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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1903

CHARLES HENRY BUTLER

REPORTER

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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.
EDWARD DOUGLASS WHITE, Associate Justice.
RUFUS W. PECKHAM, Associate Justice.
JOSEPH McKENNA, Associate Justice.
OLIVER WENDELL HOLMES, Associate Justice.
WILLIAM R. DAY, Associate Justice.

PHILANDER CHASE KNOX, Attorney General.
HENRY MARTYN HOYT, Solicitor General.
JAMES HALL McKENNEY, Clerk.
JOHN MONTGOMERY WRIGHT, Marshal.

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CASES ADJUDGED

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SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1903.

GONZALES *v.* WILLIAMS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 225. Argued December 4, 7, 1903.—Decided January 4, 1904.

The immigration act of March 3, 1891, 26 Stat. 1084, relates to foreigners as respects this country—to persons owing allegiance to a foreign government; citizens of Porto Rico are not "aliens," and upon arrival by water at the ports of our mainland are not "alien immigrants" within the intent and meaning of the act.

THE facts of this case, which involved the power of the Commissioner of Immigration at the Port of New York to detain a citizen of Porto Rico as an alien immigrant under the provisions of the act of March 3, 1891, 26 Stat. 1084, are stated in the opinion of the court.

Mr. Frederick R. Coudert, Jr., and *Mr. Paul Fuller*, with whom *Mr. Charles E. LeBarbier* was on the brief, for appellant:

The commissioner could have no jurisdiction unless the petitioner were an alien. Act of August 28, 1894, 28 Stat. 390. *The Martonelli Case*, 63 Fed. Rep. 437, was decided before the

statutes of 1894 were published. The cession of Porto Rico definitely transferred the allegiance of the native inhabitants from Spain to the United States. Arts. II, III, IX, Treaty of December 10, 1898. This treaty made the territory domestic territory. *De Lima* v. *Bidwell*, 182 U. S. 1. For definitions of "alien" see Ency. of Law; Webster's International Dictionary; 2 Kent's Com. 50; Burrill's Law Dictionary, citing 1 Peters, 343; *Boyd* v. *Thayer*, 143 U. S. 162. Allegiance determines nationality. 1 Pollock's Hist. of Eng. Law, 441, 443. By the common law a change of sovereignty from a foreign domination makes the inhabitants, both *anti nati* and *post nati*, British subjects. Chalmer's Colonial Opinions, 663; Lawrence's Wheaton, Appx. 894; *Campbell* v. *Hall*, 1 Cowper, 204; Westlake Int. Private Law, 203; *Doe* v. *Acklam*, 2 B. & C. 779; Stepney Election Petition, 1886, 17 Q. B. D. 54. The United States did not, until this case arose, claim that Porto Ricans were aliens. Brief of Attorney General in *Insular* cases, p. 172. The question as to meaning of term citizen and what constitutes citizenship under the United States law must be examined in the light of the English law. *United States* v. *Wong Kim Ark*, 169 U. S. 655. See also *Minor* v. *Happersett*, 21 Wall. 162; *Ex parte Wilson*, 114 U. S. 417; *Boyd* v. *United States*, 116 U. S. 616; *Smith* v. *Alabama*, 124 U. S. 465; *Moore* v. *United States*, 91 U. S. 270; *Hennessy* v. *Richardson*, 189 U. S. 34. Citizen and subject are identical terms. Munroe Smith's Ency. Political Science and History under Nationality; Butler's Treaty Making Power, vol. 1, p. 16 *n*.

The change of allegiance, while it made the Porto Rican born before the cession a national or subject, did not necessarily make him a citizen. There cannot, however, be an "American alien." As to rights of citizens of United States and control of Congress thereover, see *Civil Rights Cases*, 109 U. S. 3; *Maxwell* v. *Dow*, 176 U. S. 581, 588; *Wong Wing* v. *United States*, 169 U. S. 228; Woodrow Wilson, The State, p. 498, § 917.

The theory of the treaty makers and the general policy of the Government is to confer the ordinary civil rights upon the

new inhabitants, while withholding from them all political privileges. Certain rights are accorded to all persons within the United States and they are not dependent upon citizenship or alienage. *Insular Cases,* 182 U. S., *Mankichi Case,* 190 U. S. 197. There are various gradations of subjection. Cogordon, La Nationalité, pp. 7, 8; Bluntschli's Theory of the State, Eng. Transl. 203. The *Dred Scott Case,* 19 How. 399, was the first to hold that subjection and citizenship were not necessarily identical in the United States. The status of the colored race, as settled by that decision, was changed by the Fourteenth Amendment. See dissenting opinion *United States* v. *Wong Kim Ark,* 169 U. S. 649. As to status of Indians, see *Elk* v. *Wilkins,* 112 U. S. 101. For illustrations of distinction between subjects and citizens, see Cogordon, La Nationalité; Glard, Nationalité Francaise, pp. 263, 380–408.

Mr. Federico Degetau, Resident Commissioner from Porto Rico, as *amicus curiæ* by leave of the court.

By the Protocol of August 12, 1898, Porto Rico was ceded by Spain to the United States; this cession was confirmed by Art. II of the Treaty of Paris. Congress, by subsequent legislation, enacted laws for that territory under the clause of the Constitution relating to the territory of the United States, Art. IV. sec. 3. The island, therefore, has ceased to be a province of Spain and has become "territory of the United States—although not an organized territory in the technical sense of the word." *De Lima* v. *Bidwell,* 182 U. S. 1. Under the military Government of the United States the inhabitants were released from their former political relations, General Miles' Proclamation—General Brooks' General Order No. 1, and took the oath to support the Constitution of the United States, renouncing forever all allegiance to any prince or potentate or foreign sovereignty and particularly that of the Government and sovereignty of Spain. This form of the transfer of sovereignty was confirmed by the act of April 12, 1900. Thus the inhabitants have acquired United States citizen-

ship, and have been incorporated with those who were already American citizens in the same *body politic* according to sec. 7 of said act. Some of those who were already American citizens prior to the annexation of Porto Rico have been elected members of the Porto Rican House of Delegates by the native citizens of Porto Rico, and in other cases as citizens of Porto Rico have cast their votes to elect natives of the Island as their representatives. The Resident Commissioner, a native citizen of Porto Rico, could not be entitled to represent, in a political capacity, the hundreds of citizens of the United States, born or naturalized in the mainland, who have given him their suffrages, if he were an alien. The taking as a member of the bar of this Honorable Court, the oath to maintain the Constitution of the United States, is incompatible with allegiance to any other power than that prescribed by, and defined in, the charter in which the sovereign people of the United States directly created this court as well as the other departments of our Government.

Mr. Solicitor General Hoyt for appellee:

The act of August 18, 1894, 28 Stat. 390, makes the decision of the appropriate immigration or customs officer, if adverse to the admission of an alien, final unless reversed on appeal to the Secretary of the Treasury. Even if appellant herein was ultimately entitled to a writ of *habeas corpus*, she was not in a position justly to obtain the writ until she had prosecuted an unavailing appeal to the Secretary of the Treasury, and thus pursued her remedy in the executive course to the uttermost.

The finality of the executive decision in cases relating to admitted aliens and those where the claim of citizenship is made has been repeatedly sustained by this court. *Nishimura Ekiu* v. *United States*, 142 U. S. 651; *Lem Moon Sing* v. *United States*, 158 U. S. 538; *Chin Bak Kan* v. *United States*, 186 U. S. 193; *Japanese Immigrant Case*, 189 U. S. 86. While there are decisions in the lower courts, arising under the Chinese exclu-

sion laws and other immigration laws, which appear to hold that where the initial question is whether the applicant for admission is or is not an alien, the executive jurisdiction is not completely conclusive, and does not oust the jurisdiction of the courts, on the whole, the tendency of this court and of the subordinate tribunals which have applied its decisions seems to be that the executive authority has the right and power to pass upon all questions presented, including the question whether a particular applicant is an alien or not; and the decision of that authority upon this question is final.

In this inquiry insistence on fixed and unchanging definitions of terms must be avoided. We are to weigh the inclusion and import of the word "alien" in the light of the spirit and meaning of the law. The holding of this court in *De Lima* v. *Bidwell*, 182 U. S. 1, with respect to the word "foreign" should not affect the question here on the word "alien." This issue, which affects persons and not things, immigration laws and not tariff laws, is essentially different.

Appellant is not a citizen, and is to be regarded as an alien within the meaning of the immigration laws.

It is conceded that the people of Porto Rico are connected with this Government by a certain tie distinguishing them from other ordinary foreigners, that they may be "nationals;" but this does not operate to confer citizenship. Must Congress have intended that all who were not aliens in the strict and unrelieved sense should escape the immigration laws, or that all who were not citizens should be subject to them? The solution of the controversy is dependent solely upon the proper construction of the law.

By the treaties ceding Florida, Louisiana, California and Alaska we agreed that the inhabitants of the ceded territories should eventually be admitted to citizenship. A review of the cases arising under those treaties shows that until the acquired territories were finally admitted to Statehood, the inhabitants were not truly citizens and were manifestly regarded, when the question was raised, as aliens. *United States*

v. *Laverty*, 3 Mart. 733; *American Insurance Co.* v. *Canter*, 1 Pet. 542; *Inglis* v. *Sailors' Snug Harbor*, 3 Pet. 99.

The authorities on international law show that nothing is predicated of the effect of cession beyond the general change of nationality and the general results of practice under treaties like our early ones.

The recent *Insular* cases anticipated this question in an illustrative way rather than as indicating settlement. We may, however, justly reach the conclusion that in the view of a majority of the court in *Downes* v. *Bidwell* there was, upon general principles, no incorporation of native inhabitants into our body politic; and in view of the express reservation by the treaty, recognized by subsequent legislation, it was necessary for Congress to determine what the exact status and rights of these inhabitants shall be. Nor do the dissents in the *Insular* cases suggest any conflict with the argument of the Government in the present case.

It is manifest that Congress, in enacting the immigration laws, found it necessary for our welfare to exclude the dangerous or burdensome classes of foreigners enumerated in those laws; and the court has sustained in the broadest terms the sovereign right of the nation to exclude aliens and the authority of Congress to enact the laws necessary for that purpose, and has noted the purpose and motive of the laws. The underlying reason and necessity of all such laws require that this bar against "native inhabitants" should be maintained until Congress has deliberately determined their status. An examination of the various laws enacted by Congress for Porto Rico and the Philippines, during the past three years, shows that any extension of the local rights and privileges requires a specific enactment; *e. g.*, army appropriation act of March 2, 1903, providing that citizens of Porto Rico shall be eligible for enlistment in the regular army; act of April 12, 1900, sec. 9, nationalizing Porto Rican vessels and admitting them to the coasting trade.

Opposing counsel regard the Government contention in this

case as involving a manifest incongruity. But the attitude of the United States simply is that dangerous or feeble defectives among our island inhabitants are not to be admitted to this country as if they were citizens; and the supposed incongruity is disposed of by the statement that former aliens by birth and race, now under our sovereignty and protection in appurtenant domestic territory, are still aliens respecting proper immigrant exclusions, when the Spanish treaty and consequent laws preserved the *status quo ante*, and Congress has not affirmatively removed the ban.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

This is an appeal by Isabella Gonzales from an order of the Circuit Court of the United States for the Southern District of New York, dismissing a writ of *habeas corpus* issued on her behalf, and remanding her to the custody of the United States Commissioner of Immigration at the Port of New York. 118 Fed. Rep. 941.

Isabella Gonzales, an unmarried woman, was born and resided in Porto Rico, and was an inhabitant thereof on April 11, 1899, the date of the proclamation of the Treaty of Paris; she arrived at the Port of New York from Porto Rico, August 24, 1902, when she was prevented from landing and detained by the Immigration Commissioner at that port as an "alien immigrant," in order that she might be returned to Porto Rico if it appeared that she was likely to become a public charge.

If she was not an alien immigrant within the intent and meaning of the act of Congress entitled "An act in amendment to the various acts relative to immigration and the importation of aliens under contract or agreement to perform labor," approved March 3, 1891, 26 Stat. 1084, c. 551, the commissioner had no power to detain or deport her, and the final order of the Circuit Court must be reversed.

The act referred to contains these provisions:

"That the following classes of aliens shall be excluded from admission into the United States, in accordance with the

existing acts regulating immigration, other than those concerning Chinese laborers: All idiots, insane persons, paupers or persons likely to become a public charge. . . .

"SEC. 8. That upon the arrival by water at any place within the United States of any alien immigrants it shall be the duty of the commanding officer and the agents of the steam or sailing vessel by which they came to report the name, nationality, last residence, and destination of every such alien, before any of them are landed, to the proper inspection officers, . . . All decisions made by the inspection officers or their assistants touching the right of any alien to land, when adverse to such right, shall be final unless appeal be taken to the superintendent of immigration, whose action shall be subject to review by the Secretary of the Treasury. It shall be the duty of the aforesaid officers and agents of such vessel to adopt due precautions to prevent the landing of any alien immigrant at any place or time other than that designated by the inspection officers, and any such officer or agent or person in charge of such vessel who shall either knowingly or negligently land or permit to land any alien immigrant at any place or time other than that designated by the inspection officers, shall be deemed guilty of a misdemeanor. . . ."

"SEC. 10. That all aliens who may unlawfully come to the United States shall, if practicable, be immediately sent back on the vessel by which they were brought in. . . .

"SEC. 11. That any alien who shall come into the United States in violation of law may be returned as by law provided, . . ."

The treaty ceding Porto Rico to the United States was ratified by the Senate, February 6, 1899; Congress passed an act to carry out its obligations March 2, 1899; and the ratifications were exchanged and the treaty proclaimed April 11, 1899, 30 Stat. 1754. Then followed the act entitled "An act temporarily to provide revenues and a civil government for Porto Rico, and for other purposes," approved April 12, 1900. 31 Stat. 77, c. 191. The treaty provided:

"Article II.

"Spain cedes to the United States the island of Porto Rico and other islands now under Spanish sovereignty in the West Indies, and the island of Guam in the Marianas or Ladrones.

"Article III.

"Spain cedes to the United States the archipelago known as the Philippine Islands, and comprehending the islands lying within the following line. . . ."

"Article IX.

"Spanish subjects, natives of the Peninsula, residing in the territory over which Spain by the present treaty relinquishes or cedes her sovereignty, may remain in such territory or may remove therefrom, retaining in either event all their rights of property, including the right to sell or dispose of such property or of its proceeds; and they shall also have the right to carry on their industry, commerce and professions, being subject in respect thereof to such laws as are applicable to other foreigners. In case they remain in the territory they may preserve their allegiance to the Crown of Spain by making, before a court of record, within a year from the date of the exchange of ratifications of this treaty, a declaration of their decision to preserve such allegiance; in default of which declaration they shall be held to have renounced it and to have adopted the nationality of the territory in which they may reside.

"The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress."

By the constitution of the Spanish monarchy, and the Spanish Civil Code, in force in Porto Rico when the treaty was proclaimed, persons born in Spanish territory were declared to be Spaniards, but Porto Ricans who were not natives of the Peninsula, remaining in Porto Rico, could not, according to the terms of the treaty, elect to retain their allegiance to Spain. By the cession their allegiance became due to the United

States, which was in possession and had assumed the government, and they became entitled to its protection. The nationality of the island became American instead of Spanish, and by the treaty, Peninsulars, not deciding to preserve their allegiance to Spain, were to be "held to have renounced it and to have adopted the nationality of the territory in which they may reside."

Thereupon Congress passed the act of April 12, 1900. That act created a civil government for Porto Rico, with a Governor, Secretary, Attorney General, and other officers, appointed by the President, by and with the advice and consent of the Senate, who, together with five other persons, likewise so appointed and confirmed, were constituted an executive council, at least five of whom should be "native inhabitants of Porto Rico;" and local legislative powers were vested in a legislative assembly, consisting of the executive council and a house of delegates to be elected.

The Attorney General, the Treasurer, the Auditor, the Commissioner of the Interior, the Commissioner of Education were to make report through the Governor to the Attorney General of the United States, the Secretary of the Treasury of the United States, and so on, to be transmitted to Congress; and all laws enacted by the legislative assembly were to be reported to Congress, which reserved the power to annul the same.

Courts were provided for, and, among other things, Porto Rico was constituted a judicial district, with a district judge, attorney and marshal, to be appointed by the President for the term of four years. The district court was to be called the District Court of the United States for Porto Rico, and to possess, in addition to the ordinary jurisdiction of District Courts of the United States, jurisdiction of all cases cognizant in the Circuit Courts of the United States. And writs of error and appeals might be brought and taken from and to the Supreme Court of the United States.

Provision was also made for the election of a commissioner to the United States, to be paid a salary by the United States,

but no person was eligible to such election "who is not a *bona fide* citizen of Porto Rico, who is not thirty years of age, and who does not read and write the English language."

By section 9 regulations were to be made "for the nationalization of all vessels owned by the inhabitants of Porto Rico;" by section 14 the statutes of the United States were generally put in force in the island; by section 16 judicial process was to run in the name of the President of the United States.

By section 7 the inhabitants of Porto Rico, who were Spanish subjects on the day the treaty was proclaimed, including Spaniards of the Peninsula who had not elected to preserve their allegiance to the Spanish Crown, were to be deemed citizens of Porto Rico, and they and citizens of the United States residing in Porto Rico were constituted a body politic under the name of The People of Porto Rico.[1]

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[1] Sections 7, 9, 14 and 16 were as follows:

"SEC. 7. That all inhabitants continuing to reside therein who were Spanish subjects on the eleventh day of April, eighteen hundred and ninety-nine, and then resided in Porto Rico, and their children born subsequent thereto, shall be deemed and held to be citizens of Porto Rico, and as such entitled to the protection of the United States, except such as shall have elected to preserve their allegiance to the Crown of Spain on or before the eleventh day of April, nineteen hundred, in accordance with the provisions of the treaty of peace between the United States and Spain entered into on the eleventh day of April, eighteen hundred and ninety-nine; and they, together with such citizens of the United States as may reside in Porto Rico, shall constitute a body politic under the name of The People of Porto Rico, with governmental powers as hereinafter conferred, and with power to sue and be sued as such."

"SEC. 9. That the Commissioner of Navigation shall make such regulations, subject to the approval of the Secretary of the Treasury, as he may deem expedient for the nationalization of all vessels owned by the inhabitants of Porto Rico on the eleventh day of April, eighteen hundred and ninety-nine, and which continued to be so owned up to the date of such nationalization, and for the admission of the same to all the benefits of the coasting trade of the United States; and the coasting trade between Porto Rico and the United States shall be regulated in accordance with the provisions of law applicable to such trade between any two great coasting districts of the United States."

"SEC. 14. That the statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have

Gonzales was a native inhabitant of Porto Rico and a Spanish subject, though not of the Peninsula, when the cession transferred her allegiance to the United States, and she was a citizen of Porto Rico under the act. And there was nothing expressed in the act, nor reasonably to be implied therefrom, to indicate the intention of Congress that citizens of Porto Rico should be considered as aliens, and the right of free access denied to them.

Counsel for the Government contends that the test of Gonzales' rights was citizenship of the United States and not alienage. We do not think so, and, on the contrary, are of opinion that if Gonzales were not an alien within the act of 1891, the order below was erroneous.

Conceding to counsel that the general terms "alien," "citizen," "subject," are not absolutely inclusive, or completely comprehensive, and that, therefore, neither of the numerous definitions of the term "alien" is necessarily controlling, we, nevertheless, cannot concede, in view of the language of the treaty and of the act of April 12, 1900, that the word "alien," as used in the act of 1891, embraces the citizens of Porto Rico.

We are not required to discuss the power of Congress in the premises; or the contention of Gonzales' counsel that the cession of Porto Rico accomplished the naturalization of its people; or that of Commissioner Degetau, in his excellent argument as *amicus curiæ*, that a citizen of Porto Rico, under the act of 1900, is necessarily a citizen of the United States. The question is the narrow one whether Gonzales was an alien within the meaning of that term as used in the act of 1891.

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the same force and effect in Porto Rico as in the United States, except the internal revenue laws, which, in view of the provisions of section three, shall not have force and effect in Porto Rico."

"SEC. 16. That all judicial process shall run in the name of 'United States of America, ss: the President of the United States,' and all criminal or penal prosecutions in the local courts shall be conducted in the name and by the authority of 'The People of Porto Rico;' and all officials authorized by this act shall before entering upon the duties of their respective offices take an oath to support the Constitution of the United States and the laws of Porto Rico."

The act excludes from admission into the United States, "in accordance with the existing acts regulating immigration other than those concerning Chinese laborers," certain classes of "aliens" and of "alien immigrants" arriving at any place within the United States, in respect of all of whom it is required that the commanding officer and agents of the vessel by which they come shall report the name, nationality, last residence and destination before any are landed.

The decisions of the inspection officers adverse to the right to land are made final unless an appeal is taken to the Superintendent of Immigration, whose action is subject to review by the Secretary of the Treasury; and all aliens who unlawfully come into the United States in violation of law shall be immediately, if practicable, sent back, or may be returned as by law provided.

We think it clear that the act relates to foreigners as respects this country, to persons owing allegiance to a foreign government, and citizens or subjects thereof; and that citizens of Porto Rico, whose permanent allegiance is due to the United States; who live in the peace of the dominion of the United States; the organic law of whose domicil was enacted by the United States, and is enforced through officials sworn to support the Constitution of the United States, are not "aliens," and upon their arrival by water at the ports of our mainland are not "alien immigrants," within the intent and meaning of the act of 1891.

Indeed, instead of the immigration laws operating externally and adversely to the citizens of Porto Rico, they were themselves put in force and effect there by section 14 of the act of April 12, 1900, as the Secretary of the Treasury was advised by the acting Attorney General, July 15, 1902, in respect of the act "to regulate immigration," approved August 3, 1882, 22 Stat. 214, c. 376; 24 Op. 86. The act provided for the collection of "a duty of fifty cents for each and every passenger not a citizen of the United States who shall come by steam or sail vessel from a foreign port to any port within the United

States. . . . The money thus collected shall be paid into the United States Treasury, and shall constitute a fund to be called the immigrant fund, and shall be used, under the direction of the Secretary of the Treasury, to defray the expense of regulating immigration under this act, . . ."

By section 2 inspection was provided for, "and if on such examination there shall be found among such passengers any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge, they shall report the same in writing to the collector of such port, and such persons shall not be permitted to land."

The department held that the duty collected in Porto Rican ports should be accounted for and credited to the "immigrant fund," as is done with collections upon alien passengers arriving at ports in the United States.

In *Huus* v. *New York & Porto Rico Steamship Company*, 182 U. S. 392, 396, we held that by section 9 of the act of April 12, 1900, "it was evidently intended, not only to nationalize all Porto Rican vessels as vessels of the United States, and to admit them to the benefits of their coasting trade, but to place Porto Rico substantially upon the coast of the United States, and vessels engaged in trade between that island and the continent, as engaged in the coasting trade."

Again, in respect of paragraph 703 of the tariff act of July 24, 1897, 30 Stat. 151, 203, c. 11, exempting "works of art, the production of American artists residing temporarily abroad," the Department of Justice held that Mr. Molinas, a native of Porto Rico, and an artist, temporarily living in Biarritz, France, and there on April 11, 1899, became, under section 7 of the act of April 12, 1900, a citizen of Porto Rico, and as such an American artist entitled to the privileges of that paragraph. 24 Op. 40.

The Attorney General, in his communication to the Secretary of the Treasury, among other things, said: "It will be observed that paragraph 703 above quoted does not mention citizenship, but uses the phrase 'American artists.' It is clearly not in-

conceivable for a man to be an American artist within the meaning of such a statute and yet not be a citizen of the United States." And after commenting on the effect of the temporary absence of Mr. Molinas at the time the treaty was proclaimed, the Attorney General concluded his opinion thus: "But even in supposing that a native Porto Rican like Mr. Molinas, temporarily absent at the date of the treaty, has been unintentionally omitted from section 7, he is undoubtedly one of those turned over to the United States by Article IX of the treaty to belong to our nationality. He is also clearly a Porto Rican; that is to say, a permanent inhabitant of that island, which was also turned over by Spain to the United States. As his country became a domestic country and ceased to be a foreign country within the meaning of the tariff act above referred to, and has now been fully organized as a country of the United States by the Foraker act, it seems to me that he has become an American, notwithstanding such supposed omission."

The Attorney General applied the ruling in *De Lima* v. *Bidwell*, 182 U. S. 1, that, "with the ratification of the treaty of peace between the United States and Spain, April 11, 1899, the island of Porto Rico ceased to be a 'foreign country' within the meaning of the tariff laws."

In that case we were all of opinion that the action was properly brought, because as the question was whether the goods were imported at all the case did not fall within the customs administrative act. *In re Fassett, Petitioner*, 142 U. S. 479.

And in the present case, as Gonzales did not come within the act of 1891, the commissioner had no jurisdiction to detain and deport her by deciding the mere question of law to the contrary; and she was not obliged to resort to the Superintendent or the Secretary.

Our conclusion is not affected by the provision in the Sundry Civil Act of August 18, 1894, 28 Stat. 372, 390, c. 301, in relation to the finality of the decisions of the appropriate immigration or custom officers, or the similar provision in the act "to regulate the immigration of aliens into the United States,"

approved March 3, 1903, 32 Stat. 1213, c. 1012. The latter act was approved after the Gonzales litigation was moved, but it is worthy of notice that the words "United States" as used in the title and throughout the act were required to be construed to mean "the United States and any waters, territory or other place now subject to the jurisdiction thereof." § 33. The definition indicates the view of Congress on the general subject.

Gonzales was not a passenger from a foreign port, and was a passenger "from territory or other place" subject to the jurisdiction of the United States.

In order to dispose of the case in hand, we do not find it necessary to review the Chinese exclusion acts and the decisions of this court thereunder.

Final order reversed and cause remanded with a direction to discharge Gonzales.

SINCLAIR *v.* DISTRICT OF COLUMBIA.

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

No. 94. Argued December 14, 1903.—Decided January 4, 1904.

As § 233 of the Code of the District requires the same construction as § 8 of the act of February 9, 1893, this court has no jurisdiction to review, on writ of error, a judgment of the Court of Appeals of the District of Columbia in a criminal case. *Chapman* v. *United States*, 164 U. S. 436.

THE facts are stated in the opinion.

Mr. C. C. Cole and *Mr. J. J. Darlington* for plaintiff in error.

