick R. R. Co.*, 156 U. S. 400, 419. It even was argued on this ground that it appeared from other evidence that Martindale had no equity as against the Emporia bank, and that therefore the decree could be upheld. But, as we have said, the evidence objected to was too important not to have had an influence on the decision, and therefore we confine ourselves to the consideration of that.

It may be urged that, even if the appellants get their rights by subrogation, (and it is to be noticed that the only claim made in their pleadings is to be subrogated to the rights of Martindale,) still their rights are independent when the subrogation is complete. In reply we fall back upon the distinction between admissions and an attempt to release the rights. The distinction was recognized in England in the case of a suit by a naked trustee. If he undertook fraudulently to release the cause of action and his release was pleaded, the plea would be ordered off the files. *Innell* v. *Newman*, 4 B. & Ald. 419. See *Payne* v. *Rogers*, 1 Dougl. 407; *Anon.*, 1 Salk. 260; *Troeder* v. *Hyams*, 153 Massachusetts, 536, 538. But his admissions were evidence for the defendant. *Bauerman* v. *Radenius*, 7 Term Rep. 663; *Craib* v. *d'Aeth*, 7 Term Rep. 670, *n.* (*b*). The analogy by no means is perfect, but it is sufficient. In these days, when the whole tendency of decisions and legislation is to enlarge the admissibility of hearsay where hearsay must be admitted or a failure of justice occur, we are not inclined to narrow the lines. The interest of Martindale continued, the appellants claim through it, and we are of opinion that, under the circumstances, admissions by Martindale contrary to that interest properly were let in. Cases of admissions by a trustee having no interest in the suit may stand on different ground.

The decree is objected to as granting affirmative relief to Albaugh against his co-defendant Newman. As the appellants are dismissed out of court, the error, if it was one, does not concern them.

Decree affirmed.

MR. JUSTICE BREWER and MR. JUSTICE PECKHAM dissented.

OPINIONS PER CURIAM, ETC., FROM JANUARY 19, TO MARCH 1, 1903.

No. 68. JOHN S. SWANN ET AL., TRUSTEES, ETC., PLAINTIFFS IN ERROR, *v.* STATE OF WEST VIRGINIA. In error to the Supreme Court of Appeals of the State of West Virginia. Submitted December 8, 1902. Decided January 26, 1903. *Per Curiam.* Decree affirmed with costs, on the authority of *King* v. *Mullins*, 171 U. S. 404. *Mr. George E. Price* and *Mr. S. S. Green* for the plaintiffs in error. *Mr. W. Mollohan*, *Mr. Geo. W. McClintic* and *Mr. Murray Briggs* for the defendant in error.

No. 153. THEODORE READ, PLAINTIFF IN ERROR, *v.* MISSISSIPPI COUNTY. In error to the Supreme Court of the State of Arkansas. Submitted January 28, 1903. Decided February 2, 1903. *Per Curiam.* Judgment affirmed with costs, on the authority of *Morley* v. *Lake Shore, etc., Railway Company*, 146 U. S. 162. *Mr. William H. Carroll* for the plaintiff in error. No appearance for the defendant in error.

Decisions on Petitions for Writs of Certiorari.

From January 19 to March 1, 1903. See vol. 187, p. 639.

No. 433. WILLIAM E. HALE, RECEIVER, ETC., PETITIONER, *v.* JAMES A. HILLIKER. January 19, 1903. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. M. H. Boutelle*, *Mr. Wm. E. Hale* and *Mr. A. L. Pincoffs* for the petitioner. *Mr. Charles E. Patterson* and *Mr. Alpheus Bulkeley* for the respondent.

No. 443. RICHARD A. BURGET, PETITIONER, *v.* HORACE R. ROBINSON. January 19, 1903. Petition for a writ of certiorari

to the United States Circuit Court of Appeals for the First Circuit denied. *Mr. John W. Corcoran* and *Mr. P. A. Collins* for the petitioner. *Mr. Stiles W. Burr* and *Mr. John W. Saxe* for the respondent.

No. 546. Standard Sewing Machine Company, Petitioner, *v.* Arthur M. Leslie. January 19, 1903. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Charles S. Holt* and *Mr. John Dane, Jr.*, for the petitioner. *Mr. Charles K. Offield* and *Mr. Charles C. Linthicum* for the respondent.