Submitted for defendant in error by *Mr. A. B. Duvall* and *Mr. Edward H. Thomas.*

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

Plaintiff in error was prosecuted by information in the Police Court of the District of Columbia, for a violation of an act of Congress, approved February 2, 1899, entitled "An act for the prevention of smoke in the District of Columbia, and for other purposes," 30 Stat. 812, c. 79, and was found and adjudged guilty, and sentenced "to pay a fine of fifty dollars and in default to be committed to the workhouse for the term of ninety days." The judgment was affirmed by the Court of Appeals of the District of Columbia, 20 D. C. App. 336, brought here on error, and argued on the merits and on motion to dismiss.

The Court of Appeals of the District of Columbia was established by an act of Congress, approved February 9, 1893, 27 Stat. 434, c. 74, section 8 of which was as follows:

"That any final judgment or decree of the said court of appeals may be re-examined and affirmed, reversed, or modified by the Supreme Court of the United States, upon writ of error or appeal, in all causes in which the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars, in the same manner and under the same regulations as heretofore provided for in cases of writs of error on judgment or appeals from decrees rendered in the supreme court of the District of Columbia; and also in cases, without regard to the sum or value of the matter in dispute, wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of or an authority exercised under the United States."

On March 3, 1901, an act "to establish a code of law for the District of Columbia," 31 Stat. 1189, c. 854, was approved, (and subsequently amended by acts approved January 31 and June 30, 1902, 32 Stat. 2, c. 5; 32 Stat. 520, c. 1329,) section 233 of which provides that—

"Any final judgment or decree of the court of appeals may

be re-examined and affirmed, reversed, or modified by the Supreme Court of the United States, upon writ of error or appeal, in all cases in which the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars, in the same manner and under the same regulations as existed in cases of writs of error on judgments or appeals from decrees rendered in the supreme court of the District of Columbia on February ninth, eighteen hundred and ninety-three, and also in cases, without regard to the sum or value of the matter in dispute, wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States."

It will be perceived that section 8 of the one act and section 233 of the other are in substance the same, and they must bear the same construction. And the ruling in *Chapman* v. *United States*, 164 U. S. 436, in respect of section 8, is decisive on the point that this writ of error cannot be maintained.

That case, as stated by the court, was this:

"Chapman was indicted in the Supreme Court of the District of Columbia for an alleged violation of section 102 of the Revised Statutes, in refusing to answer certain questions propounded to him by a special committee of the Senate of the United States, appointed to investigate charges in connection with proposed legislation then pending in the Senate. To this indictment the defendant demurred on the ground, among others, that section 102 of the Revised Statutes was unconstitutional, and that, therefore, the court was without jurisdiction in the premises. This demurrer was overruled by the trial court and its judgment thereon affirmed by the Court of Appeals of the District. 5 D. C. App. 122. Defendant was thereupon tried and convicted, and motions for new trial and in arrest of judgment having been made and overruled (the question of the constitutionality of section 102 being raised throughout the proceedings), was sentenced to be imprisoned for one month in jail and to pay a fine of one hundred dollars,

which judgment was affirmed on appeal. 24 Wash. Law Rep. 251. (8 D. C. App. 302.) A writ of error from this court was then allowed, 24 Wash. Law Rep. 297, (8 D. C. App. 320,) which the United States moved to dismiss."

It was held that this court had no jurisdiction to review on writ of error a judgment of the Court of Appeals of the District of Columbia in a criminal case under section eight of the act of February 9, 1893; and the writ of error was accordingly dismissed. Attention was called to the fact that it had been previously decided that the court had no jurisdiction to grant a writ of error to review the judgments of the Supreme Court of the District of Columbia in criminal cases either under the judiciary act of March 3, 1891, c. 517, 26 Stat. 826, *In re Heath*, 144 U. S. 92; or under the act of February 6, 1889, c. 113, 25 Stat. 655, *Cross* v. *United States*, 145 U. S. 571; or on *habeas corpus*, *Cross* v. *Burke*, 146 U. S. 82. And although the validity of any patent or copyright, or of a treaty or statute of, or an authority exercised under, the United States, was not drawn in question in those cases, it was distinctly ruled in reaching the conclusions announced that neither of the sections of the act of March 3, 1885, applied to any criminal case; and *Farnsworth* v. *Montana*, 129 U. S. 104; *United States* v. *Sanges*, 144 U. S. 310, and *United States* v. *More*, 3 Cranch, 159, were cited with approval.

We were of opinion that section eight of the act establishing the Court of Appeals of the District of Columbia, and the act of March 3, 1885, c. 355, 23 Stat. 443, were the same in their meaning and legal effect. The first section of the act of 1885 prohibited appeals or writs of error unless the matter in dispute exceeded the sum of five thousand dollars, but the second section provided that the restriction should not apply to cases wherein the validity of any patent or copyright was involved, or where the validity of a treaty or statute of or an authority exercised under the United States was drawn in question, and that in all such cases an appeal or writ of error might be brought without regard to the sum or value in dispute. And it was

ruled that the last clause of section eight of the act of 1893 must receive the same construction as had been given to the second section of the act of 1885. We said: "The meaning of both statutes is that in the cases enumerated the limitation on the amount is removed, but both alike refer to cases where there is a pecuniary matter in dispute, measureable by some sum or value, and they alike have no application to criminal cases."

United States v. *More*, 3 Cranch, 159, was cited to the main proposition and was quoted from in respect of the suggestion that because the punishment on conviction by the statute under which plaintiff in error was indicted, tried and convicted embraced a fine, there was therefore a sum of money in dispute. The case involved section eight of the act of February 27, 1801, c. 15, entitled "An act concerning the District of Columbia," 2 Stat. 103, and creating a Circuit Court for the District of Columbia, which provided "that any final judgment, order or decree in said Circuit Court, wherein the matter in dispute, exclusive of costs, shall exceed the value of one hundred dollars, may be re-examined and reversed or affirmed in the Supreme Court of the United States, by writ of error or appeal. . . ." It was held that this court had no jurisdiction under that section over the judgments of the Circuit Court of the District of Columbia in criminal cases, and Chief Justice Marshall said: "On examining the act 'concerning the District of Columbia,' the court is of opinion, that the appellate jurisdiction, granted by that act, is confined to civil cases. The words, 'matter in dispute,' seem appropriated to civil cases, where the subject in contest has a value beyond the sum mentioned in the act. But in criminal cases, the question is the guilt or innocence of the accused. And although he may be fined upwards of $100, yet that is, in the eye of the law, a punishment for the offence committed, and not the particular object of the suit."

And the previous ruling that section five of the judiciary act of 1891 had no application was repeated.

Chapman's case was decided November 30, 1896, and on the third of March, 1897, an act was approved which authorized this court to issue writs of certiorari in cases made final in that court to bring them up for review and determination. 29 Stat. 692, c. 390. This was carried forward into section 234 of the District Code, and in the meantime we had reviewed the judgment of the Court of Appeals in certain criminal cases on certiorari granted under the act. *Winston* v. *United States*, 172 U. S. 303; 171 U. S. 690.

The rule that applies to capital cases and infamous crimes applies to criminal offenses over which the police court of the District of Columbia exercises jurisdiction, and under that rule this writ of error must be

Dismissed.

STATE OF NEW YORK *ex rel.* PENNSYLVANIA RAILROAD COMPANY *v.* KNIGHT.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 91. Argued December 11, 1903.—Decided January 4, 1904.

Although a railroad corporation may be largely engaged in interstate commerce it is amenable to state regulation and taxation as to any of its service which is wholly performed within the State and not as a part of interstate commerce.

A cab service maintained by the Pennsylvania Railroad Company to take passengers to and from its terminus in the city of New York, for which the charges are separate from those of other transportation and wholly for service within the State of New York is not interstate commerce, although all persons using the cabs within the company's regulations are either going to or coming from the State of New Jersey by the company's ferry; such cab service is subject to the control of the State of New York and the railroad company is not exempt, on account of being engaged in interstate commerce, from the state privilege tax of carrying on the business of running cabs for hire between points wholly within the State.

THIS is a writ of error to the Supreme Court of the State of New York to review a judgment of that court affirming the

assessment by the Comptroller of the State of New York of a certain tax against the relator, The Pennsylvania Railroad Company. The contention of the plaintiff in error is that the tax, which is a franchise tax imposed under appropriate statutes of New York upon the company for carrying on the business of running cabs and carriages for hire between points entirely within the State of New York, is invalid under the interstate commerce clause of the Constitution of the United States, article I, section 8, subdivision 3.

The facts are undisputed. In 1897 the company established a cab stand on its own premises at the Twenty-third street ferry in the city of New York, and has since maintained a service of cabs and coaches under special licenses from the city of New York, whereby they can stand on those premises only. The sole business done by those cabs and coaches is to bring the company's passengers to and from its ferry from Twenty-third street to Jersey City. The charges for this service are separate from those of the company for further transportation, and no part of its receipts from the cab service is received as compensation for any service outside the State of New York. As a separate business, this cab service has not been profitable to the company, but has been operated at a loss. The validity of this tax was sustained both by the Supreme Court and the Court of Appeals of New York. 67 App. Div. 398; 171 N. Y. 354.

Mr. Henry Galbraith Ward, with whom *Mr. A. Leo Everett* was on the brief for plaintiff in error:

The taxes in question being laid upon the privilege of doing business are unconstitutional if the business is interstate commerce: the tax under section 182 is a tax on the privilege of doing business. *People ex rel. Penna. R. R. Co.* v. *Wemple*, 138 N. Y. 1.

In that case which arose before the relator established its cab business, and when it was engaged solely in taking and landing passengers and freight at the piers and ferries of New York City, the court then held that the company was exclusively

engaged in interstate commerce, and that as the tax was upon that business, it was invalid.

The same must of course be true of the tax under section 184. The taxes cannot therefore be justified as if they were taxes upon property, or taxes upon a franchise regarded as part of the corporation's property, as in the following cases: *State Tax on Railway Gross Receipts*, 15 Wall. 284; *Delaware Railroad Tax*, 18 Wall. 206; *Telegraph Co.* v. *Texas*, 105 U. S. 460; *Western Union Tel. Co.* v. *Massachusetts*, 125 U. S. 530; *Pullman's Car Co.* v. *Pennsylvania*, 141 U. S. 18; *Maine* v. *Grand Trunk Ry.*, 142 U. S. 217; *Ficklen* v. *Shelby Co.*, 145 U. S. 1; *Ashley* v. *Ryan*, 153 U. S. 436; *Pittsburgh, etc., Ry. Co.* v. *Backus*, 154 U. S. 421; *Postal Telegraph Co.* v. *Adams*, 155 U. S. 688; *Hooper* v. *California*, 155 U. S. 648; *Erie R. R. Co.* v. *Pennsylvania*, 158 U. S. 431; *Western Union Tel. Co.* v. *Taggart*, 163 U. S. 1; *Adams Express Co.* v. *Ohio*, 165 U. S. 194; *American Refrigerating Co.* v. *Hall*, 174 U. S. 70.

Under the classification given in *Atlantic &c. Telegraph Co.* v. *Philadelphia*, 190 U. S. 106, this case is in the category of those in which the tax has been held to be upon the privilege of engaging in commerce, as *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196; *Robbins* v. *Shelby Taxing District*, 120 U. S. 489; *Fargo* v. *Michigan*, 121 U. S. 230; *Phila. S. S. Co.* v. *Pennsylvania*, 122 U. S. 326; *Leloup* v. *Port of Mobile*, 127 U. S. 640; *Asher* v. *Texas*, 128 U. S. 129; *McCall* v. *California*, 136 U. S. 104; *Crutcher* v. *Kentucky*, 141 U. S. 47.

It follows, and indeed it is admitted by the Court of Appeals, that if the cab business is interstate commerce the taxes are invalid.

In the operation of its cab service the Pennsylvania Railroad Company is wholly engaged in interstate commerce.

The court below erred in employing the test of continuous tickets purchased in another State. *Foster* v. *Davenport*, 22 How. 244; *Kelley* v. *Rhoads*, 188 U. S. 1; *Railway Co.* v. *Interstate Com. Com.*, 162 U. S. 184; *L. & N. R. R. Co.* v. *Behlmer*, 175 U. S. 648; *The Daniel Ball*, 10 Wall. 565.

The doctrine that where there is *not* a through contract there is *not* interstate commerce, is a radically different one, and was not involved in either of the cases last cited. *Munn* v. *Illinois*, 94 U. S. 113; *Coe* v. *Errol*, 116 U. S. 517; *Detroit, etc., Ry. Co.* v. *Interstate Com. Com.*, 74 Fed. Rep. 803; 167 U. S. 633, do not support the decision of the Court of Appeals. As to definition of, and what constitutes interstate commerce, see *The Daniel Ball, supra; Wabash Railway Co.* v. *Illinois*, 118 U. S. 557, 565; *Norfolk & W. Ry. Co.* v. *Pennsylvania*, 136 U. S. 114; *Rhoades* v. *Iowa*, 170 U. S. 412, 426; *Caldwell* v. *North Carolina*, 187 U. S. 622, 632; *Kelley* v. *Rhoads*, 188 U. S. 1; *Diamond Match Co.* v. *Ontonagon*, 188 U. S. 82.

These decisions show that the court does not employ any arbitrary tests or distinctions, which may be good for one case but not for another, but investigates each one upon its facts, and if the transportation is interstate commerce in point of fact (though no contract is made for through transportation) it will be protected from state interference. We see the same regard for the substance rather than form of the transaction in *Cutting* v. *Florida Ry. & Nav. Co.*, 46 Fed. Rep. 641; *Galveston, etc., Ry.* v. *Armstrong* (Tex.), 43 S. W. Rep. 614; *State* v. *Gulf, Col. & S. F. Ry. Co.* (Tex.), 44 S. W. Rep. 542.

How far the plaintiff in error would be subject to state taxation, if it did a local business in addition to carrying interstate passengers, is a different question, which ought not to embarrass the decision of this case.

The cab service of the Pennsylvania Railroad is wholly interstate, that of the New York Central is only partly interstate. As to when the business ceases to be interstate so as to come under state control for taxation, see *Brown* v. *Maryland*, 12 Wheat. 419. See also *Pullman* v. *Adams*, 189 U. S. 420, and *Osborne* v. *Florida*, 164 U. S. 650, where it is held that, if a company doing interstate business chooses to do local business as well, it cannot complain if a privilege tax be imposed on it for doing business generally.

Mr. John Cunneen, Attorney General of the State of New York, for defendant in error:

The cab service maintained by the Pennsylvania Railroad Company in New York city is not interstate commerce and the taxes are valid. This case falls within *Coe* v. *Errol*, 116 U. S. 517; *Brown* v. *Houston*, 114 U. S. 662; *Diamond Match Co.* v. *Ontanagon*, 188 U. S. 82.

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

The contention of the company is that this cab service is merely an extension and therefore a part of its interstate transportation; that it is not carrying on a cab business generally in the city of New York, but is merely furnishing the service to those who seek to take over its lines some interstate transportation, thus commencing the transportation from their houses instead of from the ferry landing, or like service to those who have already received such interstate transportation, thus completing the transportation to their places of destination; that the character of the business remains unchanged, although individuals may avail themselves of this service who do not intend or have not received any interstate transportation, for they who thus use the service do so wrongfully and against the wish of the company. In other words, the company, to promote its general business, seeks only to complete the continuous transportation of interstate passengers to or from their residences or hotels in New York city instead of commencing and ending such transportation at the ferry landing at Twenty-third street; the character of the service depends not on the action of the passenger, but on the purpose of the company in providing it, and the omission to include the charge for the cab service in the charges for other transportation arises from the practical difficulty of making such inclusion, and does not alter the fact that such cab service is a part of the interstate transportation.

To hold the even balance between the Nation and the States in the exercise of their respective powers and rights, always difficult, is becoming more so through the growing complexity of social life, and business conditions. Into many relations and transactions there enter elements of a national as well as those of a state character, and to determine in a given case which elements dominate and assign the relation or transaction to the control of the Nation or of the State, is often most perplexing. And this case fully illustrates the perplexities.

It is true that a passenger over the Pennsylvania Railroad to the city of New York does not in one sense fully complete his journey when he reaches the ferry landing on the New York side, but only when he is delivered at his temporary or permanent stopping place in the city. Looking at it from this standpoint the company's cab service is simply one element in a continuous interstate transportation, and as such would be excluded from state and be subject to national control. The State may not tax for the privilege of doing an interstate commerce business. *Atlantic & Pacific Telegraph Company* v. *Philadelphia*, 190 U. S. 160. On the other hand, the cab service is exclusively rendered within the limits of the city. It is contracted and paid for independently of any contract or payment for strictly interstate transportation. The party receiving it owes no legal duty of crossing the state line.

Undoubtedly, a single act of carriage or transportation wholly within a State may be part of a continuous interstate carriage or transportation. Goods shipped from Albany to Philadelphia may be carried by the New York Central Railroad only within the limits of New York, and yet that service is an interstate carriage. By reason thereof the Nation regulates that carriage, including the part performed by the New York company. But it does not follow therefrom that the New York company is wholly relieved from state regulation and state taxation, for a part of its work is carriage and transportation begun and ended within the State. So the Pennsylvania company, which is engaged largely in interstate

transportation, is amenable to state regulation and state taxation as to any of its service, which is wholly performed within the State and not as a part of interstate transportation. Wherever a separation in fact exists between transportation service wholly within the State and that between the States a like separation may be recognized between the control of the State and that of the Nation. *Osborne* v. *Florida*, 164 U. S. 650; *Pullman Co.* v. *Adams*, 189 U. S. 420.

As we have seen, the cab service is rendered wholly within the State and has no contractual or necessary relation to interstate transportation. It is either preliminary or subsequent thereto. It is independently contracted for, and not necessarily connected therewith. But when service is wholly within a State, it is presumably subject to state control. The burden is on him who asserts that, though actually within, it is legally outside the State; and unless the interstate character is established, locality determines the question of jurisdiction. *Coe* v. *Errol*, 116 U. S. 517, though not in all respects similar, is very closely in point. In that case spruce logs had been drawn down from Wentworth's Location in New Hampshire, and placed in Clear Stream, also in New Hampshire, to be from thence floated down the Androscoggin River to the State of Maine, there to be manufactured and sold. After they had thus been drawn down and placed in Clear Stream, a tax was imposed upon them by the State of New Hampshire. The validity of that tax was challenged on the ground that the logs were in process of transportation from Wentworth's Location in New Hampshire to the State of Maine. It was sustained by the Supreme Court of New Hampshire, and also by this court. In the course of the opinion Mr. Justice Bradley made these pertinent observations (p. 528):

"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. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another State, or committed to a common carrier for transportation to such State, its destination is not fixed and certain. It may be sold or otherwise disposed of within the State, and never put in course of transportation out of the State. Carrying it from the farm, or the forest, to the depot, is only an interior movement of the property, entirely within the State, for the purpose, it is true, but only for the purpose, of putting it into a course of exportation; it is no part of the exportation itself. Until shipped or started on its final journey out of the State its exportation is a matter altogether *in fieri*, and not at all a fixed and certain thing." *Diamond Match Company* v. *Ontonagon*, 188 U. S. 82; *Detroit &c. Railway Company* v. *Interstate Commerce Commission*, 21 C. C. A. 103; 43 U. S. App. 308; *Interstate Commerce Commission* v. *Detroit &c. Railway Company*, 167 U. S. 633.

As shown in the opinion from which we have just quoted, many things have more or less close relation to interstate commerce, which are not properly to be regarded as a part of it. If the cab which carries the passengers from the hotel to the ferry landing is engaged in interstate transportation, why is not the porter who carries the traveler's trunk from his room to the carriage also so engaged? If the cab service is interstate transportation, are the drivers of the cabs and the dealers who supply hay and grain for the horses also engaged in interstate commerce? And where will the limit be placed?

We are of opinion that the cab service is an independent local service, preliminary or subsequent to any interstate transportation, and therefore the judgment of the Supreme Court of the State of New York was correct, and it is

Affirmed.

WABASH RAILROAD COMPANY *v.* FLANNIGAN.

ERROR TO THE ST. LOUIS COURT OF APPEALS OF THE STATE OF MISSOURI.

No. 115. Submitted December 18, 1903.—Decided January 4, 1904.

Where the Federal question asserted to be contained in the record is manifestly lacking all color of merit the writ of error will be dismissed.

On petition of interpleader in a state court by a judgment debtor to engraft upon two judgments for the same debt, one in the State in which the action is brought and the other in a different State, a limitation to a single satisfaction out of a specific sum, there is no merit in the claim to protection under the due faith and credit clause of the Federal Constitution where it does not appear that in the state courts any rights were set up specifically based upon the judgment obtained in the other State, an effect was claimed therefor which if denied to it would have impaired its force or effect, or any right to the relief demanded was predicated upon the effect to be given thereto.

THE action wherein was entered the judgment which is sought to be reviewed by this writ of error was begun on December 20, 1900, by the filing in the Circuit Court of the city of St. Louis of a petition on behalf of the Wabash Railroad Company, the plaintiff in error in this court. The defendants named in the petition were Alexander Flannigan and Virgil Rule, the present defendants in error. The cause of action was ultimately embodied in a third amended petition, filed, by leave of court, on April 15, 1901. From a recital made in the opinion of the St. Louis Court of Appeals the following summary of the allegations of that pleading is made:

After asserting its existence as a consolidated corporation from a named date, plaintiff alleged that it was indebted, on June 10, 1891, to one Tourville, for wages, in the sum of $81.98; that an action to recover such indebtedness was instituted by Tourville in a court of the State of Missouri on the date named, and that a judgment was rendered in favor of

Tourville, which had been finally affirmed by said court; that in April, 1895, the defendant Flannigan recovered judgment against Tourville and the railroad company in a court of the State of Illinois, the railroad company being made garnishee in the action on account of the original indebtedness of $81.98 to Tourville, above mentioned; that Tourville had assigned the judgment obtained by him in the Missouri court to the defendant Virgil Rule, and that both the defendants Flannigan and Rule were undertaking to collect their respective judgments from the railroad company. The court was asked to permit a deposit in court of the sum of $81.98 and interest, and to require the defendants to interplead and to have determined their rights in respect to such deposited sum. The defendant Rule was served with summons, and a written appearance was filed on behalf of Flannigan, who was a non-resident.

In stating the subsequent steps in the litigation we shall omit reference to the facts which clearly have no relevancy to the alleged Federal questions.

Following the filing of the third amended petition an application was made for the allowance of a temporary injunction against the defendants, prohibiting them from attempting to enforce their respective judgments pending the determination of the action. An order was thereupon made temporarily restraining the defendants, and requiring them "to show cause, if any they have, why a temporary injunction should not be issued herein, and the relief prayed for in said third amended petition should not be granted." A "return" to this order to show cause was filed on behalf of the defendant Rule, and therein were set forth numerous reasons why a temporary injunction should not issue and the relief prayed in the third amended petition should not be granted. Flannigan answered, admitting each and every allegation therein, and claiming priority of lien and right of payment out of the so-called fund of $81.98. Thereafter, on April 22, 1901, the plaintiff filed a motion for the relief prayed for, notwithstand-

ing the aforesaid return of Virgil Rule, and numerous reasons were stated in support of the motion. On April 29, 1901, the court entered the following order:

"Now at this day come the parties herein by their respective attorneys, and the order issued herein on April 15, 1901, commanding the defendants to show cause why a temporary injunction should not be granted against them, coming on for hearing upon the pleadings, affidavits and proofs adduced, and the court having duly considered the same, and being sufficiently advised of and concerning the premises, doth order that the prayer of plaintiff's bill be and is denied. It is further ordered by the court that the restraining order granted against defendants on April 15, 1901, be and is hereby dissolved."

A motion for rehearing was filed and overruled. The motion was based upon the assumption that the order in question operated as a judgment dismissing the petition. The fifteenth and last ground of the motion and the first and only specific reference made to the Constitution of the United States in the proceedings up to that time was as follows:

"Fifteenth. Because the court erred in refusing to give full faith and credit to the judgment of a sister State, as required by the Constitution and laws of the United States."

On appeal the St. Louis Court of Appeals entered a judgment affirming in all things the "judgment" of the trial court. 75 S. W. Rep. 691. No allusion was made in the opinion to any constitutional question. Application was then made to transfer the cause to the Supreme Court of Missouri, upon the claim that it involved "a construction of section one of article four of the Constitution of the United States." The application was denied. A petition was next presented to the presiding judge of the St. Louis Court of Appeals, praying the allowance of a writ of error from this court. The petition was overruled, for the following stated reasons:

"In *Wabash Railroad Company* v. *Tourville*, 179 U. S. 322, the judgment herein involved came under review. The validity of the Tourville judgment, as we understand the opinion,

was sustained, and its priority over that of Flannigan was adjudged. In the face of this decision we deny the writ."

A writ of error was afterwards allowed by a justice of this court. The error assigned embraced the following alleged Federal questions:

"19. Your petitioner charges and avers that in said suit, while the same was pending in said Circuit Court and in said Court of Appeals, the construction of the following clauses of the Constitution of the United States was drawn in question, viz:

"The following clause of section 1, article IV: 'Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State.'

"Section 11, article IV: 'The citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States.'

"The following clause of section 1, article XIV, of amendments to the Constitution: 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.'

"Your petitioner says that the decisions of the courts on said clauses of the Constitution in said cause were against the rights, title, privilege and exemption specially set up and claimed under said clauses of said Constitution by your petitioner."

Mr. Wells H. Blodgett and *Mr. George S. Grover* for plaintiff in error:

The court has ample jurisdiction to hear and determine this controversy by reason of the constitutional question apparent upon the face of the record. *Insurance Co.* v. *Needles*, 113 U. S. 574; *Carpenter* v. *Strange*, 141 U. S. 87; *Water Co.* v. *Green Bay*, 142 U. S. 269; *Gordon* v. *Bank*, 144 U. S. 97; *Cooke* v. *Avery*, 147 U. S. 375; *Powell* v. *Brunswick County*, 150 U. S.

440; *Scott* v. *McNeal*, 154 U. S. 34; *Sayward* v. *Denny*, 158 U. S. 180; *Railway* v. *Chicago*, 166 U. S. 226; *Canal Co.* v. *Paper Co.*, 172 U. S. 58; *Water Power Co.* v. *Railway Co.*, 172 U. S. 475.

The judgment of a sister State may become a Federal question: *First.* Where the existence or validity of such judgment is in dispute in a state court, and the decision impairs its integrity, or existence; *Second.* Where the effect of the judgment according to the law and usage of the State where rendered is in dispute in a state court, and the decision is adverse "to the claimed or contended effect of such judgment." The case at bar falls under the latter instance. *Crapo* v. *Kelley*, 88 U. S. 610; *Dupasser* v. *Rochersar*, 21 Wall. 130; *Live Stock Company* v. *Butchers Union*, 120 U. S. 141; *Huntington* v. *Attrill*, 146 U. S. 657; *Railway* v. *Sturm*, 174 U. S. 710; *Green* v. *Buskirk*, 5 Wall. 310.

By denying the relief prayed for, the court below deprived the plaintiff in error of its property "without due process of law," in violation of the Fourteenth Amendment to the Constitution of the United States. *Railway Co.* v. *Sturm*, 194 U. S. 710.

Plaintiff in error was entitled to the relief prayed for and Flannigan was entitled to a hearing on the issue of priority.

A bill of interpleader may be properly filed in any cause, as well after the adverse claims to the fund have been reduced to judgment, as prior to that time. *Cheever* v. *Hodgson*, 9 Mo. App. 565; *Dodds* v. *Gregory*, 51 Mississippi, 351; *Woodruff* v. *Taylor*, 20 Vermont, 65; *Provident Savings Inst.* v. *White*, 115 Massachusetts, 112; 2 Story Eq. Jurisprudence (13th ed.), 137 note; *Hamilton* v. *Marks*, 5 DeGex & Smale, 638; 13 Eng. Law & Eq. 321; *Johnson* v. *Maxey*, 43 Alabama, 521; *Newhall* v. *Kastens*, 70 Illinois, 156; *Mills* v. *Townsend*, 109 Massachusetts, 115; *Robards* v. *Clayton*, 49 Mo. App. 610; *Building Association* v. *Joy*, 56 Mo. App. 433.

The plaintiff has never been guilty of laches.

Mr. John D. Johnson and *Mr. Virgil Rule* for defendant in error, Rule:

The decision of the St. Louis Court of Appeals was upon the ground that all the parties to the bill of interpleader had had their day in court, and that the questions raised were *res adjudicata*. This is not a Federal question and this court is, therefore, without jurisdiction. *Northern Pacific Railroad* v. *Ellis*, 144 U. S. 464; *Hammond* v. *Johnson*, 142 U. S. 73; *Hickman* v. *Fort Scott*, 141 U. S. 415; *Chaffin* v. *Taylor*, 116 U. S. 367; *Clark* v. *Keith*, 106 U. S. 464; *Peck* v. *Sanderson*, 18 How. 42.

In order to give this court power to revise the judgment of a state court it must appear upon the transcript that the constitutional question was raised by the pleadings and decided against plaintiff in error. *Oxley* v. *Butler Co.*, 166 U. S. 657, 658; *Hoydt* v. *Sheldon*, 1 Black, 518, 521; *Maxwell* v. *Newbold*, 18 How. 511.

This court will not review the judgment of a state court except upon the decree of the highest court in the State. Rev. Stat. U. S. sec. 709; *Farnsworth* v. *Montana*, 129 U. S. 104; Desty's Fed. Proc. sec. 223.

The Supreme Court of Missouri is the highest court in that State having jurisdiction in constitutional questions. Constitution of Missouri, art. 6, sec. 12; *State* v. *St. Louis Ct. of App.*, 97 Missouri, 296, 299; *State* v. *Caldwell*, 57 Mo. App. 447; *In re Essex*, 44 Mo. App. 289.

The bill of interpleader does not state facts sufficient to constitute a cause of action against defendants, for the following reasons:

It is essential to a bill of interpleader that the plaintiff shall make known his condition as a stakeholder by bringing a suit within a reasonable time after being advised of the double claims against him. *Cheever* v. *Hodgson*, 9 Mo. App. 565; *Dodds* v. *Gregory*, 61 Mississippi, 351; *McDevitt* v. *Sullivan*, 8 California, 592; *Union Bank* v. *Kerr*, 2 Md. Ch. 460; Ency. P. & P. 462 *k*; *Barnes* v. *Bamberger*, 196 Pa. St. 123; *Brackett* v. *Graves*, 51 N. Y. St. Rep. 895.

It is an essential to a bill of interpleader that the right of either defendant to the fund should not have been previously determined by a judgment at law against the plaintiff. *McKinney* v. *Kuhn*, 59 Mississippi, 186; *Risher* v. *Roush*, 2 Missouri, 95; *French* v. *Robrchard*, 5 Vermont, 43; *Holmes* v. *Clark*, 46 Vermont, 22; *Mitchell* v. *N. W. Mfg. Co.*, 26 Ill. App. 295; *Carroll* v. *Parks*, 1 Baxt. 269; *Yarborought* v. *Thompson*, B. S. & M. 291; *Haseltine* v. *Brickley*, 16 Gratt. 116; *Cornish* v. *Tanner*, 1 Young & J. 333; *Prov. Ins. Co.* v. *White*, 115 Massachusetts, 112.

A bill of interpleader must show that the plaintiff is ignorant of the rights of the parties who are called upon to interplead. Ency. P. & P. 465, n. 2; *Barker* v. *Barker*, 42 N. H. 78; *Shaw* v. *Coster*, 8 Paige, 339; *Morgan* v. *Fillmore*, 18 Abb. Pr. 219; *Mohawk, etc., R. Co.* v. *Chute*, 4 Paige, 384; *Pfister* v. *Wade*, 56 California, 43; *Illingworth* v. *Rowe*, 52 N. J. Eq. 360; *Trigg* v. *Hitz*, 17 Abb. Pr. 436; *Del., etc., R. R. Co.* v. *Corwith*, 16 Civ. Pro. Rep. (N. Y.) 312; *Heckmer* v. *Gilligan*, 28 W. Va. 750.

A judgment debt of one jurisdiction is not subject to a bill of interpleader in another jurisdiction. *Crane* v. *McDonald*, 118 N. Y. 657; *Snodgrass* v. *Butler*, 54 Mississippi, 45; *Fulton* v. *Chase*, 6 N. Y. Supp. 126; *Gibson* v. *Goldwaite*, 7 Alabama, 281; *Stone* v. *Reed*, 152 Massachusetts, 179; *Boston, etc.*, v. *Skillings*, 132 Massachusetts, 418; *Fairbanks* v. *Bilknap*, 135 Massachusetts, 179; *Kyle* v. *Mary Lee Coal Co.*, 112 Alabama, 606; *Morristown* v. *Binnings*, 26 N. J. Eq. 345; *Bartlett* v. *Sutton*, 23 Fed. Rep. 257.

The Circuit Court had no power to enforce its judgment against the person of defendant Flannigan, hence a temporary injunction as against him would have been wholly without effect, unless he chose to obey it. Rev. Stat. Mo. 1899, sec. 598*d*; *Sheedy* v. *Second Nat. Bank*, 62 Missouri, 17.

The Missouri court would have no power to decree that the judgment of the Illinois court was void or that it was not void. *Carpenter* v. *Strange*, 141 U. S. 88.

A court of one jurisdiction cannot enjoin the collection of a

judgment of another court of competent jurisdiction, in the absence of any allegation of fraud in obtaining such judgment. *Scrutchfield* v. *Souter*, 119 Missouri, 621; *Nelson* v. *Brown*, 23 Missouri, 13; *Keith* v. *Plemmons*, 28 Missouri, 104; *Pettus* v. *Elgin*, 11 Missouri, 411; *Mellier* v. *Bartlett*, 89 Missouri, 137; *Haehl* v. *Wabash R. Co.*, 119 Missouri, 325; *State ex rel.* v. *Eggers*, 152 Missouri, 487.

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

The opinion of this court, upholding the correctness of the judgment entered by the Circuit Court of Missouri in favor of Tourville, referred to in the preceding statement, was announced on December 3, 1900. *Wabash R. R. Co.* v. *Tourville*, 179 U. S. 322. The action now under review was begun seventeen days later. In the action which was under review in 179 U. S. the contention on behalf of the railroad company was that, despite the fact that on March 26, 1895, the Supreme Court of Missouri, on appeal by Tourville, had entered a judgment directing the St. Louis Court of Appeals to render judgment in favor of Tourville for the full amount of wages earned by him, the railroad company was yet entitled, after the filing in the St. Louis Court of Appeals of the mandate of the higher court, to offset against the amount of the judgment directed to be entered in favor of Tourville, the sum of the judgment recovered by Flannigan in the attachment suit which had been instituted in Illinois subsequently to the decision of the Supreme Court of Missouri in Tourville's action. The claim of jurisdiction in this court to review the judgment of the Supreme Court of Missouri, just referred to, was based upon the contention that the refusal of the Missouri courts to give to the Illinois judgment in favor of Flannigan the effect claimed for it by the railroad company was a denial of the full faith and credit to which that judgment was entitled by virtue of section 1 of article IV of the Constitution of the United States.

As already stated, the present action was begun after the opinion reported in 179 U. S. 322, affirming the judgment of the Supreme Court of Missouri, was delivered.

The controversy in the present action relates to the same judgments which were under consideration in this court in the prior action, and the purpose of the railroad company in this, as in the previous case, was to limit the amount which might be collected by the holders of the respective judgments against it to a sum which in the aggregate would not be in excess of the indebtedness to Tourville upon his original claim. In substance, therefore, the present action is but an attempt by indirection to do that which the Supreme Court of Missouri and this court have held in the prior action could not be done.

The constitutional questions now urged on behalf of plaintiff in error are that the dismissal of its petition for interpleader was a denial of full faith and credit to the garnishment judgment rendered by the Illinois court, and that the denial of the relief prayed for also violated the due process clause of the Fourteenth Amendment to the Constitution of the United States.

The objection last stated need not be further noticed, as it was asserted for the first time in the petition for the allowance of a writ of error from this court. We think it unavoidably results also that the claim of the protection of the due faith and credit clause of the Constitution of the United States here relied on is without merit. Nowhere in its petition for interpleader or in the proceedings had thereunder in the Missouri courts did the railroad company set up rights specifically based upon the Illinois judgment, claim for that judgment an effect which, if denied to it, would have impaired its force and effect, nor did the railroad company predicate any right to the relief demanded upon the effect due to the Illinois judgment. The relief asked by the railroad company in substance tended, on the contrary, to lessen the force and effect both of the Missouri and Illinois judgments. It was sought to change the status of the company from that of a general debtor for

the amount due upon each judgment and to engraft upon the judgments a limitation to a single satisfaction out of a specific fund. In its petition the railroad company expressly alleged its inability to determine whether the Illinois or the Missouri judgment possessed a priority of right to payment out of the so-called fund. Clearly, also, even the owner and holder of the Illinois judgment could not, in reason, contend that the judgment of the Missouri court complained of had the effect of denying full faith and credit to the judgment of a sister State. As the settled rule in this court is that where the Federal question asserted to be contained in a record is manifestly lacking all color of merit, the writ of error must be dismissed, *Swafford* v. *Templeton*, 185 U. S. 487, 493, and cases cited, it results that the writ or error in this case must be dismissed for want of jurisdiction.

Writ of error dismissed.

BENZIGER *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 54. Argued December 10, 11, 1903.—Decided January 4, 1904.

Paragraph 649 of the Tariff Act of 1897, providing for the free entry of "casts of sculpture when specially imported in good faith for the use and by the order of any society incorporated or established solely for religious [or other specified] purposes, should be liberally construed, and any fair doubts as to its true construction should be resolved by the courts, in favor of the importer. Figures known and correctly described as "casts of sculpture," imported in accordance with this provision of the statute, held to be entitled to free entry thereunder notwithstanding the fact that similar articles were described by certain manufacturers in trade catalogues as statuary or composition statues.

CERTAIN figures representing various saints, and also two figures of adoring angels, as specified in the collector's letter to the board of general appraisers, were, in March, 1899, spe-

cially imported into the port of New York in good faith, for the use and by the order of societies incorporated or established solely for religious purposes. The importers claimed the figures were entitled to free entry under paragraph 649 of the tariff act of 1897. 30 Stat. 151, 201. The appraiser returned them as "church statues, composed of plaster of Paris, decorated," or as "articles and wares composed wholly or in chief value of earthy or mineral substances, not specially provided for," and the collector assessed upon them a duty of 45 and 35 per cent *ad valorem* under paragraphs 97 and 450 of the same act (pages 156, 193). If dutiable, no question is made as to the correctness of the decision of the collector in assessing the duties as he did. The contention is that these figures were "specially provided for" in this act under the paragraph above mentioned, 649.

The importers protested against the decision of the collector and the case went to the board of general appraisers. Testimony was taken by the board and it found as a fact the manner in which the figures were made, which was as follows:

"The clay model of the subject, of desired size, is covered by a workman with a coating some two inches thick of plaster of Paris. When this coating has 'set' or hardened sufficiently, the clay figure inside is broken up and removed, and a plaster of Paris mould thereof thus obtained. Plaster is then carefully forced into this mould, and when dry is taken out in the form of the original clay figure. This plaster figure, after having been carefully gone over by an artist or skilled workman to cure any defects in the moulding, is in turn thoroughly covered with specially prepared plaster for the final mould. This is made in sections, which when dry are removed, and together form a perfect mould, and this composite mould becomes the manufacturer's substitute for the artist's clay or plaster cast model from which he (the manufacturer) produces his moulded statues in unlimited numbers. In the moulding process the several sections of the mould are in turn laid with the concave side upward, and have a lining of 'carton pierre,'

one-half inch or more in thickness, carefully laid and pressed into them by the moulder's hands with the aid of suitable tools. The extended arms, fingers and other slender parts are strengthened by pieces of iron wire laid in the 'carton pierre,' which is then lined either with heavy paper or coarse woven vegetable fiber cloth secured with glue. After the 'carton pierre' has dried sufficiently, the several sections of the mould are removed and their contents joined together around a framework of wood, and a figure is thus formed, the counterpart of the original model. The statue then goes to a skilled workman called a 'finisher,' who, with knife or other instrument, removes any roughness resulting from the joining of the sections, cures any other defects in the moulding, and smooths it down generally. It is then passed to the painter and decorator, who completes it in the style desired. The statues in 'carton romain' and in 'stone composition' are made in the same manner, except that the latter are uniformly lined with coarse cloth. The stations of the cross in 'carton pierre' and in terra cotta are produced in substantially the same way (those in terra cotta, however, being kiln dried or baked after moulding), and are painted and decorated in quite the same manner as the statues, the foreground and other landscape or perspective effects being painted in suitable tints or hues."

The protest was overruled by the board, and a petition for a review was duly filed by the importers (petitioners) and the case heard in the Circuit Court, Southern District of New York, and that court affirmed the decision of the board. 107 Fed. Rep. 257. An appeal was taken to the Circuit Court of Appeals, where the decision of the Circuit Court was affirmed on the opinion of the court below. Upon petition of the importers a writ of certiorari was issued from this court and the case brought here for review.

Mr. W. Wickham Smith, with whom *Mr. Charles Curie* was on the brief, for petitioners:

The testimony upon which the board of appraisers appar-

ently based the finding that these articles were known in commerce as statuary or church statuary is not sufficient upon which to establish a commercial designation. *Maddock* v. *Magone*, 152 U. S. 368; *Sonn* v. *Magone*, 159 U. S. 417.

It is, however, of no consequence how these articles are specifically known in commerce, there being no provision in the law for church statuary, or for any cast statuary at all, and if they are casts of sculpture within the meaning of the law, it is of no consequence whether they have or have not been known as church statuary.

The finding that these articles have been known in art as church statuary is based on no evidence whatever.

The importers rely in this case on the well established principle of law repeatedly applied to the construction of statutes, and particularly to revenue statutes, and recognized by this court and the subordinate Federal courts in a multitude of decisions, that where language used in a former tariff act has received a uniform and consistent interpretation by the department of the Government charged with the execution of the law (in this case the Treasury Department) and Congress in framing new legislation repeats the language of the prior act, it will, in the absence of some more controlling consideration, be presumed to have used the language in the meaning and charged with the construction which has been given to it by the executive department. *Schell* v. *Fauche*, 138 U. S. 572; *Robertson* v. *Bradbury*, 132 U. S. 493; *Robertson* v. *Downing*, 127 U. S. 613; *United States* v. *Dean Linseed Oil Co.*, 87 Fed. Rep. 456; *Anglo-California Bank* v. *Sec'y of the Treasury*, 76 Fed Rep. 750; *United States* v. *Wotten*, 50 Fed. Rep. 694; *United States* v. *Johnston*, 134 U. S. 236; *Bate Refg. Co.* v. *Sulzburger*, 157 U. S. 1; *United States* v. *Hill*, 120 U. S. 169; *United States* v. *Philbrick*, 120 U. S. 52; *Butterworth* v. *United States*, 112 U. S. 67; *Five per cent. cases*, 110 U. S. 484; *Hahn* v. *United States*, 107 U. S. 406; S. S. 7274, December 22, 1885, S. S. 11747, 1891.

Casts imported for educational societies have been free since

1816, those for churches 1861 to 1870 and from 1883 to the present time.

The policy of according free admission to articles imported for churches is one which should be approved by the courts, and the tendency of judicial decisions should be to give such provisions a liberal interpretation, and not restrict their application by imposing qualifications and limitations which Congress, after having had its attention called to the matter, has seen fit not to impose.

Mr. Assistant Attorney General McReynolds for the United States:

For definition of statue, cast, sculpture, see Century, Standard and Webster's International Dictionaries. The provisions in the former tariff statues have been construed in S. S. No. 5549; No. 7274; No. 11747; No. 13936. See also *Tutton* v. *Viti*, 108 U. S. 312; *Merritt* v. *Tiffany*, 132 U. S. 167. Congress must be understood to use the word in its known commercial sense. *200 Chests of Tea*, 9 Wheat. 430; *Lutz* v. *Magone*, 153 U. S. 107; *United States* v. *Buffalo Gas Fuel Co.*, 172 U. S. 341.

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

The petitioners claim that the figures in question here are entitled to free entry under the provision of paragraph 649 of the tariff act of 1897, 30 Stat. 151, 201, as being "casts of sculpture, where specially imported in good faith for the use and by the order of any society incorporated or established solely for religious, philosophical, scientific, educational or literary purposes," etc. The board of appraisers thought that on July 24, 1897, the day of the passage of the tariff act, and for many years prior thereto, those figures belonged to a class which was known in commerce, in art and to the classifying officers of customs of the United States as "statuary," and specifically as "church statuary." In the opinion of the board it was stated:

"It is the practice of professional sculptors to have their original creations in clay reproduced in plaster of Paris for permanent use as models from which the objects are sculptured in marble, stone or other material. The sculptor invariably goes over his plaster cast with utmost care, not only repairing any defects in the moulding, but defining more accurately the hair, finger nails, folds of the drapery and outline generally, and, above all, perfecting the facial and general expression. These plaster of Paris models are known in commerce and in art as 'casts of sculpture.' They represent the artist's right and title to his creation, and unlike the merchandise in question here, are not painted and decorated, nor dealt in as ordinary commercial articles. Casts in plaster of Paris are likewise produced from rare objects of sculpture, generally for use in museums or art institutions, but sometimes for reproduction by sculptors in marble, stone, etc., and are also called 'casts of sculpture,' but are in strict sense 'casts *from* sculpture,' being cast from plaster of Paris from sculptural objects, such, for example, as the high relief frieze of the Parthenon at Athens, the facade of the guild of the Butchers house at Hildesheim, the tomb of Englebert, and other works in the Metropolitan Museum of Art mentioned in the testimony of Messrs. Stoltzenberg and Trueg."

The board was of opinion that these figures were what is known in commerce, in art and in common speech as "statuary," and were not "specimens or casts of sculpture," and were therefore assessed, as stated.

If these figures were to be entered as statuary, they would come in free under paragraph 649 of the act of 1897, but for the limitation contained in paragraph 454, which limits the term "statuary," as used in the act, so as to "include only such statuary as is cut, carved or otherwise wrought by hand from a solid block of marble, stone, alabaster or other metal, and is the professional production of a statuary or sculptor only." The Circuit Court did not regard it necessary in the disposition of the case to determine whether these particular

figures would come in free as casts of sculpture under paragraph 649, if imported in the crude state, but held that as the figures had been painted and gilded, they were not thereafter casts of sculpture within the meaning of the act.

Upon the argument of this case at bar frequent reference was made by counsel to the provisions in former tariff acts upon this subject, as bearing upon the proper construction of the one under consideration. For convenience these provisions are reproduced in the margin as they existed in the act of 1861, 12 Stat. 178, 193; the Revised Statutes, sec. 2505, pp. 482, 487, 488; the act of 1883, 22 Stat. 488, 513, 520; the act of 1890, 26 Stat. 567, 608, 609; the act of 1894, 28 Stat. 509, 543, 544; and in the present act of 1897, 30 Stat. 151, 201.[1]

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[1] Act of March 2, 1861, Sec. 23. (12 Stat. 178.)

" . . . All philosophical apparatus, instruments, books, maps and charts, statues, statuary, busts and casts of marble, bronze, alabaster, or plaster of Paris; paintings and drawings, etchings, specimens of sculpture, cabinets of coins, medals, regalia, gems, and all collections of antiquities: *Provided*, The same be specially imported in good faith, for the use of any society incorporated or established for philosophical, literary, or religious purposes, or for the encouragement of the fine arts, or for the use or by the order of any college, academy, school, or seminary of learning in the United States."

Revised Statutes of 1874, Sec. 2505, Paragraphs 1708 and 1726, pp. 482, 487, 488. (16 Stat. 256, 268.)

1708. "Philosophical and scientific apparatus, instruments, and preparations, statuary, casts of marble, bronze, alabaster or plaster of Paris, paintings, drawings, and etchings, specially imported in good faith, for the use of any society or institution incorporated or established for philosophical, educational, scientific or literary purposes, or encouragement of the fine arts, and not intended for sale."

1726. "Regalia and gems, and statues and specimens of sculpture, where specially imported, in good faith, for the use of any society incorporated or established for philosophical, literary or religious purposes, or for the encouragement of the fine arts, or for the use or by the order of any college, academy, school or seminary of learning in the United States."

Act of March 3, 1883. (22 Stat. c. 121, pp. 488, 513, 520.)

(P. 513.) "Paintings, in oil or water colors, and statuary not otherwise provided for, thirty per centum ad valorem. But the term 'statuary,' as used in the laws now in force imposing duties on foreign importations, shall

An examination of the provisions of the various statutes shows a somewhat uniform purpose on the part of Congress to provide free entry to casts of marble, bronze, alabaster or plaster of Paris, and also statuary and specimens of sculpture, when specially imported in good faith for the societies enumerated in the acts. It is also seen that under the language used in these different paragraphs, which may be described as the "philosophical and scientific," and the "regalia and gems"

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be understood to include professional productions of a statuary or of a sculptor only."

(P. 520.) (Free list.) Par. 759. "Philosophical and scientific apparatus, instruments, and preparations, statuary, casts of marble, bronze, alabaster, or plaster of Paris, paintings, drawings, and etchings, specially imported in good faith for the use of any society or institution incorporated or established for religious, philosophical, educational, scientific, or literary purposes, or encouragement of the fine arts, and not intended for sale."

(P. 520.) (Free list.) Par. 771. "Regalia and gems, statues, statuary, and specimens of sculpture, where specially imported in good faith for the use of any society incorporated or established for philosophical, literary, or religious purposes. . . ."

Act of October 1, 1890. (26 Stat. c. 1244, pp. 567, 602, 608, 609.)

(P. 602.) Par. 465. "Paintings, in oil or water colors, and statuary, not otherwise provided for in this act, fifteen per centum ad valorem; but the term 'statuary,' as herein used, shall be understood to include only such statuary as is cut, carved or otherwise wrought by hand from a solid block or mass of marble, stone, or alabaster, or from metal, and as is the professional production of a statuary or sculptor only."

(P. 608.) (Free list.) Par. 677. "Philosophical and scientific apparatus, instruments and preparations; statuary, casts of marble, bronze, alabaster, or plaster of Paris; paintings, drawings, and etchings, specially imported in good faith for the use of any society or institution incorporated or established for religious, philosophical, educational, scientific, or literary purposes, or for encouragement of the fine arts, and not intended for sale."

(P. 609.) (Free list.) Par. 692. "Regalia and gems, statues, statuary and specimens of sculpture, where specially imported in good faith for the use of any society incorporated or established solely for educational, philosophical, literary, or religious purposes. . . ."

Act of August 27, 1894. (28 Stat. c. 349, pp. 509, 542, 543, 544.)

(P. 542.) (Free list.) Par. 575. "Paintings, . . . and statuary, not otherwise provided for in this act, but the term 'statuary' as herein used shall be understood to include only professional productions, whether round

paragraphs, some article might be admitted under either paragraph. There is no doubt that under the tariff acts prior to that of 1897, these figures could have been admitted free of duty, as "casts of plaster of Paris." Indeed, the Treasury Department had so decided in a case hereafter cited. Those words, "casts of marble, bronze, alabaster, or plaster of Paris," which appear in all the statutes cited prior to 1897, in the philosophical apparatus paragraphs, are left out in the

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or in relief, in marble, stone, alabaster, wood, or metal, of a statuary or sculptor. . . ."

(P. 543.) (Free list.) Par. 585. "Philosophical and scientific apparatus, . . . statuary, casts of marble, bronze, alabaster, or plaster of Paris, paintings, drawings, and etchings, specially imported in good faith for the use of any society or institution incorporated or established for religious, philosophical, educational, scientific, or literary purposes, or for encouragement of the fine arts, and not intended for sale."

(P. 544.) (Free list.) Par. 603. "Regalia and gems, statues, statuary and specimens or casts of sculpture, where specially imported in good faith for the use of any society incorporated or established solely for educational, philosophical, literary, or religious purposes. . . ."

Act of July 24, 1897, (the present act). (30 Stat. c. 11, pp. 151, 194, 200, 201.)

(P. 194.) Par. 454. "Paintings, . . . and statuary, not especially provided for in this act, twenty per centum ad valorem; but the term 'statuary' as used in this act shall be understood to include only such statuary as is cut, carved or otherwise wrought by hand from a solid block or mass of marble, stone or alabaster, or from metal, and as is the professional production of a statuary or sculptor only."

(P. 200.) (Free list.) Par. 638. "Philosophical and scientific apparatus, utensils, instruments, and preparations, including bottles and boxes containing the same, specially imported in good faith for the use and by order of any society or institution incorporated or established solely for religious, philosophical, educational, scientific, or literary purposes, or for the encouragement of the fine arts, or for the use or by order of any college, academy, school or seminary of learning in the United States, or any State or public library, and not for sale, subject to such regulations as the Secretary of the Treasury shall prescribe."