No. 548. Horace M. Dupee, Petitioner, *v.* Chicago Horse Shoe Company. January 19, 1903. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. William M. Jones* and *Mr. James E. Munroe* for the petitioner. *Mr. Le Roy D. Thoman* for the respondent.

No. 549. Washington National Building and Loan Association, Petitioner, *v.* Bertha L. Fiske and Husband. January 26, 1903. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. George E. Hamilton*, *Mr. M. J. Colbert*, *Mr. J. H. Ralston* and *Mr. F. L. Siddons* for the petitioner. *Mr. Maurice D. Rosenberg*, *Mr. Alexander Wolf* and *Mr. D. W. Baker* for the respondents.

No. 553. Simon Rothschild, Petitioner, *v.* Memphis and Charleston Railroad Company et al. January 26, 1903. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Heber J. May* for the petitioner. *Mr. Francis Lynde Stetson*, *Mr. F. P. Poston* and *Mr. Fairfax Harrison* for the respondents.

Decisions on Petitions for Writs of Certiorari.

No. 571. JAMES GALVIN, PETITIONER, *v.* CITY OF GRAND RAPIDS. February 2, 1903. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Timothy E. Tarsney* for the petitioner. No appearance for respondent.

No. 551. C. M. PATTERSON, PETITIONER, *v.* R. M. WADE. February 23, 1903. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. John H. Mitchell* for the petitioner. *Mr. Joseph Simon* for the respondent.

No. 557. ATLANTIC TRUST COMPANY, PETITIONER, *v.* EDGAR C. CHAPMAN, RECEIVER, ETC. February 23, 1903. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Stanley W. Dexter*, *Mr. Edward B. Whitney* and *Mr. J. J. Scrivner* for the petitioner. (*Mr. Wheeler H. Peckham*, *Mr. Adrian H. Joline*, *Mr. William B. Hornblower*, *Mr. Herbert B. Turner*, *Mr. Jno. E. Parsons*, *Mr. Wm. W. Green* and *Mr. Allan McCulloh*, for certain interested parties, filed a brief in support of petition, by special leave of the court.) *Mr. Charles N. Fox* for the respondent.

No. 568. ROBERT B. WHALLEY, MASTER, ETC., PETITIONER, *v.* THOMAS TRAVERS ET AL. February 23, 1903. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. J. Parker Kirlin* for the petitioner. *Mr. W. C. Beecher* for the respondents.

No. 576. BUFFALO ELECTRIC CARRIAGE COMPANY, PETITIONER, *v.* ELECTRIC STORAGE BATTERY COMPANY. February 23, 1903. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Thomas*

A. Banning and *Mr. Ephraim Banning* for the petitioner. *Mr. John R. Bennett* for the respondent.

No. 593. Frank J. Hearne, Petitioner, *v.* German Insurance Company et al. February 23, 1903. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Joseph K. McCammon* and *Mr. James H. Hayden* for the petitioner. *Mr. William S. Dalzell*, *Mr. Ernest L. Tustin* and *Mr. J. H. Harrison* for the respondents.

No. 518. Mutual Life Insurance Company of New York, Petitioner, *v.* Eliza Maud Hill et al. February 23, 1903. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit granted. *Mr. John B. Allen*, *Mr. Julien T. Davies*, *Mr. Edward Lyman Short* and *Mr. Frederic D. McKenney* for the petitioner. *Mr. S. Warburton* for the respondents.

No. 567. A. Chesebrough et al., Owners, etc., Petitioners, *v.* Matthew Bridges. February 23, 1903. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Milton Andros* for the petitioners. *Mr. A. H. Ricketts* for the respondent.

Cases Disposed of Without Consideration by the Court.

From January 19, to March 1, 1903. See vol. 187, p. 50.

No. 146. United States, Plaintiff in Error, *v.* S. P. Shotter Company. In error to the Circuit Court of the United States for the Southern District of Alabama. January 19, 1903. Dismissed, on motion of *Mr. Solicitor General Richards* for the

plaintiff in error. *The Attorney General* for the plaintiff in error. *Mr. John Ridout* for the defendant in error.