(P. 201.) (Free list.) Par. 649. "Regalia and gems, statuary, and specimens or casts of sculpture, where specially imported in good faith for the use and by order of any society incorporated or established solely for religious, philosophical, educational, scientific, or literary purposes, or for the encouragement of the fine arts, . . . and not for sale. . . ."

act of 1897, paragraph 638, and it is therefore urged that the figures are not entitled to free entry, as they are not casts of sculpture, provided for in paragraph 649. The question is, therefore, whether the omission of those words in paragraph 638 prevents the free entry of these figures, or are they properly described as casts of sculpture, and therefore entitled to free entry under paragraph 649.

We do not attach any very great importance, as evidence of the intention of Congress, to the omission in the act of 1897 above referred to. The language used in paragraph 649 is very broad, including all casts of sculpture, as well those heretofore mentioned in paragraphs in prior statutes similar to paragraph 638 as others. The omission in the latter paragraph was, therefore, immaterial if these figures are casts of sculpture. Although they might heretofore have come in under the designation of "casts of plaster of Paris" as contained in former paragraphs, we think they also might have come in under the designation "casts of sculpture" contained in the act of 1894 as well as in the act of 1897, and that it was not intended by Congress, in omitting the words in the latter act as to casts of plaster of Paris, in paragraph 638, to prevent their free entry under paragraph 649. The language in paragraph 638 was simply unnecessary in a case where the same articles were entitled to free entry under another paragraph.

In attempting to understand the true construction of the words used in the act of 1897 we are not very greatly aided by the opinions given by various artists called by the government and contained in this record, as to what was the proper designation of the figures. These opinions varied, although based upon conceded facts as to the manner and process by which the figures were produced. According to some of them there were but two kinds of "casts of sculpture;" one where professional sculptors have their own original creations of clay reproduced in plaster of Paris for permanent use as models and from which objects are sculptured in marble, stone or other material; and the other, where casts in plaster of Paris are

produced from rare objects of sculpture, generally for use in museums or art institutes. Some regarded the term "sculpture so wide that it was difficult to define definitely," although they thought that the figures in question were not casts of sculpture, while some regarded casts of sculpture "as such classes of plaster casts or clay or marble or bronze as are to stand singly and alone, and not be sold in endless numbers, and to be exhibited temporarily in some exhibition." We think the last definition is inaccurate and inadmissible. Under this view, whether a figure is a cast of sculpture or not, does not in the least depend upon how it is made. It is the use to which it is destined which is to determine what it is in fact. If there are to be a great many of them, to be "sold in endless numbers," they are not casts of sculpture, no matter how they are made, and if they are to "stand singly" and "be exhibited temporarily," then they are such casts. We are not satisfied as to the correctness or completeness of this definition. Whether in one case the cast is for the use of the sculpture only or in the other is destined to be reproduced indefinitely, we think is not material. They are made in the same manner, reproduced from clay, and the same means or process is taken or employed in obtaining the result. Whether the clay model is the work of the superior genius of a great sculptor or is the result of the efforts of one who could not be classed as a genius at all, they are both fashioned in the same way and the same process is followed with regard to both, and we do not think that in this statute there was any intention to confine the meaning to casts of those clay figures which were fashioned by the hand of genius, while excluding those of inferior artists or workmen. The witnesses are not, however, all of one mind, even upon the meaning of the term. Some thought that these were casts of sculpture in a certain sense as long as they remained simply plaster casts, but just as soon as additional touches were given to the casts, in the way of paint or ornamentation, the casts lost their original character as plaster casts and became statuary in wood or alabaster or bronze.

At any rate, it would cease to be an article of clay and would become a finished thing. Just as soon as a cast of sculpture was painted it would in the opinion of some of the witnesses cease to be a cast of sculpture.

Some of the artists said that you might take a cast of old sculpture, such as the *Venus de Milo*, and different antiques and reproduce them in plaster, and they would be casts of old sculpture. But whether the figures in question here were casts of sculpture, some of the witnesses were not sure.

One witness for the government gave as his opinion that the figures in question were casts or specimens because they are sculpture. As to whether they were cast or moulded, he replied that he could not state definitely, but presumably they were casts.

Another witness for the government was not willing to swear that the figures were not casts of sculpture, while still another said that in his judgment the figures in question were plaster casts in sculpture. He also thought that they might be termed casts of sculpture. Another witness for the government thought they might be called casts of bad sculpture, and that they were such articles as he had heard artists call casts of sculpture.

This brief review of some of the evidence shows the difference of opinion among the artists themselves as to what would come within their understanding of the definition of the term "casts of sculpture." The artists evidently had a contempt for the figures as specimens of art, and very probably that contempt was well founded; but, as we have said, the opinions really give no aid in considering whether the figures are or are not casts of sculpture. The description of the manner in which they are made, as set forth in the foregoing statement of facts, and also the evidence of the witnesses for the government, showing the unity of the method and process with that followed in the case of an admitted cast of sculpture, furnish us better means of determining the question in dispute than may be found in the opinions set forth in the record, and yet some of

the witnesses do in fact, as we have seen, admit that the figures are casts of sculpture, bad though they may be.

The government also examined one or two witnesses who were agents or salesmen for manufacturers in this country of what they stated to be substantially the same class of figures as the ones under discussion, and in their catalogues describing the various articles for sale, figures such as these were generally designated as "statuary," and when taking orders for such goods they were called "statuary" or "composition statues."

One of the customs examiners also testified that for the last few years articles of the nature here in question had been returned on invoices to the collector as "church statuary composed of plaster, decorated, or pulverized cement and plaster." The witness used the expression "church statuary composed of" as having been given him by some superior officer, and it was accepted by him as such.

It will be observed that there is nothing in the tariff act which speaks of "church statuary" by name. We are not satisfied from this evidence that these figures are not casts of sculpture within the meaning of the statute, nor are we impressed with the statement of some of the witnesses that if in what is termed their crude state these figures might or would be described as casts of sculpture, they would cease to be such when painted or decorated. They are still, in substance, the same thing, whether painted or not. How does the mere gilding or painting alter their original character? Some little value has perhaps been added to them, but they yet remain what they were before the painting was done. Painting a marble statue does not alter its original substance, or give the subject a new definition or meaning. Some marble statues, the work of a great sculptor, have been slightly painted under his own direction for the purpose, as supposed, of imparting a a more lifelike appearance to the statue, and of possibly thereby enhancing its value. But the statue remained a statue nevertheless.

It is so, as we think, in this case. The painting or gilding

was done to render the figures more fit for the only purpose of their importation—that is, for use in a religious society. And it was the object, as we believe, of the statute to admit such works free of duty.

In case No. 5549, Synopsis of Decisions of the Treasury Department, 1883, p. 41, it was said that the case related to certain images made of earthen substances which on importation were subjected to duty at the rate of forty per centum *ad valorem*, but were claimed in the protest filed to be dutiable at the rate of ten per centum *ad valorem*, under the provisions for "statuary" contained in schedule M, Revised Statutes, p. 478, under heading "Paintings and Statuary;" the word "statuary," being defined as limited "to include professional productions of a statuary, or of a sculptor only." It appeared on the trial that the images were made at Munich by persons who professed to have made a study of the art of sculpture for many years and who acted under the general supervision of an acknowledged sculptor. Several copies were made from one model, and in ordering them the importer designated which he wanted by the number of the article in a catalogue, and the price of the images varied from five to a hundred dollars.

The Circuit Court for the Southern District of New York held that the articles were entitled to admission as statuary under the provision above mentioned, and the department acquiesced in the opinion of the court. In that case the department was of opinion that the works were obviously made by skillful men, and might come in even under the limitation of the word "statuary" as defined in the act.

It cannot be and is not claimed that the figures in question here could come in under the term "statuary," as that term is defined in the statute of 1897, paragraph 454, which is much more narrow than that of the Revised Statutes. The case shows, however, the tendency of the department to a liberal construction of the tariff act in this regard.

On December 22, 1885, Synopsis of Decisions of the Treasury Department, 1885, p. 513, No. 7274, the question was sub-

mitted as to whether figures similar to those under consideration were entitled to free admission under the act of 1883. The department held that they could not be regarded as "statuary" because of the limitation of the meaning of the word "statuary," as used in that act, 22 Stat. 513, which provided that the word "statuary" "should be understood to include professional productions of a statuary or of a sculptor only," but that they might be admitted as casts of plaster of Paris under paragraph 759 of the free list. Paragraph 771 did not contain the words "casts of sculpture."

In Synopsis of Decisions, Treasury Department, July to December, 1891, vol. 2, p. 1164, there is contained a reply to the naval officer of New York, relative to the proper classification of certain figures imported and claimed to be free of duty as statuary or as casts of plaster of Paris, imported for a church under paragraph 677, or as statues, statuary or specimens of sculpture, under paragraph 692 of the tariff act of 1890. The Acting Secretary referred to the fact that the board of general appraisers had held that the restrictive definition in regard to "statuary" under paragraph 465 did not apply to such statuary as is specified in the free list. The language of that paragraph (465) the board held limited its definition of the term "statuary" to that paragraph alone. Continuing, the Secretary said:

"The department believes that the crude or inartistic character of the figures under consideration cannot be urged as a reason for their exclusion from the benefits of free entry. It is fair to infer a liberal intention on the part of Congress from the fact of its inclusion of religious institutions among those to which the privilege of free entry is extended. Religious institutions are not schools of art, nor can congregations without adequate means always consult esthetic rules in regard to the equipment of their churches. It is the sentiment of pious associations which gives the figure its efficiency as an aid to religious worship, and the plaster cast may in this way be as serviceable to the humble worshiper as the more costly work of genius."

The subject was again before the Treasury Department on April 26, 1893. Synopsis of Decisions, Treasury Department, 1893, p. 340. As appears upon its face the letter of the Secretary was in reply to a communication from the board of general appraisers, protesting against the free entry of articles of this nature under the act of 1890, because of the advantages thus given to the foreign dealers in these figures, some of whom had a store in Montreal, although the figures were manufactured in Munich, and the order was supplied from the Montreal store, and the board insisted that the figures were not entitled to such entry by the true construction of the statute. The Secretary, in reply, referred to what the board stated to have been the evident intention of Congress in the act that the "objects exempted from duty should be of such high order as to inspire admiration and devotional feeling," etc., and held that the views of the board might "apply to paragraph 692 and 465, but not to paragraph 677, which provides (with the restriction enumerated in paragraph 465 and implied in paragraph 692) for the exemption from duty of all casts of plaster of Paris imported in good faith for the use of any society or institution incorporated or established for religious purposes."

It was further stated that "the department cannot interpret the provisions of paragraph 677 as establishing in any respect the esthetic standard for such importations, and without discussing the propriety of such standard must administer the law according to its apparent intent." Also: "Under the last named paragraph (677) it would appear that any plaster cast which should be regarded by a religious society as a desirable acquisition, and shall be classified by the collector as coming within the terms of that paragraph, may be imported free of all duty without regard to its artistic character."

Looking at the various provisions in the tariff statutes, from and including 1861 to and including that of 1897, and taking into consideration the evidence in the record in this case, together with the action of the Treasury Department, as above referred to, the answer to the question of what is the

true meaning or construction of the words "casts of sculpture," as used in the statute of 1897, is not perfectly clear. Some fair reason might, perhaps, be given for a construction which refuses free entry to these figures, but we think that the purpose of Congress was to permit their introduction free of duty as casts of sculpture, when specially imported in good faith for the use and by the order of any of the institutions named in the act. The paragraph in question (649) makes it necessary not only that the casts of sculpture should be specially imported in good faith for the use of a society, but it must be so imported *by the order* of such society. Here for the first time it is made necessary that the importation must have been *by order* of the society, which words are a still further limitation of the conditions upon the existence of which free entry is permitted.

It may well be that when the act of 1897 was drawn, its framers had in mind the objections above mentioned, made by the board of general appraisers, and therefore further limited the right of free entry to a special importation in good faith for the use *and by order* of the society, and to that extent protecting the interests of the "regular importers who sell from stock," while at the same time recognizing the policy of permitting a free entry to those societies which in good faith ordered the articles for their own special use.

We are of opinion that the evidence does not justify the assertion that the articles in question were simply known in a commercial sense as "statuary" or "church statuary." The fact that figures of this nature were designated as statuary in a catalogue of a manufacturer in this country does not clearly or conclusively establish such commercial designation. They were also designated composition statues by the salesman when taking orders for them. If the articles were also known as "casts of sculpture," and such language correctly described them, then they would come within the statute, although some manufacturers in this country should, for purposes of a short and easy description, describe them in the catalogue as "stat-

uary," or "composition statues." It seems to us they answer the description of casts of sculpture and are properly described as such in the act.

This provision of the statute should be liberally construed in favor of the importer, and if there were any fair doubt as to the true construction of the provision in question the courts should resolve the doubt in his favor. *American Net & Twine Company* v. *Worthington*, 141 U. S. 468; *United States* v. *Wigglesworth*, 2 Story, 369; *Rice* v. *United States*, 53 Fed. Rep. 910.

The judgments of the Circuit Court of Appeals of the Second Circuit and of the Circuit Court in the Southern District of New York are reversed, with directions to the Circuit Court to reverse the decision of the board of general appraisers and of the collector, and to direct the collector to admit the figures to free entry.

So ordered.

POSTAL TELEGRAPH-CABLE CO *v.* NEW HOPE.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 92. Argued December 11, 1903.—Decided January 4, 1904.

In an action against a telegraph company doing an interstate business for license fees taxed by a borough in Pennsylvania under an ordinance fixing the amount of the tax per pole and per mile of wire, the court held that while the question of reasonableness of the tax was one for the court he would submit it to the jury for their aid and as advisory only, directing them to find for the plaintiff if they regarded the amount as reasonable and for the defendant if they regarded it as unreasonable; the jury found a verdict for plaintiff for an amount less than that fixed by the ordinance and the court directed judgment to be entered thereon for the amount so found.

Held that if the amount of the license fee fixed by the ordinance was not reasonable the ordinance was void and neither the court nor the jury could fix any other amount.

Held that a verdict for an amount less than that fixed by the ordinance, and the order of the court to enter judgment thereon for the amount so found, amounted to a finding by the jury and the court that the ordinance was not reasonable and the verdict and judgment should have been for defendant.

Held that the general rule that the plaintiff alone can complain of a verdict for less than he is entitled to under the evidence does not apply where the only basis of his claim is an ordinance which is necessarily declared to be void by the finding of a verdict for an amount less than that fixed by the ordinance itself.

THE borough of New Hope in January, 1899, commenced an action against the telegraph company, the plaintiff in error herein, to recover from it the sum of $552, with interest, from the respective times in which portions of the amounts became due, the total charges being due from the defendant, as alleged, on account of a license fee taxed by the borough, (by virtue of an ordinance to that effect,) of one dollar for each pole and of two and a half dollars for each mile of wire used in the borough by the company, the license to be applied for and the fee to be paid annually.

The company made what is termed in the record an affidavit of defence, which, among other things, averred that it was a corporation organized under the laws of the State of New York and had accepted the act of Congress, approved July 24, 1866, relating to the construction of telegraph lines over any post road of the United States, 14 Stat. 221, and that its poles and wires through the borough of New Hope were employed and operated in the transmission of messages between the different States, and were therefore instruments of commerce; that the amount of the charges claimed to be due from the defendant under the ordinance was unreasonable, unjust and excessive; that the fee was sought to be justified as a license merely, but that the amount thereof was wholly disproportionate to the usual, ordinary and necessary expenses of inspecting and supervising the poles and wires imposed upon the borough of New Hope, and was largely in excess thereof, and the fee was also largely in excess of any additional liability of that kind and character imposed upon the borough in looking after the safety of the poles and wires and to see that they were properly maintained, and was also in excess of any further liability which might or could arise to the borough by reason of any injuries

to persons or property which might arise, or may have arisen, by reason of the erection of the poles and the stringing of the wires within the limits of the borough. It was further stated that the charges were more than ten times the amount of all kinds and character of expenses and liability which might have been incurred by the borough by reason of these poles and wires, and that in view of those circumstances the assessing of the license tax upon the telegraph company was for the purpose of raising and producing revenue, and was therefore void.

The company averred that it had paid the Commonwealth of Pennsylvania all taxes upon the value of its poles and wires, as included in and represented by its capital and upon the gross receipts derived from the use thereof, and it had paid its taxes upon its property in the borough of New Hope. That the expenses incurred by the borough during the period covered by the claim practically amounted to nothing, so far as regarded inspection and supervision.

The parties proceeded to trial, and the borough having proved the passage of the ordinance and the number of poles and the number of miles of wire as claimed in the complaint, thereupon rested.

The defendant proved that the only work done by the employés of the borough in regard to the poles and wires of the company during the four years included in the claim was to count the poles each year for the purpose of assessing the tax; that no other service on the part of the borough was performed under its police powers, or at all, in regard to inspection. The defendant also showed that it was an interstate telegraph company; that it had no public office in the borough, nor had there been any commercial office therein during the time in question; that there was no office in which business was received for which tolls were charged.

It was proved also that the entire value of the line of the company in the borough of New Hope (that is, the cost of the material and construction) amounted to less than $800, and

that the claim of the borough, graduated by the number of poles in the borough and the number of miles of wire strung on them, amounted to $138 per year, or to seventeen per centum of the cost of the line in the borough.

The company also proved that it employed servants, whose duty it was to erect the poles and string the wires and inspect and watch them, and keep them in proper repair and in safe condition; that the authorities of the borough did nothing whatever in the way of inspection of the lines.

The trial judge charged the jury, among other things, that the question which arose in the evidence in the case was that of the validity of the ordinance, to be determined by the amount and character of the charges against the company; that the borough had the right to enact such police regulations as might be necessary and reasonable in the government of the town, but in regard to the taxing question it had no right to go beyond the exercise of what was termed its police power; that if the ordinance was unreasonable in amount it was void; that the power to demand the license fee must be exercised as a means of regulation, and could not be used as a source of revenue, and that when exacted as a police power it must be limited to the necessary and proper expenses of issuing the license and of inspecting and regulating the business the license covers; that the borough had the right to impose such conditions and regulations as were necessary for the general protection of the streets and the uses of the same in the borough; that in doing this the borough could not be questioned, provided the license fee was a reasonable and just one and a proper one under the circumstances and commensurate with the probable requirements and exercise of the police or supervisory power of the borough. The court then said that it had a great deal of doubt as matter of fact and law as to whether this was a reasonable subjection or not, and it was frank to say:

"That we are inclined to the view that this is an arbitrary imposition of a license or tax rate. But it appears that our

brethren upon the bench in other localities have adjudged that similar rates are not unreasonable or unnecessary; but it is argued upon the part of the defence that in those cases there was not the same proof as has been developed here. There was not shown as clearly as there is here that the amount of money received as the result of the license was a clear revenue, irrespective of any requirement for police regulation. In other words, that this borough seems to have imposed a license fee to be expended and used in the exercise of a power and a duty which it has failed to exercise at all. Now then, gentlemen, while the question as to whether an ordinance is reasonable or not is for the court, and the court does not propose to evade that question, yet I have concluded to obtain the assistance and judgment of this jury as to whether an assessment, such as this is, under the circumstances of this case, is reasonable or unreasonable under the law, as I have laid it down, for this surely involves the facts. Now if you believe that it is unreasonable according to the facts you will render a verdict for the defendant; if you believe that it is reasonable and should be paid in the full amount you will render a verdict for the plaintiff for the amount of its claim, and the court hereafter will regulate judgment in accordance with such views, either upon a motion for a new trial or otherwise, as we shall entertain after having this opinion from you, in aid of its judgment, and to determine the doubt on the facts."

The court further stated:

"The borough of New Hope had no right to impose any charge for the privilege of erecting and maintaining said poles and wires in said borough except only such sum as will reasonably cover and reimburse to it the expense to it which it may be subjected in consequence of the erection and maintenance of said poles and wires, and if the license fees sued for in this case exceed said sum, your verdict shall be for the defendant."

Instead of finding a verdict for the amount due under the ordinance, or else a verdict for the defendant, as directed by

the court, the jury on October 17, 1899, found a verdict for $466.40. The trial judge directed judgment to be entered for the borough for the amount of the verdict. From that judgment an appeal was taken by the company to the Superior Court of Pennsylvania, which affirmed the same, that court holding that, the facts being undisputed, the question of the validity of the ordinance was for the court to decide, and that if on the undisputed facts the court would not have been warranted in declaring the ordinance void, the submission of the question of its reasonableness to the jury was an error of which the defendant had no just right to complain, and the court held that it would not have been justified by the precedents in declaring the ordinance void.

The Supreme Court affirmed the judgment of the Superior Court, and upon the question that the verdict of the jury was for a less sum than the ordinance called for, said that was a matter of which, under the view of the law taken by the court, (that the question of reasonableness was for it,) the plaintiff might complain, but that it was such good luck for the defendant that it might well rest satisfied. The company thereupon sued out this writ of error.

Mr. Frank R. Shattuck for plaintiff in error.

Mr. William C. Ryan for defendant in error.

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

The ground upon which an ordinance of this nature may be upheld is stated in the two cases of *Western Union Telegraph Company* v. *New Hope*, 187 U. S. 419, and *Atlantic &c. Telegraph Company* v. *Philadelphia*, 190 U. S. 160.

The trial court held that the question whether the ordinance in this case was reasonable or not was one for the court, but he submitted it to the jury for their aid and as advisory only, the

court stating to the jury that it would thereafter regulate the judgment to be entered in accordance with such views as the court might entertain as to the reasonableness of the ordinance, and after having the benefit of the assistance of the jury upon that question.

The direction to the jury was to give a verdict for the full sum, if it thought that the ordinance was reasonable, and if not—that is, if the jury thought that the ordinance was not reasonable—then the verdict should be for the defendant. The jury did not obey that direction. It returned a verdict for a considerably less sum than was due if the ordinance were valid, and by such verdict (regard being had to the charge of the judge) it necessarily found the license fee provided for in the ordinance was unreasonable and the ordinance itself invalid. The verdict is, therefore, simply evidence of what the jury conceived to be a reasonable sum, which it thereupon proceeded to assess by its verdict, and being much less than the ordinance called for. It made itself a taxing body, the verdict being the result of its own views as to what the fees should have been. When the verdict was rendered and the court directed judgment to be entered thereon it must have thereby concurred with the jury and held the ordinance unreasonable and therefore void. Otherwise, if the ordinance was valid, the court would have directed judgment for the full sum without reference to the verdict. Finding, therefore, that the ordinance was void, instead of directing judgment for the defendant, the court followed the jury and directed judgment for the sum which the court regarded as reasonable, being the same sum found by the jury. This follows because the court had theretofore stated that in its view this ordinance was an arbitrary imposition of a license tax, and the court also announced that the verdict of the jury was not conclusive and would be acted upon by it in accordance with such views as it might entertain after the verdict was rendered. But neither the court nor the jury had any power whatever to give judgment for what either might regard a reasonable sum, if that

sum were less than the amount provided for in the ordinance. The source of jurisdiction to give any verdict or judgment for the plaintiff was the ordinance. If the amount of the license fee provided for therein was unreasonable, the ordinance was void, and there was no power in either jury or court to substitute its own judgment as to what was reasonable and to give a verdict or direct a judgment to be entered for that sum. Finding the sum named in the ordinance unreasonable, the verdict or judgment should have been for the defendant.

The argument that plaintiff alone can complain that the verdict is too small is not well founded in this instance. It is undoubtedly the general rule that a verdict or judgment for a less sum for the plaintiff than he is entitled to under the evidence is matter of complaint for him alone, and if acquiesced in by him the defendant has no cause to complain that he is charged for a less sum than he ought to have been. On grounds already stated the reasons do not apply in a case like this.

Both the Superior and the Supreme Courts of Pennsylvania proceeded in their decisions upon the theory that the question was for the court, and that the ordinance was valid; but as the jury had found a less sum than provided for by the ordinance, the judgment might stand, and the defendant could not in such event complain that the judgment was too small. Those courts in effect reverse the finding of the jury that the ordinance was unreasonable and void, while at the same time maintaining a judgment based upon such finding.

In *Western Union Telegraph Company* v. *Borough of New Hope*, 187 U. S. 419, the question of the reasonableness of the license fee exacted was left to the jury, and the jury found a verdict in favor of the plaintiff, and judgment was rendered thereon, which was affirmed by the state courts upon appeal. Upon writ of error from this court the case was reviewed here, and it was held that, as the jury and the Court of Common Pleas, the Superior Court and the Supreme Court of Pennsylvania, had all held the ordinance reasonable, this court would

not say it was so manifestly wrong as to justify our interposition.

There is a difference, however, between such a case and one like this, where the jury and the trial court have, in effect, held the ordinance void, and a judgment has been entered which is unauthorized in any event, and which should have been for the defendant. Where it is a question of amount in an ordinance in a case like this, we have held that it is not improper to submit that question to a jury, although in general the reasonableness of an ordinance is matter of law for the court. *Atlantic &c. Telegraph Co.* v. *Philadelphia*, 190 U. S. 160.

In the case cited it was stated by Mr. Justice Brewer, speaking for the court, at page 166, as follows:

"It may be conceded that, generally speaking, whether an ordinance be reasonable, is a question for the court. As said by Judge Dillon, in his work on Municipal Corporations, 4th ed. vol. 1, sec. 327: 'Whether an ordinance be reasonable and consistent with the law or not *is a question for the court*, and not the jury, and evidence to the latter on this subject is inadmissible.' While that may be correct as a general statement of the law, and especially in cases in which the question of reasonableness turns on the character of the regulations prescribed, yet when it turns on the amount of a license charge it may rightly be left for the determination of a jury. There are many matters which enter into the consideration of such a question, not infrequently matters which are disputed, and in respect to which there is contradictory testimony."

We think that in this case, like that just cited, it was not improper to submit the question to the jury, and that the verdict necessarily found the license fee exacted by the ordinance unreasonable, and the ordinance itself was therefore void. The jury could not itself assess a tax and render verdict for the amount it might judge reasonable. A judgment entered upon such a verdict for the amount thereof was improper and illegal, as it should have been for the defendant, the ordinance being void.

The judgment of the Supreme Court of Pennsylvania should be reversed and the case remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE HARLAN and MR. JUSTICE BREWER dissented.

POSTAL TELEGRAPH-CABLE CO. *v.* TAYLOR.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 93. Argued December 11, 1903.—Decided January 4, 1904.

Courts are not to be deceived by the mere phraseology in which an ordinance may be couched when it appears conclusively that it was passed for an unlawful purpose and not for the one stated therein.

A license fee cannot be imposed by ordinance of a municipality for purposes of inspection on telegraph companies doing an interstate business which is so far in excess of the expenses of inspection that it is plain that it was adopted, not to repay such expenses, but as a means for raising revenue.

THE plaintiff in error seeks to review the judgment of the Supreme Court of Pennsylvania, which affirmed the judgment of the Superior Court of that State, which in its turn affirmed the judgment of the Court of Common Pleas of Lackawanna County, in favor of the defendant in error in an action brought by it to recover the amount of a license fee imposed upon all telegraph, telephone and electric light companies having poles and wires in the borough. The ordinance was of the same nature as that mentioned in the immediately preceding case of *Postal Telegraph-Cable Company* v. *Borough of New Hope.*

By the plaintiff's statement of its claim against the defendant, the telegraph company, it sought to recover from the company the sum of $220.50, including interest from January 31, 1898.

The defendant is a corporation engaged in interstate commerce by transmitting telegraphic communications among the several States, and by its affidavit of defence it averred that it was a company engaged in forwarding telegraphic dispatches among the several States, and was a corporation organized under the laws of the State of New York; that it had paid the Commonwealth of Pennsylvania all taxes which had by legislative enactment been levied upon the value of its poles and wires erected and maintained in the borough of Taylor and elsewhere in the State; that it had accepted the act of Congress, (14 Stat. 221,) providing for the construction of telegraph lines over any post road of the United States; that it had never maintained, and does not now maintain, any office whatever in the borough of Taylor, and that no telegraphic business of any kind is done or transacted by the defendant in that borough, except the maintenance of the telegraphic lines and the transmission of telegraphic messages over the same from other places; that the ordinance in question is unreasonable, unjust and excessive, and is illegal and void, because it is designed and intended to provide revenue by taxation for the general expenses of the borough, and that no other object than this exists, or has at any time existed, for the regulations imposed by the ordinance; that the borough is under no expense whatever in issuing the license required by the ordinance, and has not been at any time before, during or after the period mentioned in the plaintiff's statement for which it makes demand, under any expense or charge of any kind whatsoever in inspecting and regulating the poles and wires; that the license fees imposed by the ordinance are not based upon the cost and expense to the borough for inspection and supervision or regulation of the defendant's lines and business, but the fees are imposed notwithstanding they are more than twenty times the amount that might have been or could possibly be incidental to such inspection, supervision and regulation, together with all reasonable measures and precautions that might have been or possibly could be required to be taken by

the said borough for the safety of its citizens and the public, or which might have been or possibly could be incurred as expenses for the most careful, thorough and efficient inspection and supervision that might have been made of the poles and wires of the defendant, although the plaintiff has not and does not maintain any inspection and supervision or care whatsoever over the poles and wires of the defendant, and has incurred no expense whatever on account thereof; that the borough is a sparsely populated district and the land therein of small value, and most of the land along the highway on which the telegraph lines are constructed is not adapted to building purposes or commercial use, and the highway is little traveled; that the borough is a coal mining community and the buildings therein consist for the most part of the coal miners' cabins or houses of one or two stories, and the business buildings are scattered and consist mostly of small shops or stores; that the poles and wires thereon are located on the side of the highway and do not interfere in the slightest degree or to any extent with its use for all highway purposes, and do not interfere with any kind of traffic or with the operation of men or apparatus in extinguishing fires; that the line is not old, decayed or worn out, but, on the contrary, is comparatively new and sound, and there is no danger of accident from the decay or breaking down of the poles and wires; that the license fees imposed by the ordinance are twenty times more than could be imposed under any power existing in the borough to make charges for all legal purposes; that the amount of the license fees imposed under the ordinance for each year largely exceeds the entire cost to the defendant itself of maintaining said line, including all repairs, reconstruction, cost of labor and material and traveling expenses of the employés, and all expenses incurred by the defendant by a careful and efficient inspection and maintenance of such poles and wires; that the fees imposed by the ordinance are so excessive that if every borough in the State of Pennsylvania in which defendant has a telegraph system should pass similar ordinances the total amount collected

would exceed $100,000 per annum, and if the same kind of an ordinance should be passed in the other States by the municipalities in which the poles and lines of the company are placed it could not pay the amount, but would become insolvent by reason of the fact that the expenses of operation, including the license fees, would be far in excess of the receipts of the defendant.

To this affidavit of defence the plaintiff excepted on the ground that it did not state any sufficient defence to plaintiff's cause of action, and also on the ground of *res adjudicata*, in that the same questions had been theretofore decided between the same parties in the courts of the State.

A rule for judgment was taken by the plaintiff for want of a sufficient affidavit of defence, and upon hearing the rule was made absolute, (the facts set forth in the affidavit of defence being thereby assumed,) and, judgment for the plaintiff being entered, it was affirmed by the Superior and Supreme Courts of Pennsylvania.

Mr. Frank R. Shattuck for plaintiff in error.

Mr. John M. Harris, with whom *Mr. E. O. Wagenhorst* was on the brief, for defendant in error.

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

The grounds of our jurisdiction to review the judgment in this and the preceding case are similar to those which sustained it in the two cases of *Western Union Telegraph Company* v. *New Hope*, 187 U. S. 419, and *Atlantic &c. Telegraph Company* v. *Philadelphia*, 190 U. S. 160. By reference to the opinions delivered in the state courts in this case it is apparent that it was not decided upon any question of *res judicata*, as set forth in the plaintiff's exceptions to defendant's affidavit of defence.

In the opinion of the Superior Court of Pennsylvania it was stated:

"Whether or not the fee is so obviously excessive as to lead irresistibly to the conclusion that it is exacted as a return for the use of the streets, or is imposed for revenue purposes, is a question for the court, and is to be determined upon a view of the facts, not upon evidence consisting of the opinions of witnesses as to the proper supervision that the municipal authorities might properly exercise and the expense of the same. Such a decision becomes a precedent which is to be regarded in other cases similarly situated. Were it to be held otherwise, the law upon the subject would be in hopeless confusion and uncertainty. We make these remarks because we cannot escape the conclusion that some of the averments of the affidavit of defence are, in reality, but the opinion of the defendant, undoubtedly honestly entertained, as to these matters. They are not stronger than the averments in *Philadelphia* v. *American Union Telegraph Company*, 167 Pa. St. 406, and the other facts averred do not distinguish the case from others in which a similar fee in boroughs has been held to be not so obviously excessive as to warrant the courts in declaring the ordinance void. The cases are collected in the opinion filed herewith in the case of *New Hope* v. *Western Union Telegraph Company*."

The opinion referred to by the Superior Court is also contained in the record, and cases were cited in that opinion from the state courts holding that they would not declare an ordinance void because of the alleged unreasonableness of the fee charged, unless the unreasonableness be so clearly apparent as to demonstrate an abuse of discretion on the part of the municipal authorities. The court further remarked:

"In many of the foregoing cases the license fee was the same as that imposed by the ordinance under consideration. In none of the cases was the ordinance declared void for unreasonableness, although it was inferentially conceded that a case might arise where the license fee would be so grossly dispro-

portioned to the burden imposed upon the municipality in consequence of the erection and maintenance of the poles and wires as to warrant the court in presuming that the ordinance was a revenue measure, not a police regulation. None of the cases lays down a fixed and invariable rule by which that question is to be determined, but after a comparison of the facts developed on the trial of this case, with the facts of some of the cases above cited, we have been led to the conclusion that the court would not have been justified by the precedents in declaring the ordinance void."

Upon the averments in the affidavit of defence, which in this proceeding must be taken to be true, we can come to no other conclusion than that the ordinance was void because of the unreasonable amount of the license fee provided for therein.

It was urged on the argument that this ordinance was a proper police regulation, and that the collection of revenue was not its object; that it was the duty of the borough officials to protect the lives and property of its citizens, and that in the discharge of such duty it had the right to constantly inspect the poles and wires for the purpose of seeing that they were safe.

There is no doubt that, for the purpose mentioned, the borough had the right claimed by its counsel. The averments of the affidavit of defence, however, show that no such duty has been discharged or attempted to be discharged by the borough. It has done absolutely nothing to protect the lives or property of its citizens by inspecting the poles and wires of the defendant.

In *Atlantic &c. Telegraph Co.* v. *Philadelphia*, 190 U. S. 160, it was held that the testimony in a case like this might be such as to compel a decision one way or the other, and the court might then be justified in directing a verdict. We think this is one of those cases. We assume that a tax of this kind ought to be large enough to cover all expenses of police supervision of the property and instrumentalities used by the company in the borough, and that it is not bound to furnish such super-

vision for nothing, but may, in addition to ordinary property taxation, subject the corporation to a charge for the expenses of the supervision. The borough is also not compelled to make its expenditures for these purposes in advance of demanding the tax from the defendant, but it must be remembered that such a tax is authorized only in support of police supervision, and if it were possible to prove in advance the exact cost that sum would be the limit of the law. As in the nature of things this is ordinarily impossible, the municipality is at liberty to make the charge enough to cover any reasonably anticipated expenses, and the payment of the fee cannot be avoided because it may subsequently appear that it was somewhat in excess of the actual expense of the supervision, nor can the company then recover the difference between the amount of the license fee and such cost. These observations are substantially reproduced from the opinion of the court in *Atlantic &c. Telegraph Company* v. *Philadelphia, supra,* delivered by Mr. Justice Brewer.

We come then to an examination of the question whether this fee, in the light of the admitted facts set forth in the affidavit of defence, can, by the widest stretch of imagination, be regarded as reasonable. The borough is, where the poles are planted and the wires stretched, sparsely settled, and the danger to be apprehended from neglect in regard to the poles and wires is reduced to a minimum. The borough has in fact done nothing in the way of inspection or supervision during the time covered by the license in question. It has not expended one dollar for any such purpose. It has incurred no liability to pay any expenses arising from inspection or supervision on its behalf. The fee itself is twenty times the amount of expense that might have been reasonably and fairly incurred to make the most careful, thorough and efficient inspection and supervision that might have been made of such poles and wires, and for all reasonable measures and precautions that possibly could be required to be taken by the borough for the safety of its citizens and the public. This is not a mere ex-

pression of opinion. It is the averment of a fact. The company knows the amount it costs for the inspection, which it avers is made by its own servants, and which it avers is a most careful and efficient inspection, one intended to place and maintain the poles and wires in a perfectly safe and satisfactory condition. Knowing that cost and comparing it with the amount demanded under the ordinance, it is enabled to state as a fact, and not as a mere opinion, that the amount of the license fee exacted under the ordinance is as stated, twenty times more than it ought to be to secure a reasonable, efficient and most careful inspection, as set forth in the affidavit mentioned.

In *Chester City* v. *Telegraph Company,* 154 Pa. St. 464, cited in *Telegraph Company* v. *New Hope,* 187 U. S. 419, 425, it was said that the affidavit in that case averred that the rates charged were at least five times the amount of the expenses involved in the supervision exercised by the municipality. The Supreme Court held that while that averment must be admitted to be true, it did not go far enough, because it referred only to the usual, ordinary and necessary expenses of the municipal officers in issuing the license and other expenses thereby imposed upon the municipality, and that it made no reference to the liability imposed upon the city by the erection of the telegraph poles. It was also stated by the court that it is the duty of the city to see that the poles are safe and properly maintained, and should a citizen be injured in person or property by reason of the neglect of such duty an action might lie against the city for the consequences of such neglect. The court said it was a mistake, therefore, to measure the reasonableness of the charge by the amount actually expended by the city in a particular year to the particular purposes specified in the affidavit.

The affidavit in this case goes much further. It includes not only the expenses that might have been incurred for an ordinary inspection, supervision and regulation, but takes into account the very matters that are spoken of in the extract from

the opinion of the Supreme Court of Pennsylvania, *supra*. Instead of the averment that the license fee charged was at least five times the amount of the expense involved in the supervision exercised by the municipality, it is stated that it is more than twenty times the amount that would reasonably be expended for the purposes stated in the affidavit.

The liability to pay for injuries that might arise from the bad condition of the poles and wires, arising from the neglect of the company to inspect and supervise the same, is not a liability which the municipality is entitled to recover from the company in advance of its happening, but it is simply one of the reasons for an inspection by the borough, which shall be most carefully and continuously performed, in order that injuries may not arise from the neglect of such supervision.

When we come to an examination of the grounds upon which this kind of a tax is justifiable, and when we find that in this case each one of those grounds is absent, how is it possible to uphold the validity of such an ordinance? To uphold it in such a case as this is to say that it may be passed for one purpose and used for another; passed as a police inspection measure and used for the purpose of raising revenue; that the enactment as a police measure may be used as a mere subterfuge for the purpose of raising revenue, and yet because it is said to be an inspection measure the court must take it as such and hold it valid, although resulting in a rate of taxation, which, if carried out throughout the country, would bankrupt the company were it added to the other taxes properly assessed for revenue and paid by the company. It is thus to be declared legal upon a basis and for a reason that do not exist in fact.

We think the court is not bound to acknowledge an ordinance such as this to be valid in face of the facts stated in the affidavit of defence. Confessedly there has been here no inspection, no expense incurred to provide for one even though not made, and all expenses and liabilities that might fairly and reasonably be incurred on the part of the borough are not one-twentieth of the amount it exacts for an inspection which it has not made.

Under such facts it would seem to be plain that the ordinance was adopted as a means for the raising of revenue and not to repay expenses for inspection.

Judging the intention of the borough by its action it did not intend to expend anything for an inspection of the poles and wires, and did intend to raise revenue under the ordinance. Courts are not to be deceived by the mere phraseology in which the ordinance is couched when the action of the borough in the light of the facts set forth in the affidavit, shows conclusively that it was not passed to repay the expenses or provide for the liabilities incurred in the way of inspection or for proper supervision.

We are of opinion that, upon the averments contained in the defendant's statement of defence, the defendant was entitled to judgment. The judgment of the Supreme Court of Pennsylvania is, therefore, reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

So ordered.

MR. JUSTICE HARLAN and MR. JUSTICE BREWER dissented.

CITIZENS' BANK *v.* PARKER.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 2. Argued October 28, 1903.—Decided January 4, 1904.

When a contract is asserted and the Constitution of the United States invoked to protect it, all of the elements which are claimed to constitute it are open to examination and review by this court; and also all that which is claimed to have taken it away, and the writ of error will not be dismissed.

The rule requiring a strict construction of statutes exempting property from taxation should not be infringed but where ambiguity exists it is

the duty of the court to determine whether doubt exists and to solve it and not to immediately surrender to it.

Where it is *res judicata* that the original charter of a bank by which its capital is exempt from any tax constituted a contract within the impairment clause of the Constitution, and that such exemption is not affected by subsequent charters and constitutions, and there is no doubt that the State intended to offer inducements to enlist capital in the early development of the State, and no license tax was demanded for fifty-eight years although that method of taxation was in force during the whole period, the exemption from any tax may be construed as including a license tax on occupation as well as taxes on property.

THIS suit was instituted in the Civil District Court for the Parish of Orleans for the recovery of the sum of twenty-four hundred dollars, claimed to be due from the bank for the year 1894 as a license tax for carrying on a banking business. The license is claimed to have been authorized by the following provision of Act No. 150 of the general assembly of Louisiana of 1890: "That for each business of carrying on a bank, banking company, association, corporation or agency, the license shall be based on the declared or nominal capital and surplus, whether said capital and surplus is owned or in use, or on deposit in the State or elsewhere, as follows, to wit: . . . Ninth class. When the said declared or nominal capital and surplus is four hundred thousand dollars or more, and under six hundred thousand dollars, the license shall be four hundred and fifty dollars ($450)."

The bank pleaded the general issue and that it was exempt from paying such license by the provisions of its charter granted in 1833, and by section 4 of the act of January 30, 1836, amending the charter, by which it was provided that "the capital of said bank shall be exempt from any tax laid by the State, or by any parish or body politic, under the authority of the State, during the continuance of its charter." It was alleged that the charter of 1833 and the amendment of 1836 were granted for a valuable consideration, and constituted a contract between the State and the bank, and that the act imposing the license impaired the obligation of the contract, and was therefore violative of the Constitution of the United

States. Certain judgments were also pleaded as *res judicata* and introduced in evidence, one of which was the decree of this court in *New Orleans* v. *Citizens' Bank*, 167 U. S. 371.

The trial court sustained the defence of the bank, based on its claim under its charter, but did not pass on the plea of *res judicata*. The court observed: "I pass only on the main issue raised without reference to the defendant's plea of *res judicata*, inasmuch as it does not appear that the issue of exemption from a license tax has been presented in any of the cases and judgments relied on to support the plea."

Judgment was entered, dismissing the demand of the State. It was reversed on appeal to the Supreme Court, the court, however, dividing. 52 La. Ann. 1086. Elaborate opinions were delivered both by the majority and minority of the court. All of the contentions of the bank were held to be untenable, but the members of the majority did not agree upon the grounds. Mr. Justice Monroe, with whom concurred the Chief Justice, placed his decision on three grounds: (1) The plea of *res judicata* could not be sustained, because the validity of a license tax was not involved in the decrees or judgments pleaded. (2) License taxes were distinguishable from taxes on property, and the bank was not exempt from the former by its charter. (3) The act of 1874, extending the charter from 1884 to 1911, was to take effect in 1884, from which it was deduced: "First, that the extension thus granted could add nothing not authorized by the constitution of 1868, under the dominion of which the act was passed, and which required the payment of a license; second, that the grant, to take effect in 1884, became subject to the constitution adopted in 1879, which also required, or authorized the legislature to require, the payment of the license." (4) Even if this were not so, the acceptance by the bank of the Act No. 79 of 1880 "specifically and in terms subjected it to the constitution of 1879, and thereby placed it out of the power of the legislature to exempt it from the payment of the license imposed on other institutions of the same class."

Mr. Justice Watkins delivered a separate opinion, and placed his concurrence on the distinction between a license tax and a property tax, and said that "the conclusion is perfectly clear that a property tax was only in contemplation of the legislature in framing that exemption." And also said that the license law under which the State proceeded "does not conflict with the contract clause of the Federal Constitution by impairing the contract rights of the defendant bank under its charter." Concluding his opinion, the learned justice observed:

"In my view, it is unnecessary for this court to go into any discussion of the constitutional questions raised and adverted to in the opinion of the majority, for the reason that on the face of the charter exemption, which the bank pleads, its liability is apparent.

"It is my view, also, that the better course of decision is, and one more in harmony with the general jurisprudence of this court, to avoid discussion of Federal questions which only arise incidentally and are unnecessary to the decision of the principal question at issue.

"Entertaining this view, I think it is preferable to pass the constitutional question under consideration and reverse the judgment of the District Court and sustain the license on the face of the charter and the law."

Mr. Justice Breaux and Mr. Justice Blanchard dissented, each filing an opinion.

Mr. Henry Denis, with whom *Mr. Branch K. Miller* was on the brief, for plaintiff in error.

Mr. E. Howard McCaleb, Jr., with whom *Mr. E. Howard McCaleb* was on the brief, for defendant in error.

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

1. A motion is made to dismiss. The ground of it is that, even

if the charter of 1833 and the amendment of 1836 exempted the bank from license taxes, the bank, by accepting the act of 1880, which enabled the bank to make compromises with its mortgage creditors, became subject to the constitution of 1879, which, it is contended, authorized or required the legislature to impose a license tax. And besides the act of 1874 extending the charter was subject to the constitution of 1868, and that required the payment of a license. Upon those grounds Mr. Justice Monroe based his opinion, and they, it is urged, involved state questions sufficient to sustain the judgment. But those grounds only had the concurrence of the Chief Justice. Mr. Justice Watkins did not assent to them and Justices Breaux and Blanchard dissented from them. The judgment of the court, therefore, does not rest upon them. The judgment rests upon the construction of the original charter, that is, upon the contract between the State and the bank, but to construe that is also our function.

But assuming that the judgment rests upon the grounds stated, we, nevertheless, have the power of review. The Federal question presented is, did the bank at the time of the imposition of the license tax sued for have a contract with the State exempting it (the bank) from such tax? The elements of that question are the original contract and all subsequent legislation relating to the contract and which it is claimed modify or change it. The motion to dismiss is, therefore, denied.

2. The question presented on the merits has been simplified by the case of *New Orleans* v. *Citizens' Bank*, 167 U. S. 371. The origin and history of the bank are there detailed, its charter and its exemptions are construed, its litigations with the city are recited and their effect declared. We need only apply and extend the reasoning of that case to decide this.

It came here from the Circuit Court of the United States. It was brought in that court by a bill in equity to enjoin the taxing officers of the State and of the city of New Orleans from taxing the bank under certain provisions of a statute of the

State for the assessment of the capital of banks. Under the statute the capital stock of banks which were represented by shares were not assessed by that name, but the shares were required to be assessed to the stockholders at their actual valuation as shown by the books of the bank, and the taxes assessed were required to be paid by the bank, which was given the power to collect the amount from the shareholders or their transferees. The real estate owned by the bank was directed to be assessed directly to it and the tax "proportioned to each share of capital stock" and deducted from the amount of taxes of that share under the statute. The statute also contained provisions for its administration and required property which had been omitted from the assessment rolls to be assessed for the current year and for three years back. The court adjudged the bank to be exempt from the taxation and granted an injunction against the collection of the taxes for the designated years by the State of Louisiana, and the city of New Orleans, "upon the capital, property or shares of stock of the shareholders of said bank, whether assessed against the bank or its shareholders."

The writ also enjoined the demanding or collecting from the bank of any state or city license tax. Commenting on the decree, this court said:

"The exemptions to which the decree below held the bank to be entitled related therefore to distinct objects of taxation, one not necessarily connected with or dependent upon the other, and may be summarized as follows: First. That the bank was not subject to taxation on its capital, shares of stock or real estate and furniture actually used for the carrying on of its banking business, and that the bank could not be lawfully obliged to pay the sum of any tax assessed on its shareholders. Second. That the stockholders of the bank were not liable for assessment on their shares of stock. Third. That the bank was also not subject to taxation on any real estate held by it which had been mortgaged to secure stock subscriptions and had become the property of the bank under foreclosure pro-

ceedings, because property so acquired became by virtue of the purchase a part of its capital stock. Fourth. That the non-liability of the bank to taxation embraced also immunity from the payment of a license to either the State of Louisiana or the city of New Orleans."

The decree was affirmed as to the objects of taxation embraced in the first subdivision, and reversed as to those embraced in the second, third and fourth subdivisions. Of the objects in the fourth subdivision it was said:

"We are at a loss to understand by what process of reasoning the decree was made to cover the question of the non-liability of the bank for license. It was not presented by the pleadings, and was entirely *dehors* the issue in the case."

In sustaining the decree of the Circuit Court as to the objects in the first subdivision, necessarily there was involved the decision that the charter of the bank, both as originally granted and as extended, exempted the capital of the bank from taxation, and the exemption was not taken away by the constitutions of 1868 and 1879, by the acceptance of the act of 1874 by the bank, nor by the act of 1880. Many considerations were referred to which might have justified this as an independent conclusion, but the decision was mainly rested upon the judgments of the courts of Louisiana which had been pleaded as *res judicata*, and which judgments, it was decided, had concluded the controversies. There was a clear adjudication, therefore, of the right of exemption of the bank from a tax on its capital.

The ruling in *New Orleans* v. *Citizens' Bank* has been followed by the Supreme Court of Louisiana. In *Treasurer of New Orleans* v. *Chaffraix*, 106 Louisiana, 250, 256, the same questions were raised on the statutes of 1874 and 1880 and the constitutions of 1868 and 1879, as are raised in the case at bar. The court, replying to them, said:

"Both these contentions were passed upon and negatived in *New Orleans* v. *Citizens' Bank*, 167 U. S. 371, and the effect of that decision of the Supreme Court of the United States is

to maintain and carry the exemption into the extended period of the bank's charter."

It is true that in a subsequent case, *State* v. *Sugar Refining Co.*, 108 Louisiana, 603, *Citizens' Bank* v. *New Orleans* is criticised and its views are not concurred in as to what constitutes the thing adjudged and an estoppel in tax cases. But the thing claimed to have been adjudged was not a right claimed under the Constitution of the United States, and there was no intimation of disapproval of *New Orleans* v. *Chaffraix*.

But if it can be contended that there is conflict between the state cases, *New Orleans* v. *Citizens' Bank* is, nevertheless, decisive of the questions adjudged by it. *Deposit Bank* v. *Frankfort*, 191 U. S. 499. And all the questions in the case at bar were adjudged by it except the question of the exemption of the bank from the payment of license taxes. That question is now presented, and we think the exemption exists. We deduce this not only from the words of the charter, but from the purpose of its enactment and of its extension. The bank was made an agency of the State. To have fostered it with aid and to have burdened it with taxation of any kind would have been inconsistent, considering the provisions of the act incorporating it, and it was immaterial whether it was constituted a quasi public corporation or entirely a private one. It was created to accomplish purposes in which the State took an interest, and the expectations which were entertained of it may be regarded in the interpretation of its charter. With the wisdom or folly of the charter we have nothing to do. Our sole function is to interpret it. It may seem, in 1903, to have been imprudent legislation. But how did it appear in 1833 and 1836? We must contemplate it as of that time. States act through men, and, of course, cannot have a greater appreciation or prophecy of things than men. Events may disappoint or baffle their purposes, but they cannot for that reason be relieved from their obligations. Nor can they necessarily be accused of folly. There are limits to the power of government and the wisest provisions may be frustrated or turned to

detriment by causes which no prescience can foresee. It is, therefore, to 1833 and 1836 we must turn, to the conditions and purposes of then.

The chief industry of Louisiana was agriculture, and it seemed to the State a wise policy to encourage and expand that industry, and the means selected was a bank which could make loans to the planters upon the security of their lands. Capital was necessary. Private persons were to be induced to subscribe, and the State aided by an issue and pledge of its bonds. It was careful to make provision for control. No act of administration could be undertaken without its consent. It was represented by six members on a board of twelve directors. It, besides, contemplated the probability of profits, and made provision to share them. The scheme was large and hazardous. Private capital had to be tempted to it, and the State, besides contributing its credit, offered the inducement of a relief from burdens. There is no doubt of this, and the dispute is only as to the degree, and, on an ambiguity which may be asserted upon a distinction in the form of taxation, a limitation is attempted to be put upon the comprehensive and expressive words of the bank's charter. This seems to us not justified. The words of the charter are "the capital of the bank shall be exempt from *any* tax." The word *any* excludes selection or distinction. It declares the exemption without limitation. And why should there have been limitation? What purpose was there to serve by making a distinction between the forms of taxation? The State did not intend to so limit its aid. It did not mean to help the bank to do business and then tax the business when done—relieve it and burden it at the same time; retain the right to impose as an occupation tax that which it gave up as a right to impose as a property tax.