No. 154. W. F. WYMAN, APPELLANT, *v.* VIRGILE HERARD. Appeal from the Supreme Court of the Territory of Oklahoma. January 22, 1903. Dismissed with costs, pursuant to the 10th rule. *Mr. George Chandler* for the appellant. *Mr. John W. Shartel* for the appellee.

No. 243. OLIVER AMES ET AL., TRUSTEES, ET AL., PLAINTIFFS IN ERROR, *v.* BOARD OF STREET COMMISSIONERS OF THE CITY OF BOSTON. In error to the Supreme Judicial Court of the State of Massachusetts. February 24, 1903. Dismissed, per stipulation. *Mr. J. H. Benton, Jr.*, for the plaintiffs in error. *Mr. Thomas M. Babson* for the defendant in error.

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BURDEN OF PROOF.

See CONTRACTS, 1; PRACTICE, 5; PAYMENT; WILL.

CASES DISTINGUISHED.

1. *Brown* v. *Houston*, 114 U. S. 622, distinguished from *Kelley* v. *Rhoads*, 1.
2. *Carter* v. *Texas*, 177 U. S. 442, distinguished from *Tarrance* v. *Florida*, 519.
3. *Coe* v. *Errol*, 116 U. S. 317, distinguished from *Kelley* v. *Rhoads*, 1.
4. *Farmers' Loan & Trust Co.* v. *Penn Plate Glass Co.*, 186 U. S. 434, distinguished from *American Ice Co.* v. *Eastern Trust &c. Co.*, 626.
5. *Pittsburg &c. Coal Co.* v. *Bates*, 156 U. S. 57, distinguished from *Kelley* v. *Rhoads*, 1.

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1. *Boston & Montana Con. Mining Co.* v. *Montana Ore Co.*, 188 U. S. 632, followed in *Boston & Montana Mining Co.* v. *Chile Gold Mining Co.*, 645.
2. *Coe* v. *Errol*, 116 U. S. 617, followed in *Diamond Match Co.* v. *Ontonagon*, 82.
3. *King* v. *Mullins*, 171 U. S. 404, followed in *Swan* v. *West Virginia*, 739.
4. *Morley* v. *Lake Shore &c. Ry. Co.*, 146 U. S. 162, followed in *Read* v. *Mississippi County*, 739.
5. *Smith* v. *Mississippi*, 162 U. S. 592, followed in *Tarrance* v. *Florida*, 519.
6. *Smyth* v. *Ames*, 169 U. S. 466, followed in *Prout* v. *Starr*, 537.
7. *The Manila Prize Cases*, 254, followed in *The Infanta Maria Teresa*, 283.
8. *Thompson* v. *Whitman*, 18 Wall. 457, followed in *Andrews* v. *Andrews*, 14.
9. *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 215, followed in *Andrews* v. *Andrews*, 14.

CAVEAT.

See WILL.

CHALLENGES.

See PRACTICE, 7.

CLOUD ON TITLE.

See EQUITY, 2.

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See INTERSTATE COMMERCE.

CONGRESS, POWERS OF.

1. The provisions of the corporation laws of the Territory of New Mexico relating to the formation and rights of irrigation companies are not invalid because they assume to dispose of property of the United States without its consent. By the act of July 26, 1866, 14 Stat. 253; Rev. Stat. § 2339, and the act of March 3, 1877, 19 Stat. 377, Congress recognized as respects the public domain and so far as the United States is concerned, the validity of the local customs, laws and deci-

CONGRESS, ACTS OF.

CONSPIRACY.

CONSTITUTIONAL LAW.