This view is sustained by contemporaneous construction of the bank's charter. It was not only the immediate sense of the officers of the State, but their continued sense through a number of years, that the bank was exempt from all taxation,

and when the right of taxation was asserted a license tax was not included. And we have authority for saying that a license tax was not demanded during a period of fifty-eight years, notwithstanding the many changes in the administrative officers of the State; that during all that time, "even from and inclusive of the very first revenue act (that of 1813), adopted after the admission of the State into the Union, license taxation as a means of revenue was provided for and enforced," and for a portion of the time (from 1869) license taxes were imposed upon banks.

Stress is put in the argument at bar upon the distinction between taxes on property and taxes on occupations. The distinction exists and counsel have cited Louisiana decisions in which that distinction has been held to justify license taxes, notwithstanding clauses in charters exempting capital stock from taxation. A review of those cases is not necessary. They were all rendered subsequently to 1836, and they depended upon the application of the constitution of 1868 or 1879, or special circumstances not applicable to the charter of the Citizens' Bank. And those cases did not embarrass the court in defining the scope of the charter of the Citizens' Bank in the decisions presently to be considered.

That the distinction between property taxes and license taxes was recognized in Louisiana in 1833 or 1836 is not very clear, but subsequently the distinction was certainly not always considered as justifying a power to impose license taxes. In *City of New Orleans* v. *Southern Bank*, 11 La. Ann. 41, the general banking law of the State, approved April 30, 1853, called the Free Banking Law, was considered. The law provided "that bankers and banking companies, doing business under this act, shall be taxed upon their *capital stock* (italics ours) at the same rate as other personal property under the laws of the State." It was held that the provision was a contract with the individual corporations formed under the act, and a license tax imposed by the common council of the city under an act passed in 1842, Session Acts of 1842, p. 17, which

empowered the city to levy a license tax on certain enumerated occupations and "all other callings, professions or business," was illegal.

The same question was presented again in *State of Louisiana* v. *Southern Bank*, 23 La. Ann. 271, upon a license tax imposed by the revenue laws of 1869. The court was urged to overrule *New Orleans* v. *Southern Bank*. The court refused to do so and affirmed the doctrine of that case, and held the act "violative of section ten, article 1, of the Constitution of the United States." The Supreme Court of Louisiana, therefore, as early as 1853, construed a provision exempting the capital stock of a bank from taxation except at a particular rate as exempting the bank from a license tax. In other words, it was held that a license tax was virtually a tax on the capital of the banks, and, we think, that must be held of the tax in the case at bar. Whatever the tax may be called—one on property or one on occupations, if its final incidence is on the capital it is comprehended in the exemption contained in the charter. As we have already pointed out, the language of the charter is universal; and it was said in *Citizens' Bank* v. *Bouny, Tax Collector*, 32 La. Ann. 239, "That language is broad enough to cover everything which, during its existence, should enter into and make part of the capital of said bank." If the language is broad enough to preclude a tax upon that which may become part of the capital of the bank, it is broad enough to preclude a tax which may become a burden upon the capital. Whatever diminishes the income of a bank diminishes its capital under the provisions of the charter of 1833. It was said in the *Bouny* case: "By the twenty-ninth section of the original charter, 'all the profits made by said corporation shall be added to and made part of its capital,' except a certain fraction of any excess of profits over what was necessary to pay the bonds issued by the bank." And the sum of $159,238.62 accumulated profits were held not to be liable to taxation. And fully as significant was the exemption declared of the sum of $636,450 assessed to the shareholders of the bank as "value of capital

stock." It was said: "Even if the shareholders be liable to taxation on their shares (upon which we express no opinion), under the peculiar and exceptionable nature of the charter of the Citizens' Bank, we think it cannot be forced to pay taxes assessed to its shareholders." In other words, the burden of tax could not be put upon the bank, however it could be imposed upon the stockholders.

We may recur to *Treasurer of New Orleans* v. *Chaffraix*. It was a proceeding to recover the payment of a tax for the year 1899, imposed upon a certain number of shares of the capital stock of the Citizens' Bank held by Chaffraix. Exemption was asserted under the clause of the bank's charter which we have quoted. This was one of the questions left open by this court in *New Orleans* v. *Citizens' Bank*, and left open in the *Bouny* case. The exemption nevertheless was sustained. It was recognized that in some jurisdictions, "including the Supreme Court of the United States," it was held that the exemption of the capital of a corporation from taxation does not of necessity include the exemption of the shareholders on their shares of stock. But the court considered that it was not necessary to approve or disapprove the doctrine, and rejected it as inapplicable to shares in the Citizens' Bank, because the intent of the legislature was otherwise. And that intent was deduced "not only from the words of the charter," but from the purposes for which the bank was instituted, and they were vividly described. Because of them, it was in effect said, and of the bank's relation to them and the state's relation to the bank, the State "granted the clause quoted above exempting from taxation." And it was observed, "at that time the refined distinction between the capital and the capital stock of a corporation had not been made by the courts, or was at least unrecognized as yet in Louisiana." We see, therefore, that in the *Bouny* case it was held that a tax on that which might become capital, or a tax which the bank would have to pay, is illegal. In the *Chaffraix* case it is held that a tax which falls on the stockholders of the bank is illegal. In other words, the

effect of the two cases is that a tax which falls upon the capital or is to be paid by the bank or its stockholders, is prohibited. A license tax has surely some one of those effects.

It is urged, however, that neither the *Bouny* case nor the *Chaffraix* case can be adduced as authoritative. The argument is that a judgment in the case at bar has become the law of the case, and that it cannot be affected by what was or has been decided in some other case, and that the judgment in the case at bar rested on non-Federal grounds which were sufficient to sustain it, to wit, the construction and application of the constitutions and statutes of that State. The argument is the same as that directed against our jurisdiction, and has been answered. When a contract is asserted and the Constitution of the United States invoked to protect it, all of the elements which are claimed to constitute it are open to our review; and, also, all of that which is claimed to have taken it away. We are certainly not confined to the decision under review. To hold that would surrender the power of review. That decision, of course, claims our first, and a most thoughtful consideration, but in the right to challenge it is the right to go outside of it, and certainly nothing can afford more light or persuasion than the utterances of the same tribunal on prior and subsequent occasions.

These propositions then are established; the exemption granted to the bank in 1833 and 1836 was not taken away by the acts extending its charter and the application thereto of the constitutions of 1868 and 1879. This was the thing adjudged in *New Orleans* v. *Citizens' Bank, supra.*

The exemption of the charter includes a license tax. This, for the reason stated, must be regarded as part of the contract between the State and the bank. And in reaching that conclusion the rule requiring a strict construction of statutes exempting property from taxation has not been infringed. We recognize the force and salutary character of the rule, but it must not be misunderstood. It is not a substitute for all other rules. It does not mean that whenever a controversy is or can

be raised of the meaning of a statute, ambiguity occurs, which immediately and inevitably determines the interpretation of the statute. The decisive simplicity of such effect is very striking. It conveniently removes all difficulties from judgment in many cases of controverted construction of laws. But we cannot concede such effect to the rule, nor is such effect necessary in order to make the rule useful and, at times, decisive. Its proper office is to help to solve ambiguities, not to compel an immediate surrender to them—to be an element in decision, and effective, maybe, when all other tests of meaning have been employed which experience has afforded, and which it is the duty of courts to consider when rights are claimed under a statute. Will courts ever be exempt, or have they ever been exempt from that duty? Has skill in the use of language over been so universal, or will it ever be so universal as to make indubitably clear the meaning of legislation? Has forecast of events ever been so sure, or will it ever be so sure, as to make inevitably certain all the objects contemplated by a statute? We think not, and there never will be a time in which judicial interpretation of laws will not be invoked, and it cannot be omitted, because a doubt may be asserted concerning the meaning of the legislators. We repeat, it is the judicial duty to ascertain if doubt exists.

The judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

MR. JUSTICE BREWER, with whom the CHIEF JUSTICE concurs, dissenting:

I dissent from the opinion and judgment in this case and will state briefly my reasons therefor: Where it is contended that a State having once entered into a contract has by subsequent legislation impaired its obligations, this court, while exercising its independent judgment in respect to the terms of the contract and the fact of impairment, will lean to the views announced by the courts of that State. In *Wilson* v. *Standefer*, 184 U. S. 399, 412, we said:

"But as the general rule is that the interpretation put on a state constitution or laws by the Supreme Court of such State is binding upon this court, and as our right to review and revise decisions of the state courts in cases where the question is of an impairment by legislation of contract rights, is an exception, perhaps the sole exception, to the rule, it will be the duty of this court, even in such a case, to follow the decision of the state court when the question is one of doubt and uncertainty. 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."

Where it is contended that exemption from taxation has been granted by contract with the State, the exemption, if any be found to exist, will not be extended by construction, but will be confined to that which is clearly within the terms of the contract. *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 544; *Ohio Insurance Co.* v. *Debolt*, 16 How. 416, 435; *Railroad Co.* v. *Litchfield*, 23 How. 66, 88; *Railway Co.* v. *Loftin*, 98 U. S. 559, 564; *Railroad Co.* v. *Thomas*, 132 U. S. 174, 185; *Railroad Co.* v. *Alsbrook*, 146 U. S. 279, 295; *Railroad Co.* v. *Decatur*, 147 U. S. 190; *Schurz* v. *Cook*, 148 U. S. 397, 409; *Bank* v. *Tennessee*, 161 U. S. 134, 146; *Insurance Co.* v. *Tennessee* 161 U. S. 174, 177.

In the last of these cases, on page 177, we said:

"It must always be borne in mind in construing language of this nature that the claim for exemption must be made out wholly beyond doubt; for, as stated by Mr. Justice Harlan, in *Chicago, Burlington & Kansas City Railroad* v. *Guffey*, 120 U. S. 569, 575: 'It is the settled doctrine of this court that an immunity from taxation by a State will not be recognized unless granted in terms too plain to be mistaken.'"

And in next to the last case we also said, on page 146:

"These cases show the principle upon which is founded the rule that a claim for exemption from taxation must be clearly made out. Taxes being the sole means by which sovereignties can maintain their existence, any claim on the part of any one to be exempt from the full payment of his share of taxes on any portion of his property must on that account be clearly defined and founded upon plain language. There must be no doubt or ambiguity in the language used upon which the claim to the exemption is founded. It has been said that a well founded doubt is fatal to the claim; no implication will be indulged in for the purpose of construing the language used as giving the claim for exemption, where such claim is not founded upon the plain and clearly expressed intention of the taxing power."

Only last term the same doctrine was reaffirmed in *Theological Seminary* v. *Illinois*, 188 U. S. 662, 672, in these words:

"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."

I make these quotations, which are in harmony with the many other decisions of this court, for even the most casual examination of them makes it apparent that the rule therein stated is plainly ignored in this case, and that a term, whose meaning is well understood, is stretched beyond its ordinary significance and to its utmost limits in order to include the alleged exemption.

The Supreme Court of Louisiana in this case held that a license tax was not within the exemption of the bank from any tax upon its capital, the one being a charge for the privilege of carrying on the business, and the other an exemption of a part of the property of the bank from taxation. In the course of its opinion it said, after referring to a prior case:

"There the tax resisted, like those resisted in the cases relied on, was, at least, a tax of the same character—that is, a tax

upon 'property'—while the tax involved in this litigation is one essentially different; it is a tax, it is true, but one upon callings or occupations, and it is controlled and governed by rules and principles entirely different from those which bear upon property taxation. *City of New Orleans* v. *Louisiana Savings Bank*, 31 La. Ann. 638; *Walters* v. *Duke*, 31 La. Ann. 671; *Parish of Morehouse* v. *Brigham*, 41 La. Ann. 665. Articles 203, 206, 207 and 209 of the constitution of 1879 also disclose this very fully and clearly. See *City* v. *Ernst*, 35 La. Ann. 746, and *State ex rel. Ernst* v. *Assessors*, 36 La. Ann. 347.

* * * * * * * *

"The defendant urges that the license tax is substantially one upon its capital. The views expressed by us above indicate our opinion upon this point. The mere reference in the license acts to the declared or nominal capital or surplus from business or banking institutions is not a tax upon the capital or surplus itself of the different banks, but a mere method of classifying the banks and establishing a graduation of licenses as required by article 206 of the constitution. *State of Louisiana* v. *Liverpool & London & Globe Insurance Co.*, 40 La. Ann. 463; *Parish of Morehouse* v. *Brigham*, 41 La. Ann. 665.

"This court, in *City of New Orleans* v. *State National Bank*, 34 La. Ann. 892, said: 'A provision in the charter of a corporation exempting its stock and real estate from taxation, does not cover an exemption *from license taxation*. The grant of a charter to a bank, authorizing it to carry on a certain business during the term of its charter, does not import permission to do so without contributing to the support of the government in like manner with natural persons pursuing the same business.'

* * * * * * * *

"The extent of the exemption granted originally from taxation was from 'taxation upon its capital.' It could never have claimed greater or other exemption than that. The law of

1890, the unconstitutionality of which is pleaded, does not pretend to impose, nor does it impose any tax upon the '*bank's capital*,' and, therefore, there could by no possibility be, nor is there, any violation of any contract obligation through that act even should there really be any existing obligation at all between the State and the defendant as to taxation."

That there is a clear distinction between a property tax on the capital of a corporation and a license tax for the privilege of carrying on the business of the corporation, has been so often decided by this and other courts, and is so clear, that it seems almost a waste of words to refer to decisions. And yet it may be well to refer to a few that it may be apparent how strongly, emphatically and for how long a time the distinction has been affirmed. As a preliminary thereto let it be borne in mind that the franchise of a corporation is the privilege granted to it to do the business named in its charter, and a license tax for the privilege of doing business is simply a tax upon the franchise. In *Gordon* v. *Appeal Tax Court*, 3 How. 133, 150, decided in 1844, it was said:

"A franchise for banking is in every State of the Union recognized as property. The banking capital attached to the franchise is another property, owned in its parts by persons, corporate or natural, for which they are liable to be taxed, as they are for all other property, for the support of government."

In *Hamilton Co.* v. *Massachusetts*, 6 Wall. 632, 640:

"Property taxation and excise taxation, as authorized in the constitution of the State, are perfectly distinct."

In *Farrington* v. *Tennessee*, 95 U. S. 679, Mr. Justice Swayne, after referring to taxation of bank capital and shares of stock, added (p. 687):

"There are other objects in this connection liable to taxation. It may be well to advert to some of them.

"1. The franchise to be a corporation and exercise its powers in the prosecution of its business."

In *Tennessee* v. *Whitworth*, 117 U. S. 129, 136, Chief Justice Waite declared:

"In corporations four elements of taxable value are sometimes found; 1, franchises; 2, capital stock in the hands of the corporation; 3, corporate property; and, 4, shares of the capital stock in the hands of the individual stockholders. Each of these is, under some circumstances, an appropriate subject of taxation; and it is no doubt within the power of a State, when not restrained by constitutional limitations, to assess taxes upon them in a way to subject the corporation or the stockholders to double taxation."

Both of these last cases were cited with approval in *Bank of Commerce* v. *Tennessee*, 161 U. S. 134, 146. Many more cases might be cited to the same effect, but these will serve as illustrations. It is conceded that this distinction was recognized in Louisiana, though it is contended that it was not always held sufficient to uphold, in the case of a contract exemption of the capital, the retention of a power to impose license taxes, and some early decisions of the Supreme Court of that State are cited. But what does this argument amount to? Because the distinction between the two taxes has not always been recognized in Louisiana it must now be repudiated. The legislature must be held to have not recognized the distinction in this case, because the courts have sometimes in other cases failed to recognize it. It is not pretended that there has been a uniform ruling on the part of the Supreme Court of Louisiana ignoring the distinction. On the contrary, this very case (and this is only one of several) recognizes it. It seems to me this is a plain overturning of the hitherto settled rule of this court, that a doubt is to be resolved in favor of a State, for the alleged doubt in this particular case is resolved in favor of the corporation.

But upon what ground is it claimed that a doubt exists? Why should not the legislature be credited with recognizing the distinction recognized elsewhere through the country and sometimes at least, if not always, in Louisiana? It is said that there is something peculiar in the organization of this bank; that its purpose was to aid the agricultural interests of the

State, and that the State assisted by a loan of its credit and retained partial control through directors appointed by it. But is it not the rule that an exemption from taxation is not given as a gratuity, but by reason of some supposed benefit to the State as a whole or some particular interest therein? Does the fact that some interest in the State is specially benefited change the rule as to the construction of an exemption? It seems to me that that is a doctrine as novel as it is dangerous. It is true that the State loaned its credit and retained a partial control through directors appointed by it, but we have in the legislation of Congress and in the decisions of this court a very suggestive analogy. The Union Pacific Railroad Company was a corporation chartered by Congress. It was given a large amount of public lands and the credit of the United States was loaned to it to the extent of $16,000 and over a mile. A partial control was retained through directors appointed by the government. In these respects it presents a close similarity to the Citizens' Bank. It was held by this court that while the franchise given by Congress to this and other transcontinental railroads was exempt from state taxation, yet the property belonging to those corporations was not. *California* v. *Pacific Railroad Company*, 127 U. S. 1; *Thomson* v. *Pacific Railroad*, 9 Wall. 579; *Railroad Company* v. *Peniston*, 18 Wall. 5. It was not doubted that Congress could in its discretion have provided for such exemption, but as it failed to prescribe it, the court held that it did not exist. If from the fact that the corporation was aided by bonds of the United States, was engaged in doing the work of the nation in interstate transportation and a partial control retained by Congress, that its property as well as its franchise was exempt from state taxation, why should there be an inference from the fact that Louisiana aided by its bonds this particular corporation and retained a partial control thereof; that it intended to grant any other exemption than was expressly stated?

Again, it is contended that contemporaneous construction determines that the exemption of the capital included the

exemption of the franchise. It seems to me a sufficient answer is that in 1853 the Supreme Court held that a provision exempting the capital stock of a bank from taxation, except at a particular rate, exempted the bank from a license tax. *City of New Orleans* v. *Southern Bank*, 11 La. Ann. 41. It is not strange that thereafter there was no effort to impose a license tax on this bank and that the administrative officers respected the opinion of the Supreme Court, and did not until of late seek a reconsideration of that ruling. It also appears that there was no specific statute providing for a license tax upon banks until 1869, and that was after the decision of the Supreme Court referred to.

It is also said that if a license tax on the franchise is enforced it must be paid out of the capital and so in effect be a tax upon the capital. That argument would make in every case an exemption of the capital a relief from all taxation, for every tax must in the last analysis come out of the capital. But what under those circumstances becomes of the doctrine of a strict construction of a contract exemption of taxes?

Further, it must be remembered that objects and means of taxation were not in the years past sought for with the same avidity as at present. The demand for revenue was not so great, and there was much inattention to the matter of securing objects and devising modes of taxation. So the mere fact that a particular kind of tax was not sought to be enforced upon any institution is not conclusive of the fact that it was necessarily exempt therefrom. It may simply mean that other objects seemed to the taxing authorities more accessible and more conveniently reached for taxation. At any rate, we are not justified in holding that the mere fact of an omission to press such a taxation upon the bank establishes that such a tax was included within the exemption in the face of a ruling of the highest court of the State that it was not.

For these reasons I am constrained to dissent from the opinion of the court.

MR. JUSTICE HARLAN also dissents.

JOPLIN *v.* CHACHERE.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 96. Argued December 16, 1903.—Decided January 4, 1904.

An adjudication by commissioners under sec. 4 of the act of March 3, 1807, amending the act of March 2, 1805, for settlement of claims of land in the Territory of Orleans and Louisiana, for an exact quantity of land already occupied by the claimant by one claiming under a grant of the former sovereign, and which was confirmed by the act of April 29, 1816, so vested the title in the claimant that a patent issued by the Government in 1900 to the heirs of the claimant will not prevail against a title properly acquired meanwhile by adverse possession based upon a tax sale, notwithstanding no survey other than the general survey of 1856 was made after the confirmation.

THIS action was brought in the Eighteenth Judicial District Court, parish of Acadia, State of Louisiana, by plaintiff in error to have himself declared the owner of a tract of land containing 870.06 acres, described as section 41, township 7 south, range 1 east. Subsequently he amended his petition and claimed one-tenth individually and nine-tenths as administrator of the succession of Bennet Joplin. He traced title in both capacities to Bennet Joplin, to whom the land was confirmed by the act of Congress, approved March 3, 1807, entitled "An act respecting claims of land in the Territory of Orleans and Louisiana." 2 Stat. 440. This act was an amendment to the act of March 2, 1805, 2 Stat. 324, which provided for ascertaining and adjusting the titles and claims to land within the same territory. The purpose of both acts was to recognize and establish the titles possessed by the inhabitants of that territory prior to its acquisition by the United States.

Section 4 of the act of 1807 provided:

"That the commissioners appointed or to be appointed for the purpose of ascertaining the rights of persons claiming land in the Territories of Orleans and Louisiana, shall have full powers to decide according to the laws and established usages and customs of the French and Spanish governments, upon

all claims to lands within their respective districts, where the claim is made by any person or persons, or the legal representative of any person or persons who were on the 20th day of December, one thousand eight hundred and three, inhabitants of Louisiana, and for a tract not exceeding the quantity of acres contained in a league square, and which does not include either a lead mine or salt spring, which decision of the commissioners, when in favor of the claimant, shall be final against the United States, any act of Congress to the contrary notwithstanding."

A patent was issued July 16, 1900, in favor of Bennet Joplin, heirs and assigns. Stating the recitals of the patent and some other facts, the Supreme Court of Louisiana said:

"That it [the patent] was granted in accordance with the provisions of the act of Congress of the third of March, one thousand eight hundred and seven. It declares there had been deposited in the General Land Office of the United States a patent certificate numbered fourteen hundred and ninety-nine, issued by the register and receiver of the United States Land Office, on the 25th of May, one thousand nine hundred, whereby it appeared that the private land claim of Bennet Jopling,[1] being number one thousand nine hundred and twenty-seven, Class B, in the report of the old Board of Commissioners for the Western District of the Territory of Orleans, was confirmed by the said commissioners under the authority conferred upon them by the act of Congress approved on the 3d of March, 1807, entitled 'An act respecting claims to land in the Territories of Orleans and Louisiana'; that the claim had been regularly surveyed and designated as section forty-nine in township seven, south of range one west, and section forty-one, in township seven, south of range one east, of the Louisiana meridian, in the Southwestern District of Louisiana, containing eight hundred and seventy acres and six-hundreths of an acre, as appeared by a plat and descriptive notes on file (in the General Land Office) thereof, duly examined and approved by James Lewis, surveyor

[1] Name so spelled in opinions of the state court.

general for Louisiana, on the 9th day of May, one thousand nine hundred; that this plat and descriptive notes were inserted and made part of the patent.

"The plat and descriptive notes referred to were signed, as recited, by James Lewis, surveyor general of Louisiana, on the 9th of May, 1900.

"Immediately following the plat the surveyor general recites that it represents the survey of the private land claim of Bennet Jopling, confirmed by the old board of commissioners for the western district of Louisiana, in pursuance of authority conferred upon them by the fourth section of the act of Congress approved March 3rd, 1807, entitled 'An act respecting claims to lands in the Territories of Orleans and Louisiana,' as appeared by their confirmation certificate No. B. 1927, dated March 11th, 1812. After making this recital, the surveyor general says: 'The following being a description of the survey taken from the approved field notes of N. B. Phelps, deputy surveyor.' He then gives the field notes of the survey.

"At the end of the document, under date of May 9th, 1900, are the words 'examined and approved,' followed by the signature of the surveyor general."

The defendants Chachere and Boagni depended for title upon purchases from Victor C. Sittig, by authentic acts duly recorded. Sittig purchased the same at tax sale in 1871. The defendants pleaded that Sittig and themselves had the uninterrupted, peaceable and actual possession of the land in good faith since 1871; had erected improvements thereon and paid taxes. They also pleaded the prescription of three, four, five, ten and twenty years. Victor Sittig was called in warranty and made the same defences.

The District Court decreed that the claim of plaintiff be rejected, the plea of prescription set up by defendants be sustained, and they be quieted in their title and possession of the land. The Supreme Court of the State affirmed the decree, and the case was then brought here. Other facts are stated in the opinion.

Mr. S. D. McEnery, with whom *Mr. George S. Dodds* and *Mr. Mark M. Boatner* were on the brief, for plaintiff in error:

Legislative confirmation must be by specific boundaries distinguishing and separating the tract from other tracts making it capable of identification. *Whitney* v. *Morrow*, 112 U. S. 693.

The legal title to the claim was in the United States until patent issued in 1900, and the defendants cannot avail themselves of the plea of prescription. The confirmation to Joplin by act of Congress was only as to quantity, and not to any specifically described tract of land. There was only an equitable interest in Joplin and his heirs until a survey should be made and approved by the surveyor general, segregating his part from the public domain, and from conflicting claims. The survey of 1856 was not approved until May 9, 1900, when the receiver and register approved said survey, giving to Joplin and to conflicting claimants the tracts to which they were entitled under the confirmation. It was only then that the complete legal title was vested in Joplin to the tract of land in controversy. It was only from this time that prescription commences. *Langdeau* v. *Hanes*, 21 Wall. 521; *Morrow* v. *Whitney*, 95 U. S. 551.

Under the law, property, therefore, could not be assessed and sold in the same year, in which it was assessed, and the tax deed is an absolute nullity. *Redfield* v. *Parks*, 132 U. S. 239.

The deed did not contain the recitals required by law and was void. *Rap* v. *Lowry*, 30 La. Ann. 1272; *Lambert* v. *Craig*, 45 La. Ann. 1110; *Thacher* v. *Pervell*, 6 Wheat. 119. There was no judgment, the assessment was made in the name of one who was dead and was not according to law. *Stafford* v. *Twitchell*, 33 La. Ann. 520.

Where the statute makes the deed *prima facie* evidence, that the requirements of the sale have been complied with, it does not relieve the purchaser from proof that the statutory conditions precedent have been complied with. *Robson* v. *Osborn*, 13 Texas, 298; Cooley on Taxation, 355.

Mr. G. L. Dupré, with whom *Mr. E. D. Saunders* was on the brief, for defendant in error:

That where a person is entitled to demand a patent for a particular and determined tract of land, he is to be treated as the owner of that tract, and the land as liable to taxation, even though he neglects to take out the patent.

A patent is merely evidence of a grant; it adds nothing to the grantee's rights, but only furnishes him with convenient proof thereof. *Carroll* v. *Safford*, 3 How. 441; *Railway Co.* v. *Prescott*, 16 Wall. 603; *Railway Co.* v. *McShane*, 22 Wall. 444; *Simien* v. *Perrodin*, 35 La. Ann. 931; *Barney* v. *Dolph*, 97 U. S. 652; *Stark* v. *Starrs*, 6 Wall. 402; *Moran* v. *Horsky*, 178 U. S. 212.

The theory of any conflict having existed, as a matter of fact, is too shadowy to deserve consideration. And if there ever was a conflict, it did not involve the land now in suit. And whether there was or was not a conflict, the entire tract stood severed from the public domain after the approved survey of 1856. The title of the Government was wholly and forever extinguished to all the land included in the survey, though there might still have been a question whether Joplin could take all within the lines of the survey, or whether some parts of the area so included had not already been granted to others.

In addition to this, we submit that the fact of any conflict is not established. The plaintiffs offered two letters to show that there was a conflict. The defendants objected, and the offered documents were excluded. The court may have erred in excluding these letters, but this court does not review the action of the state court in excluding or admitting evidence. *Sherman* v. *Grinnell*, 144 U. S. 202; *Cleveland Ry. Co.* v. *Backus*, 154 U. S. 443; *Sayward* v. *Denny*, 158 U. S. 185.

The confirmation by the commissioners and by Congress of a claim originating under the Spanish government, to a particular tract, carried title thereto without a survey or patent. The Supreme Court of Louisiana held that the claim was made and confirmed to a particular body of land.

This finding of fact by the state court will not be questioned by this court. *Thayer* v. *Spratt*, 189 U. S. 353; *West. Un. Tel. Co.* v. *Call Pub. Co.*, 181 U. S. 103.

The allowance and confirmation by the commissioners and by Congress of a claim to a particular, determined tract, in itself carries title to the confirmee, without survey or patent. *Langdeau* v. *Hanes*, 21 Wall. 521.

If a survey is required, then, as a matter of fact, one was made and approved by the proper officers in 1856, and the tract has since been carried on the public maps as the approved Joplin claim.

Both of these state courts found that, as a fact, a survey of the Joplin tract was made and approved by the United States Surveyor General of Louisiana in 1856, and it is immaterial on what evidence the state courts based their finding of fact in this matter. This court will not inquire whether that evidence was adequate or inadequate to support the conclusion which the state courts reached as to the fact. *Chicago Life Ins. Co.* v. *Needles*, 113 U. S. 684.

The adjudication by the state courts that the tax title had become valid by prescription does not present a Federal question. This court will follow the state court on questions of state law. *Dibble* v. *Dellingham*, 163 U. S. 72; *Leffingwell* v. *Warren*, 2 Black, 399; *Bauserman* v. *Blunt*, 147 U. S. 652; *Poffe* v. *Langford*, 104 U. S. 770; *N. O. Waterworks Co.* v. *Louisiana*, 185 U. S. 351; *Castillo* v. *McConnico*, 168 U. S. 674.

Plaintiffs do not attack the constitutionality of the statute; they merely complain that, in applying it the state court has erred in holding a tax title to be *prima facie* valid and a proper basis for the ten years' prescription. Even if this decision were erroneous, which it is not, that error would not raise a Federal question. Where the statute is not assailed, this court will not review alleged errors of the state courts in the administration of the statute, because, it is charged, such errors bring about a denial of due process of law. *Lent* v. *Tillson*, 140 U. S. 331.

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

The question presented is the effect of the defence of adverse possession and the plea of prescription. The contention of plaintiff in error is that such defence cannot avail against a United States patent. In other words, until the issue of the patent the title was in the United States and was unaffected by the occupation of the defendants.

Counsel say:

"The confirmation to Joplin by act of Congress was only as to quantity, and not to any specifically described tract of land. There was only an equitable interest in Joplin and his heirs until a survey should be made and approved by the surveyor general, segregating his part from the public domain, and from conflicting claims. The survey of 1856 was not approved until May 9, 1900, when the receiver and register approved said survey, giving to Joplin and to conflicting claimants the tracts to which they were entitled under the confirmation. It was only then that the complete legal title was vested in Joplin and his heirs to the tract of land in controversy. It was only from this time that prescription commences."

Is the contention of counsel justified? They cite *Langdeau* v. *Hanes*, 21 Wall. 521, and *Morrow* v. *Whitney*, 95 U. S. 551. To determine the application of those cases there are important facts to be considered. The Supreme Court of Louisiana said:

"We do not think there is any dispute between the parties as to the facts. That, on the 12th of March, 1812, the Board of Commissioners appointed under section 4 of the act of Congress, approved March 3, 1807, confirmed to Bennet Jopling, under certificate No. 1927, by *virtue of occupancy and settlement under Joseph Chevalier Poiret*, nine hundred and thirteen and ninety-eight hundredths acres of land in Bayou Mallet woods, in the county of Opelousas. That on April 29, 1816, Congress, reciting the various acts bearing upon the subject, (act of March 10, 1812, act of February 27, 1813, and act of April,

1814,) passed an act for the confirmation of certain land claims in the Western District of the State of Louisiana, and that under section 4 of that act it was enacted 'that the claims marked "B," described in the reports of the Commissioners of the Western District of the State of Louisiana, formerly Territory of Orleans, and recommended by them for confirmation, be and the same are hereby confirmed.' That the claim of Bennet Jopling, covered by certificate No. 1927 of the Board of Commissioners, was confirmed in favor of Jopling by that act of Congress. That, although the claim was so confirmed by act of Congress, no patent was issued for the land by the United States Government until July, 1900."

In other words, the land claimed by Poiret was identified by his possession. It contained a definite quantity. Fractions of acres were even regarded, and almost necessarily. The right of a claimant depended upon possession, and naturally its extent was marked by definite boundaries. How else could a claim have any strength at all—any right to confirmation at all? The certificates issued by the commissioners were denominated grants, (sec. 7,) and they were required to designate a tract of land, (sec. 6). Section 7, it is true, provided for a survey. The provision is "that the tracts of land thus granted by the commissioners shall be surveyed at the expense of the parties, under the direction of the surveyor general," in all cases where authenticated plats of the land, as surveyed by the French, Spanish and American governments, respectively, shall not have been filed with the proper register and recorder, or shall not appear on the public records of the territories. The surveying officer was required to transmit general and particular plats of land thus surveyed to the proper register and recorder and copies to the Secretary of the Treasury. The duties of the officers under the act may be summarized as follows: (1) The commissioners to investigate the claim, and if they confirmed it to issue a certificate thereof and transmit a transcript of their final decision to the Secretary of the Treasury. (2) The register and receiver, upon the filing of the

certificate with him and a plat of the land being also filed with him by the surveyor general or officer acting as surveyor general, should issue a certificate, which, being transmitted to the Secretary of the Treasury, would entitle the party to a patent. (3) The survey of the land by the surveyor general or officer acting as such. (4) Reports by the Secretary of the Treasury to Congress "for their final determination thereon, in the manner and at the time heretofore prescribed by law for that purpose." There is no evidence that the register and receiver issued a certificate other than that mentioned in the patent. The commissioners performed the duties required of them and the Secertary of the Treasury performed his. And a survey was made of the land in 1856.

Under these facts did the title pass by the confirmation expressed in the act of Congress of April 29, 1816, 3 Stat. 328, or, at the latest, upon the survey in 1856, or did it pass by the patent in July, 1900? For answer we may refer to the cases cited by the plaintiff in error.

In *Langdeau* v. *Hanes*, the contest was between a title claimed by virtue of the act of Congress, March 26, 1804, which confirmed claims to lands in the district of Vincennes, and a title claimed by adverse possession. It was provided by the act of Congress that a person to whom land is confirmed, whenever his claim shall have been located and surveyed, shall be entitled to the certificate from the register and receiver, which certificate shall entitle him to a patent. The tract in dispute was surveyed in 1820, but a patent was not issued until 1872. The defendant's claim of title rested on an adverse possession of thirty years. The state court held that the act of confirmation of 1807 was a present grant and became so far operative and complete as to convey the legal title when the land was located and surveyed by the United States in 1820; second, the patent was not of itself a grant of the land but only evidence of a grant; third, the adverse possession of the defendant was a bar to the recovery by the plaintiff. These propositions were affirmed by this court. The

court held that the act of Congress of 1804 was a recognition and discharge of the obligation, incurred by the government upon acquiring the territory from Virginia, to protect and confirm the possession and titles of the inhabitants to their property. And it was held that it was competent for Congress to provide how that should be done, and Congress required a presentation of the claims to the register and receiver of the land office, constituted them commissioners to pass upon the claims "according to justice and equity," and to transmit to the Secretary of the Treasury a transcript of their decisions with their report. The Secretary of the Treasury submitted the decisions and the report to Congress, as he was required to do, and Congress passed the act of 1807 to confirm them. The court said:

"This confirmation was the fulfillment of the condition stipulated in the deed of cession so far as the claimants were concerned. It was an authoritative recognition by record of the ancient possession and title of their ancestor, and gave to them such assurance of the validity of that possession and title as would be always respected by the courts of the country. The subsequent clause of the act providing for the issue of a patent to the claimants, when their claim was located and surveyed, took nothing from the force of the confirmation.

"In the legislation of Congress a patent has a double operation. It is a conveyance by the government when the government has any interest to convey, but where it is issued upon the confirmation of a claim of a previously existing title it is documentary evidence, having the dignity of a record, of the existence of that title, or of such equities respecting the claim as justify its recognition and confirmation. The instrument is not the less efficacious as evidence of previously existing rights because it also embodies words of release or transfer from the government.

"In the present case the patent would have been of great value to the claimants as record evidence of the ancient possession and title of their ancestor and of the recognition and con-

firmation by the United States, and would have obviated in any controversies at law respecting the land the necessity of other proof, and would thus have been to them an instrument of quiet and security. But it would have added nothing to the force of the confirmation. The survey required for the patent was only to secure certainty of description in the instrument, and to inform the government of the quantity reserved to private parties from the domain ceded by Virginia.

"The whole error of the plaintiff arises from his theory that the fee to the land in controversy passed to the United States by the cession from Virginia, and that a patent was essential to its transfer to the claimants, whereas, with respect to the lands covered by the possessions of the inhabitants and settlers mentioned in the deed of cession, the fee never passed to the United States; and if it had passed, and a mere equitable title had remained in the claimants after the cession, the confirmation by the act of 1807 would have operated as a release to them of the interest of the United States. A legislative confirmation of a claim to land is a recognition of the validity of such claim, and operates as effectually as a grant or quitclaim from the government."

This doctrine was repeated in *Morrow* v. *Whitney*, 95 U. S. 551. The question arose upon the ruling of the trial court refusing to admit a patent of the United States in evidence. Sustaining the ruling, this court said:

"In this case, the patent would have been of great value to the claimant. It would have enabled him, without other proof, to maintain his title in the tribunals of the country. Founded as it would have been upon a survey by the government, it would have removed the doubt as to the boundaries of the tract, which always arises where their establishment rests in the uncertain recollection of witnesses as to ancient possession. It would thus have proved to its possessor an instrument of quiet and security, but it would not have added anything to the interest vested by the confirmation. *Ryan et al.* v. *Carter et al.*, 93 U. S. 78."

These cases are not in conflict with *Gibson* v. *Chouteau*, 13 Wall. 92, as was observed in *Langdeau* v. *Hanes*. The land in controversy had been part of the public lands of the United States. The title of Gibson was derived under the act of Congress of February 17, 1815, for the relief of the inhabitants of the county of New Madrid, in the Territory of Missouri, who had suffered by earthquakes. 3 Stat. 211. James T. O'Carroll obtained permission from the Spanish authorities to settle on vacant lands in the district of New Madrid, in the Territory of Louisiana, and in pursuance of the permission he settled upon a tract embracing about 1000 arpents of land, in that part of the country which afterwards comprised the county of New Madrid in the Territory of Missouri. The land settled upon, to the extent of 640 acres, was confirmed to O'Carroll by different acts of Congress. In 1812 the land was injured by an earthquake, and upon proof of the fact the recorder of land titles at St. Louis gave a certificate to that effect, which authorized the location of a like quantity on any of the public lands of the Territory of Missouri, a sale of which was authorized by law. Under this certificate the land in dispute was located. The land located had been previously surveyed, but for some cause the survey and plat were not returned to the recorder until August, 1841. The recorder then issued a patent certificate to "James T. O'Carroll or his legal representatives." The survey was not approved by the Commissioner of the General Land Office, because it did not show its interferences with conflicting claimants. A new survey and plat were made, showing interferences, and were filed with the recorder on the 26th of March, 1862, and a new patent certificate issued. In the following June the patent of the United States was issued to Mary McRee, who had acquired the interest of the locator by various mesne conveyances. In August following she conveyed to Gibson. Against the title thus acquired, among other defences, adverse possession for the period prescribed by the statute of Missouri was pleaded. The plea was sustained. The judgment was reversed by this court.

It is obvious that there is a clear distinction between the case and *Langdeau* v. *Hanes* and *Whitney* v. *Morrow*. The act of 1815 did not confirm to O'Carroll the tract of land which he obtained from the Spanish authorities. It only enabled him or his representatives to locate a like quantity of the public land, and a segregation of that quantity and its exact identification were necessary, and this did not occur until the issue of the patent in 1862. The patent, therefore, was not the mere formal assurance of a title that had been conveyed by another government, but it was the conveyance of the title of this government after conditions performed, which authorized but did not anticipate it nor were they its equivalent. The case at bar, therefore, does not come under the precedent of *Gibson* v. *Chouteau;* it comes under that of *Langdeau* v. *Hanes* and *Morrow* v. *Whitney*.

Plaintiff in error claims under Joplin, who claimed under Poiret, who claimed under the French government. And it was the title to a tract of land thus claimed that the commissioners under the act of 1807 adjudicated and granted, and it was that title which was confirmed by the act of April 29, 1816.

What element then is wanting? Plaintiff in error says the identification of the land, its complete definition by boundaries, and until this was done the title was in the United States. We need not dispute the principle upon which the contention rests. We think its conditions were satisfied. Poiret's title was obtained by occupation and the right of his successor Joplin depended upon that, and by that the award of the commissioners could only have been measured. It is not conceivable that the boundaries of the tract were not ascertained by them. Their certificate, as was seen, expressed an exact quantity, 918.98 acres, and having a frontage of 1080 arpents. The evidence before the commissioners is not exhibited, but there was a survey in 1856. The remarks of the Supreme Court of Louisiana are, therefore, apposite:

"It is evident that Poiret was shown to the board to have *already occupied and settled a particular body of land for the time*

stated and to have *already had an existing right or privilege to a particular tract.* The identity of the tract confirmed must have been fixed by evidence before the board and the survey which followed was unquestionably based upon the evidence preserved and made known to the surveyor. The Jopling claim under Poiret was not based upon the survey, but the survey was based upon the existing claim, and simply identified the land to which Poiret and Jopling were entitled by antecedent occupancy and settlement."

Speaking of the survey, the court said:

"If, however, a survey of the claim was necessary in order to complete the transfer of ownership of this property to Jopling, we are satisfied that a survey of the same was made and approved by the surveyor general, W. J. McCulloh, as far back as 1856. The present surveyor general of Louisiana refers to the survey and field notes of Phelps as having been approved, but not as a matter of original approval by himself, as the plaintiff seems to contend. In the act of sale of this land under which the plaintiff claims from James W. Jopling to James H. Houston, Jr., the land transferred is referred to as a 'Spanish grant' with the added words (see parish map and a list of private land claims, where the above described property is well defined as belonging to Bennet Jopling). We have before us a copy of the parish map here referred to, with the different private claims (among others that of Bennet Jopling) distinctly set out and the surveys on which they were located minutely detailed, certified to as far back as 1856 by the surveyor general. It may be that it is not strictly and technically in evidence, but it is before us by reference in one of the acts, and were we not to act upon it the only effect would be to remand uselessly the case in order to have it formally introduced."

Bennet Joplin, it was testified, died before the assessment was made upon which the tax sale upon which the title of the defendants in error depended, and the validity of the assessment, therefore, is denied, because it was not made in the name of the owner, as required by the statute of the State of 1870.

The assessment is also attacked for non-conformity with the statutes in other particulars. In passing on the questions thus raised the Supreme Court of Louisiana construed the statutes of the State differently from plaintiff in error, and answered all the questions on grounds not Federal, and which, therefore, we need not discuss.

Judgment affirmed.

CRONIN *v.* ADAMS.

ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

No. 100. Argued December 16, 1903.—Decided January 4, 1904.

The right to sell liquor by retail depends upon the law of the State which may affix conditions in granting the right, and one who accepts a license under the state law, or a municipal ordinance authorized thereby, is not deprived of his property or liberty without due process of law, within the meaning of the Federal Constitution, by reason of conditions or prohibitions in the ordinance as to the sale of liquor in places where women are employed or permitted to enter.

THE facts are stated in the opinion.

Mr. Milton Smith for plaintiff in error:

This ordinance is unreasonable, arbitrary, partial and oppressive; the power, however, to adopt it was expressly conferred by the general assembly upon the city council of the city of Denver by clause 5 of sub. 12, sec. 20, of the charter. But this charter provision is void—and hence the ordinance adopted in pursuance of its grant—because it violates the Fourteenth Amendment of the Constitution of the United States and also violates the constitution of Colorado, art. II, §§ 3, 25; chap. 27 Laws of Colorado; Civil Rights, § 427, p. 575, Mills' Ann. Stat.

For judgments recovered under civil rights acts, see *Baylies*

v. *Curry*, 128 Illinois, 287; *Railroad Co.* v. *Brown*, 17 Wall. 445. Municipal by-laws must not conflict with the general law. Sedgwick on Construction of Statutes, p. 400; *Davis* v. *Mayor*, 1 Duer, 451.

As the ordinance is contrary to sec. 427 of the statute, in denying to a large class of citizens equal access and enjoyment to places of public resort and amusement it is void. *New Orleans* v. *Phillipi*, 9 La. Ann. 44; *Siloam Springs* v. *Thompson*, 41 Arkansas, 461; *Haywood* v. *The Mayor*, 12 Georgia, 405.

The ordinance is a legislative promulgation to the effect that the selling of wines, etc., was prejudicial to the welfare and morals of a community, was in fact a nuisance, and it is sought to be abated by abridging the liberty of all women, and by curtailing the profits, taking the property without process of law of numerous business men engaged in the retail sale of liquors. A municipal body cannot by ordinance or enactment declare any particular thing a nuisance which has not theretofore been pronounced to be such by law or so adjudged by judicial determination. *Yates* v. *Milwaukee*, 10 Wall. 504; Wood on Nuisances, note 1, p. 977; Dillon on Mun. Corp. §§ 315, 316, 322; *Mayor* v. *Winfield*, 8 Humph. 707.

The ordinance is not void solely because it is unjust, partial and oppressive, and because it violates natural, social and political rights of our citizens, but because it prohibits rights and privileges, and takes away property rights guaranteed and protected by the Constitution and laws of the State and of the nation. *People* v. *Morris*, 13 Wend. 325.

For definition of liberty and property, see *Munn* v. *Illinois*, 94 U. S. 142.

The police power in its broadest acceptation means the general power of the government to preserve and promote the public welfare, even at the expense of private rights. *New Orleans Gas Light Co.* v. *Hart*, 40 La. Ann. 474; 4 Blackstone's Com., 162 ; *Commonwealth* v. *Alger*, 7 Cush. 84; *Stone* v. *Mississippi*, 101 U. S. 814.

Generally speaking, it may be said that the police power is

exercised by the legislative department of the government; that it is limited by constitutional provisions in the United States, and other fundamental law; that it can only be exercised within given rules, and for the public good; that rights guaranteed by the Constitution cannot be violated; that if it is obnoxious to vested rights and unreasonable, the courts will declare the law void; that it must be exercised so that all are affected by it, and not one class favored and another class imposed upon. Tiedeman's Limitations of Police Power, § 2; 18 Am. & Eng. Ency. 760; *Mugler* v. *Kansas City*, 123 U. S. 623; *Toledo, etc., R. Co.* v. *Jacksonville*, 67 Illinois, 37; *People* v. *Gillson*, 109 N. Y. 389; 1 Dillon's Mun. Corp. 142; Cooley's Const. Lim. (6th ed.) chap. 16; *Platt &c. Co.* v. *Lee*, 2 Colo. App. 184; *Platt &c. Co.* v. *Dowell*, 17 Colorado, 376; *United States* v. *Cruikshank*, 92 U. S. 542; *Louisville &c. R. R. Co.* v. *State*, 66 Mississippi, 662, aff'd 133 U. S. 587. The word person as used in the Constitution of the United States and of Colorado refers to men and women. A woman has the same rights as a man. *In re Mary McGuire*, 57 California, 604. As to what is "the law of the land," see *Dartmouth College* v. *Woodward*, 4 Wheat. 519; Works of Webster, vol. 5, p. 487; Cooley's Const. Lim. 431, citing on p. 705, *Commonwealth* v. *Alger, supra; Bank* v. *Okely*, 4 Wheat. 235, 244. Police power of the States is limited by the Fourteenth Amendment. *G. C. & St. F.* v. *Ellis*, 165 U. S. 160; *In re Morgan*, 26 Colorado, 415.

A classification of the ordinance which allows a man to go into saloons and prohibits women from being present there is invalid. *State* v. *Loomis*, 115 Missouri, 307, 314; *Vanzant* v. *Waddell*, 2 Yerger, 260, 270; *Dibrell* v. *Morris Heirs*, 15 S. W. Rep. 87, 95; *Bell's Gap R. R.* v. *Pennsylvania*, 134 U. S. 232.

The question of morality, which the Supreme Court of Colorado claims justifies the ordinance, is not involved as it nowhere appears that the ordinance is based upon any such question; and neither that court nor this can assume that the question of morals had anything to do with the passage of the ordinance. The case was decided practically upon the pleadings. No

testimony was offered as to the effect of the presence of women in the saloons, and there is nothing in the record upon which to base a claim that evil effects follow from the mere presence of women in saloons, and if such evil effects do result they can be done away with by legislation which will act equally and uniformly upon all classes of persons.

Mr. Charles L. Brock, with whom *Mr. Henry A. Lindsley* and *Mr. Halsted L. Ritter* were on the brief, for defendants in error:

The laws in question have been sustained by the Supreme Court of the State of Colorado, and this effectually answers any argument which counsel may make, based upon any alleged infringement of the state laws or state constitution.

This doctrine requires neither argument nor citation of authority.

The charter provision and the ordinance in question are a valid exercise of the police power of the State of Colorado and are not obnoxious to any Federal limitation. *Boston Beer Co.* v. *Mass.*, 97 U. S. 25; *Stone* v. *State of Miss.*, 101 U. S. 814; *New Orleans Gas Light Co.* v. *La. Light & Heat Producing & Mfg. Co.*, 115 U. S. 650; *Barbier* v. *Connelly*, 113 U. S. 27; *Austin* v. *State of Tenn.*, 179 U. S. 343; *Holden* v. *Hardy*, 169 U. S. 366; *L'Hote* v. *City of New Orleans*, 177 U. S. 588; *L. & N. R. R. Co.* v. *Kentucky*, 161 U. S. 677; *Camfield* v. *United States*, 167 U. S. 518; Black on Intoxicating Liquors, §§ 26, 37, 39, 42; *Schwuchow* v. *City of Chicago*, 68 Illinois, 444; *Giozza* v. *Tiernan*, 148 U. S. 655; *Bartemeyer* v. *Iowa*, 18 Wall. 129; *License Cases*, 5 How. 504; *Mugler* v. *Kansas*, 123 U. S. 623; *Crowley* v. *Christensen*, 137 U. S. 86; *State* v. *Luddington*, 33 Wisconsin, 107; *Denver* v. *Domedian*, 15 Colo. App. 36; *Foster* v. *Police Commissioners*, 102 California, 491; *Ex parte Hays*, 98 California, 556; *Bergman* v. *Cleveland*, 39 Ohio St. 651; *Blair* v. *Kilpatrick*, 40 Indiana, 312; *State* v. *Reynolds*, 14 Montana, 383; *State* v. *Considine*, 16 Washington, 358; *In re Considine*, 83 Fed. Rep. 157.

These cases show that the State, in its own discretion, may wipe the liquor traffic out entirely, within its boundaries, by prohibiting its sale to all, or that it may lessen the evil by designating those most likely to be injured by its use and prohibiting its sale to them.

The alleged discrimination against women, by said laws, is not a question that can be raised by the plaintiff.

If there is a discrimination of which the courts can take cognizance, this may be done only upon the complaint of a woman who has been affected thereby. It is a strange sort of incongruity for a saloon keeper, who is manifestly moved by greed and cupidity, to appear in a court of conscience under the guise of defending the rights of woman, when he shows that his real purpose is to do all in his power to debauch and debase her. Before a person can have any standing in court to test the validity of a statute on account of an alleged unlawful discrimination, he must show that he is the person against whom the discrimination is made. *Wagner* v. *The Town of Garrett*, 118 Indiana, 114; *Commonwealth* v. *Wright*, 79 Kentucky, 22; *Marshall* v. *Donovan*, 10 Bush, 681; *Smith* v. *McCarty*, 56 Pa. St. 359.

Mr. Justice McKenna delivered the opinion of the court.

This suit was brought by the plaintiff in error against the defendants in error, who were officers of the city of Denver, to restrain them from enforcing an ordinance of the city on the ground that the ordinance was "contrary to the provision of the constitution of the State of Colorado and amendments thereto, and contrary to the provisions of the Constitution of the United States," and "contrary to the laws of the State of Colorado, guaranteeing civil rights to all persons, and contrary to other statutes of the State of Colorado."

A preliminary injunction was allowed. It was made perpetual upon hearing by decree of the court. The decree was reversed by the Supreme Court of the State, and this writ of error was then sued out.

Sections 745 and 746 of article 15 of the ordinance of Denver, which are complained of and attacked, are as follows:

"SEC. 745. Each and every liquor saloon, dram shop or tippling house keeper, . . . who shall have or keep, in connection with or as part of such liquor saloon, dram shop or tippling house, any wine room or other place, either with or without door or doors, curtain or curtains, or screen of any kind, into which any female person shall be permitted to enter from the outside, or from such liquor saloon, dram shop or tippling house, and there be supplied with any kind of liquor whatsoever, shall, upon conviction, be fined as hereinafter provided.