1. Within repeated decisions of this court the statute of a State under which the cost of a public improvement may be assessed upon the abutting property in proportion to frontage, such statute, as construed by the state courts, requiring such assessment to conform to the actual special benefits accruing to each of the abutting property owners, is not in conflict with the Constitution of the United States. *Schaefer* v. *Werling*, 516.
2. The Constitution of the United States, with the several amendments thereof, must be regarded as one instrument, all of whose provisions are to be deemed of equal validity. And in an action properly instituted against a state official the Eleventh Amendment is not a barrier to a judicial inquiry as to whether the provisions of the Fourteenth Amendment have been disregarded by state enactments. *Prout* v. *Starr*, 537.
3. By the Laws of Texas of 1883, c. 58, as amended by the Laws of 1885, c. 12, p. 13, a purchaser was bound to pay the notes given in payment for public land as they matured, and it was the duty of the commissioner to issue a patent for the land on payment of the notes and interest. In November, 1885, the laws of Texas did not give the State the right to forfeit lands for non-payment of installments due from purchasers, although at various periods prior thereto there had been provisions in the law to that effect. In 1897 and 1895 laws were enacted providing for forfeiture in case of such non-payment, but giving the purchaser the right to be heard in a court of justice pursuant to certain forms of procedure prescribed in the law upon the question of whether he was actually in default. *Held*, as to a purchaser of lands in 1885 (after the passage of the act of that year) and who from 1893 to December, 1897, (after the passage of the act of that year) had failed to make any of the payments due under his contract, that the act of

ESTOPPEL.

EVIDENCE.

LOTTERIES.

A slip retained by the agent of a lottery which is the duplicate of a slip retained by the purchaser, indicating the numbers selected by him, is not a paper, certificate or interest purporting to be or to represent chances, shares and interest in the prizes thereafter to be awarded by lot in the drawings of a lottery commonly known as the game of policy within the meaning of the act of Congress of March 2, 1895, c. 191, 28 Stat. 963. *Francis* v. *United States*, 375.

MARRIAGE AND DIVORCE.

Although marriage, viewed solely as a civil relation, possesses elements of contract, it is so interwoven with the very fabric of society that it cannot be entered into except as authorized by law, and it may not, when once entered into, be dissolved by the mere consent of the parties. *Andrews* v. *Andrews*, 14.

MINERAL LANDS.

Lands valuable solely or chiefly for granite quarries are mineral lands within the exception and the meaning of the provisions of the act of Congress of July 2, 1864, granting, under conditions therein stated, every alternate odd-numbered section of public land *not mineral* to the amount of twenty alternate sections per mile on each side of its line to the Northern Pacific Railroad Company. The word mineral need not be construed as synonymous with metalliferous. *Northern Pacific Ry. Co.* v. *Soderberg*, 526.

MORTGAGE.

Although, as held in *Farmers' Loan & Trust Company* v. *Penn Plate Glass Co.*, 186 U. S. 434, a covenant in a mortgage to keep the property insured does not run with the land so that an actual grantee taking subject to the mortgage comes under a primary obligation to insure, the case is different under the peculiar language of the mortgage herein,

PROBATE.

PUBLICATION.

STOCKHOLDER.

The presumption of liability of a stockholder of a national bank begotten by the presence of her name on the stock register may be rebutted if the jury finds the fact to be that a *bona fide* sale of her stock had been made and she had performed every duty which the law imposed on her in order to secure a transfer on the registry of the bank. *Earle* v. *Carson*, 42.

See LOCAL LAW, 4;
RECEIVER, 1, 3;
TRANSFER OF STOCK.

TAXATION.

1. By the act of Congress of February 8, 1887, c. 119, known as the Indian General Allotment Act it was provided: "That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare, that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted, as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void. *Held:* (1) That neither the lands allotted nor the permanent improvements thereon nor the personal property obtained from the United States and used by the Indians on the lands allotted to them, are subject to state or local taxation during the period of the trust provided by the above act of 1887. (2) The United States has such an interest in the question of such taxation as to entitle it to maintain a suit to protect the Indians against such local or state taxation. (3) This suit was properly brought in equity and not at law, the remedy at law not being as adequate and efficacious as was necessary. *United States* v. *Rickert*, 432.
2. A franchise granted by the proper authorities of Indiana, for maintain-

TERRITORIAL LAWS.

TRANSFER OF STOCK.

The power of a stockholder to transfer her stock in a national bank, like other personal property, is not limited by the mere fact that at the time of the transfer the bank, which was a going concern, was insolvent in the sense that its assets, if liquidated, would not discharge its liabilities, unless it be shown that the seller was aware of the facts and had sold her stock in order to avoid the impending double liability. Nor is such a *bona fide* sale void if the person to whom the stock is sold is, owing to his insolvency, unable to respond to the double liability, if the fact of such insolvency was unknown to the seller. *Earle* v. *Carson*, 42.