"SEC. 746. No person . . . having charge or control of any liquor saloon or place where intoxicating or malt liquors are sold or given away, or any place adjacent thereto, or connected therewith in any manner whatsoever, either by doors or otherwise, shall suffer or permit any female person to be or remain in such liquor saloon, dram shop, tippling house or other place where intoxicating or malt liquors are sold or given away, for the purpose of there being supplied with any kind of liquor whatsoever. No person owning or having charge or control of any liquor saloon, dram shop or tippling house shall employ or procure, or cause to be employed or procured, any female person to wait or in any manner attend on any person in any dram shop, tippling house or liquor saloon, or in any place adjacent thereto or connected therewith, where intoxicating or malt liquors are sold or given away, nor shall any female person be or remain in any dram shop, tippling house, liquor saloon or place adjacent thereto or connected therewith, and wait or attend on any person, or solicit drinks in any such place."

The Supreme Court held that those sections did not violate the constitution of the State, and that they were authorized by the statutes of the State, and sustained the validity of the ordinance against the contention that it violated the Constitution of the United States, on the ground that it was enacted

in the exercise of the police power of the State. Declaring the laws of the State in regard to liquor selling, the court said:

"Under the license laws of this State no one may engage in the business of selling liquor without a license. He has no absolute right to sell at all. It is only a privilege he gets when a license is granted. The city of Denver, under its charter, has the exclusive power to prohibit, restrain, tax and regulate the sale of intoxicating liquors. It may exercise that power to prohibit the sale altogether; or, if it see fit, it may regulate the sale and impose such conditions as it deems necessary. Under these license laws, one may not engage in the liquor traffic as of common right, but may do so only upon compliance with prescribed regulations, and if he applies for a license under which only he may lawfully sell, he is held to take that license with whatever restrictions or limitations are imposed by the authority which, and which only, can give him the coveted privilege. One of the conditions which the charter of Denver requires to be inserted in every liquor license is the one of which plaintiff complains."

This, the court decided, disposed of the complaint of plaintiff in error. In other words, that the restrictions of the ordinance were conditions of his license, and by accepting the license he accepted the conditions, and no rights of his were infringed. "The traffic in it (liquor) is unlawful without a license, and it may be prohibited in Denver," was the unequivocal declaration of the court.

What cause of action, then, has plaintiff in error? He is not a female nor delegated to champion any grievance females may have under the ordinance, if they have any. The right to sell liquor by retail to anybody depends upon the laws of the State, and they have affixed to that right the condition expressed in the ordinance. But even if plaintiff in error were not in such situation he cannot resist the ordinance. We said in *Crowley* v. *Christensen*, 137 U. S. 86:

"The sale of such liquors in this way (by retail) has therefore been, at all times, by the courts of every State, considered

as the proper subject of legislative regulation. Not only may a license be exacted from the keeper of the saloon before a glass of his liquors can be thus disposed of, but restrictions may be imposed as to the class of persons to whom they may be sold, and the hours of the day and the days of the week on which the saloons may be opened. Their sale in that form may be absolutely prohibited. It is a question of public expediency and public morality, and not of Federal law. The police power of the State is fully competent to regulate the business—to mitigate its evils or to suppress it entirely. There is no inherent right in a citizen to thus sell intoxicating liquors by retail; it is not a privilege of a citizen of the State or of a citizen of the United States."

Judgment affirmed.

CRONIN v. CITY OF DENVER.

ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

No. 101. Argued December 16, 1903.—Decided January 4, 1904.

Certain sections of an ordinance of the city of Denver, Colorado, as to the sale of liquor held not to be unconstitutional on the authority of *Cronin* v. *Adams*, *ante*, p. 108.

THE facts are stated in the opinion.

Mr. Milton Smith for plaintiff in error.

Mr. Charles L. Brock, with whom *Mr. Henry A. Lindsley* and *Mr. Halsted L. Ritter* were on the brief, for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This action was brought in the police court of the city of

Denver, State of Colorado, to collect $500, for the violation of section 746 of ordinance No. 101 of the city. Plaintiff in error was found guilty, and fined the sum of $50. On appeal to the County Court he was also found guilty and fined $100. The judgment was affirmed by the Supreme Court of the State, and thereupon the Chief Justice of the State allowed this writ of error.

The case involves the constitutionality of sections 745 and 746 of the ordinance of the city of Denver. That question was passed upon in *Cronin* v. *Adams*, just decided, *ante*, p. 108, and on its authority the judgment is

Affirmed.

CHARLES McINTIRE *v.* EDWIN A. McINTIRE.

EDWIN A. McINTIRE *v.* CHARLES McINTIRE.

APPEALS FROM, AND IN ERROR TO, THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

Nos. 84, 85. Argued December 8, 1903.—Decided January 4, 1904.

A testator left a residue "to be equally divided between my brothers Edwin and Charles children." At the date of the will the brother Edwin had died leaving six children, five of whom survived the testator. Charles had two children and he and one of his children survived the testator.

Held that the residue was to be divided *per capita*.

Counsel was retained to uphold the will at the petition of legatees, including the administrator with the will annexed, and was paid by order of court, the payments being charged by him against the interest of these legatees without prejudice to an application to have them charged against the estate. In the final account, the payments were charged against the estate and his accounts were allowed.

Held that the charge was proper.

An order of court was made by consent that the administrator with the will annexed should act as such, but without commission or other charge, the assets being in other hands. When the debts were paid the assets

were transferred to him by another order on his giving a new and larger bond.

Held that he was entitled to no commissions notwithstanding the change made by the later order.

Partial distributions are charged against special pecuniary legacies, not against the interest of the legatees in the residue.

Interest properly is charged against an administrator for money which the record shows to be due from him to the estate.

THE facts are stated in the opinion.

Mr. William G. Johnson for Charles McIntire:

Division should have been *per stirpes* and not *per capita*. *White* v. *Holland*, 92 Georgia, 216; *Ihrie's Estate*, 162 Pa. St. 369; *Green's Estate*, 140 Pa. St. 253; *Risk's Appeal*, 52 Pennsylvania, 269; *Walker* v. *Griffin*, 11 Wheat. 375; *Records* v. *Fields*, 155 Missouri, 314. Cases cited by the Court of Appeals and on administrator's brief, distinguished, and as to Maryland cases, see *Alder* v. *Beall*, 11 G. & J. 123. *Webb* v. *Blackler*, 2 P. Wms. 383, has been shaken if not entirely rejected. *Henry* v. *Thomas*, 118 Indiana, 23, and see cases cited on p. 30; *Vincent* v. *Newhouse*, 83 N. Y. 505, and cases cited on p. 513; *Balcom* v. *Haynes*, 14 Allen, 204; *Raymond* v. *Hilhouse*, 45 Connecticut, 467; *Lyon* v. *Acker*, 33 Connecticut, 222; *Minter's Appeal*, 40 Pa. St. 111.

Mr. William Henry Dennis and *Mr. Charles Cowles Tucker*, with whom *Mr. Henry E. Davis* was on the brief, for the administrator c. t. a.:

Division was properly *per capita* and not *per stirpes*. *Blackler* v. *Webb*, 2 P. Wms. 383; *Bryant* v. *Scott*, 1 Dev. & Bat. Eq. 155, and cases cited; *Scott's Estate; Gwynn's Appeal*, 163 Pa. St. 165; *Howard* v. *Howard*, 30 Alabama, 391; *De Laurencel* v. *De Boom*, 67 California, 362; *Walker* v. *Griffin*, 11 Wheat. 375, distinguished; *Moffit* v. *Varden*, 9 Fed. Cas. 689; *S. C.*, 6 Cranch C. C. 658; *Follansbee* v. *Follansbee*, 7 App. D. C. 282; *Payne* v. *Rosser*, 53 Georgia, 662; *Huggins* v. *Huggins*, 72 Georgia, 825; *Pitney* v. *Brown*, 44 Illinois, 363; *Best* v. *Farris*,

21 Ill. App. 49; *Purnell* v. *Culbertson*, 12 Bush, 369; *McFatridge* v. *Holtzclaw*, 94 Kentucky, 352; *Brown* v. *Brown*, 6 Bush, 648; *Maddox* v. *State*, 4 H. & J. 540; *Brown* v. *Ramsey*, 7 Gill, 348; *McPherson* v. *Snowden*, 19 Maryland, 197; *Thompson* v. *Young*, 25 Maryland, 450; *Brittain* v. *Carson*, 46 Maryland, 186, citing *Lenden* v. *Lenden*, 10 Simons, 626; *Benson* v. *Wright*, 4 Md. Ch. 278; *Alder* v. *Beall*, 11 G. & J. 123, and *Levering* v. *Levering*, 14 Maryland, 30, distinguished; *Allen* v. *Keplinger*, 62 Maryland, 8; *Plummer* v. *Plummer*, 94 Maryland, 66; *Hill* v. *Bowers*, 120 Massachusetts, 135, and cases cited; *Nichols* v. *Denny*, 37 Mississippi, 59; *Crawford* v. *Redus*, 54 Mississippi, 700; *Farmer* v. *Kimball*, 46 N. H. 435; *Campbell* v. *Clark*, 64 N. H. 328; *Burnet* v. *Burnet*, 30 N. J. Eq. 595; *Benedict* v. *Ball*, 38 N. J. Eq. 48; *Macknet* v. *Macknet*, 24 N. J. Eq. 277; *Thornton* v. *Roberts*, 30 N. J. Eq. 473; *Hayes* v. *King*, 37 N. J. Eq. 1; *Budd* v. *Haines*, 52 N. J. Eq. 488; *Stokes* v. *Tilly*, 1 Stockt. 120; *Fisher* v. *Skillman's Ex'r*, 3 C. E. Green, 229; *Bunner* v. *Storm*, 1 Sandf. Ch. 357, citing *Warrington* v. *Warrington*, 2 Hare, 54; *Collins* v. *Hoxie*, 9 Paige, 81; *Seabury* v. *Brewer*, 53 Barb. 662; *Myres* v. *Myres*, 23 How. Pr. 410; *In re Verplanck*, 91 N. Y. 439, and cases cited; *Lee* v. *Lee*, 39 Barb. 172; *Bisson* v. *West Shore R. R. Co.*, 143 N. Y. 125; *Ward* v. *Stow*, 2 Dev. Eq. 509; *Waller* v. *Forsythe*, 1 Phill. Eq. 353; *Johnston* v. *Knight*, 117 N. C. 122; *Cheeves* v. *Bell*, 1 Jones Eq. 234; *Lane* v. *Lane*, 1 Wins. 630; *Roper* v. *Roper*, 5 Jones Eq. 16; *Howell* v. *Tyler*, 91 N. C. 207; *Ex parte Leith*, 1 Hill Ch. 151; *Campbell* v. *Wiggins*, Rice Ch. 10; *Allen* v. *Allen*, 13 S. Car. 512; *Perdriau* v. *Wells*, 5 Rich. Eq. 20; *Wessenger* v. *Hunt*, 9 Rich. Eq. 459; *Dupont* v. *Hutchinson*, 10 Rich. Eq. 1; *Seay* v. *Winston*, 7 Humph. 472; *Kimbro* v. *Johnston*, 15 Lea, 78; *Puryear* v. *Edmondson*, 4 Heisk. 43; *Ingram* v. *Smith*, 1 Head, 411; *Rogers* v. *Rogers*, 2 Head, 660. *DeVaughn* v. *Hutchinson*, 165 U. S. 566, distinguished. "Between" means "among." In at least sixteen of the cases cited, *supra*, "between" was used in referring to more than two legatees without indicating a division into classes. And see

cases cited in *Farmer* v. *Kimball*, 46 N. H. 435, on this use of the word.

Extraneous evidence under the circumstances surrounding this case was not admissible to show the intent of a testator.

We submit that such evidence is inadmissible. See *Weatherhead's Lessee* v. *Baskerville*, 11 How. 357; *Wilkins* v. *Allen*, 18 How. 385; *Mackie* v. *Stone*, 93 U. S. 589; *Kaiser* v. *Brandenburg*, 16 App. D. C. 16, and cases cited; *Bunner* v. *Storm*, 1 Sandf. Ch. 357; *Myres* v. *Myres*, 23 How. Pr. 410; 1 Jar. on Wills (5th ed.), pp. 509 *et seq.*

The amount of the interest charged to the administrator is sufficient to sustain the cross appeal. *Shields* v. *Thomas*, 17 How. 5; *Markel* v. *Hoffman*, 101 U. S. 113; *Texas &c. Ry.* v. *Gentry*, 163 U. S. 361.

The allowance of commissions is a matter peculiarly within the province of the Orphans' Court, which has a close-at-hand view of the administration of the estate; and so far as discretion is vested in that court, its exercise is not subject to appeal. *Wilson* v. *Wilson*, 3 G. & J. 201; *Parker* v. *Gwynn*, 4 Maryland, 423; *Sinnott* v. *Kenaday*, 12 App. D. C. 115; 14 App. D. C. 1; *Eversfield* v. *Eversfield*, 4 H. & J. 12. The right to commission is a valuable right. *Richardson* v. *Stanbury*, 4 H. & J. 275.

A court does not charge a fiduciary with interest, unless he has unreasonably detained money or has used it or realized interest on it himself. *Wilson* v. *Wilson*, 3 G. & J. 20; *Handy* v. *State*, 7 H. & J. 42.

MR. JUSTICE HOLMES delivered the opinion of the court.

These are cross appeals from the Court of Appeals of the District of Columbia. 14 App. D. C. 337. To avoid all questions of form there are also writs or error on the same grounds. The appeal of Charles McIntire is from the overruling of exceptions to the final account of the administrator with the will annexed of the estate of David McIntire, and presents two

questions, one of construction and one of administration outside the terms of the will. The probate of the will already has been before this court. 162 U. S. 383.

The question of construction is the main one. It is whether the children of the testator's brothers, Edwin and Charles, take *per capita* or *per stirpes* under the residuary clause of the following will:

"January 7th, 1880.

"This is my last will and testament.

"I David McIntire. tin-plate worker, of this city (of) do will, bequeath, or devise, to my nephews, and nieces, that is to say, from July the first. 1st eighteen hundred and fifty-four. 1854

"To the opening of. on reading of this, paper. one thousand three hundred and fifty dollars and sixty-four cents ($1,350.64) is to be calculated at six (6) per cent. interest

"That amount whatever it may be is to be given to each of my brother Edwin's children. The remainder if any, is to be equally divided between my Brothers Edwin and Charles children. David McIntire."

There was an addition and also an earlier document of January 1, 1880, which it is unnecessary to copy. At the date of the will the brother Charles was living and had two sons, Charles and Henry, the latter of whom died before the testator. The brother Edwin had died, leaving six children, one of whom died before the testator. The testator held promissory notes of his brother Charles for $1350.63. The brother Charles also now is dead.

The argument for a division *per stirpes* is this. Earlier in the paper the testator had used the phrase "nephews and nieces," which it would have been natural to repeat had he intended to make a division *per capita*. But instead of that he says "my brothers Edwin and Charles children," which is not very different from "my brother Edwin's children and my brother Charles' children," and orders an equal division "between" them. "Between," if accurately used, imports that not more

than two persons or groups are set against each other, *Ihrie's Estate*, 162 Pa. St. 369, 372; *Records* v. *Fields*, 155 Missouri, 314, 322, and those groups are earmarked and shown to be regarded as groups by naming the parents from which respectively they come. The equality of division is an equality between the groups. See *Hall* v. *Hall*, 140 Massachusetts, 267, 271. This mode of distribution has the recommendation that it follows the rule in cases of intestacy. *Raymond* v. *Hillhouse*, 45 Connecticut, 467, 474. See further *Alder* v. *Beall*, 11 G. & J. 123, explained in *Plummer* v. *Shepherd*, 94 Maryland, 466, 470. But the court is of opinion that the general rule of construction must prevail according to which, in the case of a gift to the children of several persons described as standing in a certain relation to the testator, the objects of the gift take *per capita* and not *per stirpes*. *Walker* v. *Griffin*, 11 Wheat. 375, 379; *Balcom* v. *Haynes*, 14 Allen, 204; *Hill* v. *Bowers*, 120 Massachusetts, 135. The fact that one of the parents was living at the date of the will is deemed sufficient to exclude a reference to the statute of distributions. *Blackler* v. *Webb*, 2 P. Wms. 383; *Bryant* v. *Scott*, 1 Dev. & Bat. Eq. (N. C.) 155, 157. And with regard to the word "between," the will is an illiterate will, and as the popular use of the word is not accurate no conclusion safely can be based upon that. See *Maddox* v. *State*, 4 H. & J. 539; *Brittain* v. *Carson*, 46 Maryland, 186; *Collins* v. *Feather*, 52 W. Va. 107; *Lord* v. *Moore*, 20 Connecticut, 122; *Pitney* v. *Brown*, 44 Illinois, 363; *Farmer* v. *Kimball*, 46 N. H. 435, 439; *Burnet* v. *Burnet*, 30 N. J. Eq. 595; *Myres* v. *Myres*, 23 How. Pr. 410; *Waller* v. *Forsythe*, 1 Phillips' Eq. (N. C.) 353.

The other error assigned on behalf of Charles McIntire is that the court charged the estate with $11,500, fees paid to counsel for services in defending the will against the attack of the said Charles and his father. The amount was paid in different sums by orders of court, in several instances on the petition of the children of Edwin, one of whom was the administrator with the will annexed, and was directed to be charged

against the interest of those children in the first instance, but without prejudice to an application to have it finally charged against the estate. On the allowance of the account it was charged against the estate. We are of opinion that the charge was proper. There is no contest over the amount. It was the proper business and duty of the administrator to defend the will, and he was entitled to a reasonable allowance for what he had to pay in doing so. The only just alternative would be to charge counsel fees as costs against the losing party, which would have been less favorable to the appellant. The general proposition is not disputed, but it is said that in this case the legatees retained the counsel and therefore ought to pay them. The other legatees as well as the administrator no doubt had a share in calling the counsel in. But that did not matter. The services were services to the estate in maintaining the testator's will, they were adopted by the administrator and the usual rule must prevail. It is said that there was no application to change the original order and no chance to be heard against it. But plainly this cannot be true. As observed by the court below, allowing the account changed the order and charged the fees on the estate. Whatever want of formality there may have been, the appellant had the right and opportunity to object and except to the account, as well on this ground as others, and he used it. The precise mode in which the allowance appeared upon the account is not material, but may be explained in a word or two. The payments were made by the solicitors of the parties while they had the assets in their hands, as will be stated in a moment. They rendered their account, crediting themselves with those payments generally. Then they turned over the assets, less these payments and their commissions, to the administrator. In the account of the latter he charges himself only with the net amount received by him, and makes no charge for the counsel fees against the legatees, and thus throws the burden on the residue of the estate.

The foregoing considerations dispose of the appeal of Charles

McIntire. There is a cross-appeal by the administrator from the allowance of certain exceptions to the account. The first error assigned is that he was denied commissions. The reason was this. On February 19, 1885, pending the controversy on the will and other controversies, an order was made by consent of all parties, to the effect, among other things, that Edwin A. McIntire should act as administrator, "but without any allowance for commission or other charge for his services as such administrator," and that the assets should remain under the control of the court (they having been paid into court under another order of the same date, passed in an equity cause). The next year, all debts having been paid except a disputed note, another order was made by consent, turning over the assets to the solicitors of the parties. The funds were managed by the solicitors until the will was established, when on petition of the administrator offering to give an additional bond, the assets were put into his hands on July 7, 1896, upon his filing a bond for $100,000. It is argued that this restoration of the assets to the hands of the administrator with the duty of distribution and the requirement of a new bond, relieved him of the terms of the bargain on which it was agreed that he should act, if that bargain ever was valid. We think it enough to say that we perceive no such change of situation from what was anticipated as should have that result. Whether the bargain was good or bad, the services were rendered under it, and therefore purported to be gratuitous. The law does not forbid gratuitous services, even in fiduciary relations, and if acts purport to be done gratuitously no claim for payment can be founded upon them at a later date. See *Johnson* v. *Kimball*, 172 Massachusetts, 398, 400, 401.

A partial distribution was made under an order of December 9, 1897, of $2800 to each of the children of Edwin, and of $6022.02 to Charles McIntire. Complaint is made because the sums paid to Edwin's children were charged against the legacies to them instead of against their share in the residue, whereas the payment to Charles was charged to his share in

the residue, which was all he had. It is said that this mode stops the running of interest on the legacies to the disadvantage of the legatees. But we see no ground for complaint. Of course the liabilities of the estate in the form of legacies as well as those in the form of debts are to be satisfied before the residue exists. In the absence of a definite understanding at the time, partial payments naturally would be taken as working that satisfaction and as stopping the liability of the estate for interest. The same principle applies to another sum which four of the legatees agreed to treat as having been paid to them as stated below.

A third error alleged concerns $500, part of the counsel fees in addition to the sums mentioned above. This was paid upon a petition of Edwin's children, stating that the counsel "had been managing their interests," and under an order directing the same to be charged to their distributive shares without reserving any right to apply to have it finally charged to the estate. We are not disposed to overturn the decision that this payment must be borne by the legatees, as they were content to be charged with it in the order allowing the payment.

The next error assigned is that the administrator was charged with interest on an item of $10,000 from April 18, 1884, to February 25, 1885. This sum was alleged to have been received by the administrator and improperly omitted from the inventory. The matter was referred to arbitrators. In order to avoid a family quarrel, if possible, the four sisters of the administrator agreed to be charged with $2500 each, as on a partial distribution, and gave receipts on February 25, 1885. Thereupon the administrator requested the arbitrators to find that he received and must account for the sum, and they did so. Very probably the matter of interest was overlooked, but the result of the transaction is that the administrator stands charged on the record as owing the estate $10,000 until the time of distribution to the sisters, and of course that he must pay interest at the legal rate. It is not a case of charging interest not earned against an administrator having funds in his

hands as such, but it is a charge against him for money which he ought to have put into his account and held as an identified fund, but did not. The motives which induced his consent to charge himself are immaterial. Whatever they were, the effect of the record is the same.

Finally, the administrator objects to being charged with interest on an item of $1419.73, which he received in 1891. There is perhaps more doubt about this than concerning the more important matters, but we shall not disturb the decree. The assets had been ordered to be paid into court and then had been transferred, as above stated, to the solicitors of the parties as custodians. The administrator did not pay this sum over, but kept it in his own hands.

Decree affirmed.

GERMAN SAVINGS AND LOAN SOCIETY *v.* DORMITZER.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 104. Argued December 16, 17, 1903.—Decided January 4, 1904.

A writ of error will not be dismissed on the ground that the Federal question was not set up in the court below, and that the decision rested on two grounds, one of which was estoppel and independent of the Federal question, when the plaintiff in error had insisted upon his constitutional rights as soon as the occasion arose, and the opinion deals expressly with such rights.

A decree of divorce may be impeached collaterally in the courts of another State by proof that the court granting it had no jurisdiction, even when the record purports to show jurisdiction and appearance of the other party, without violating the full faith and credit clause of the Federal Constitution. *Andrews* v. *Andrews*, 188 U. S. 14.

The facts that a resident of a State after selling out his property and business went to another State, bought land and decided to locate there are sufficient for the courts of the latter State to find thereon that he had changed his domicil and that the courts of the State from which he had removed had no jurisdiction of an action subsequently brought by him for divorce.

THE facts are stated in the opinion.

Mr. William Scott Goodfellow, with whom *Mr. E. C. Hughes* and *M . William W. Hindman* were on the brief, for plaintiff in error.

Mr. Robert A. Howard and *Mr. Lucius G. Nash* for defendant in error.

Mr. Frederick W. Dewart for Mr. William M. Murray, guardian *ad litem* for minor Tull.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a writ of error to the Supreme Court of Washington on the ground that full faith and credit has not been given to a decree of divorce rendered in the State of Kansas. See 23 Washington, 132. The record is long, but all that is material to the case in this court can be stated in a few words. The defendants in error are the children of one F. M. Tull, and brought a complaint for the purpose, so far as the Savings Society, the plaintiff in error, is concerned, of establishing their right to an undivided share in certain land in Spokane, Washington, to which the Savings Society claims an absolute title. At least that form of relief was held to be open under their complaint. Their claim was made on the ground that the land was community property of their parents and that they inherited an undivided share upon their mother's death. The Savings Society claimed under the foreclosure of a mortgage executed by F. M. Tull. Before the execution of their mortgage and after Tull had applied for a loan his wife died, and probate proceedings were instituted under which Tull purported to purchase his children's interest as a preliminary to making the mortgage. It has been decided that these probate proceedings were void as against a purchaser with notice and that the Savings Society took with notice. These are local matters with which we have no concern. But the Savings Society contended that it had a good title, irrespective of these proceedings. The land was purchased with the proceeds of Kansas property which seems to have stood in the name of F. M. Tull. Tull procured a divorce in Kansas, and if that

divorce was valid his wife's interest in his property was gone. Therefore, it is said, the land in Washington followed the character of the purchase money as his separate property, although before the payment was completed the divorced parties made up their differences and were married to each other a second time.

The Supreme Court of Washington, trying the case *de novo*, found that Tull had changed his domicil from Kansas to Washington before beginning his divorce proceedings, and therefore that the decree was without jurisdiction and void. It further found on evidence satisfactory to itself that, the divorce being out of the way, the property was joint or community property, and that his children had the right they claimed. With this last again we are not concerned, and the only question for us is whether the court could go behind the record of the Kansas case.

There is a motion to dismiss. It is said that the Federal question was not set up in the court below, and that the court put its decision on two distinct grounds, one of which was that the Society was estopped to deny the children's title. The latter ground, it is said, was independent of the Federal question. But the opinion of the court deals expressly with the constitutional rights of the Savings Society, and the Society seems to have insisted on those rights as soon as the divorce was attacked. *Tullock* v. *Mulvane*, 184 U. S. 497, 503, 504. As to the other point, it is at least doubtful whether the court meant to find any estoppel except on the footing that the property was shown to be community property. The motion to dismiss is overruled. See *Johnson* v. *Risk*, 137 U. S. 300, 307.

On the merits, however, the plaintiff in error has no case. It is suggested that the invalidity of the judgment for want of jurisdiction was not put in issue in the pleadings. It is a sufficient answer that the Supreme Court of the State treated it as in issue. *Hill* v. *Mendenhall*, 21 Wall. 453, relied on by the plaintiff in error, came from the Circuit Court of the United

States, and when a case properly is brought here from the Circuit Court upon constitutional grounds the whole case is open. *Horner* v. *United States*, 143 U. S. 570. But it is otherwise when a case comes, as this does, from a state court. *Osborne* v. *Florida*, 164 U. S. 650, 656; *McLaughlin* v. *Fowler*, 154 U. S. 663; *Murdock* v. *Memphis*, 20 Wall. 590.

It is too late now to deny the right collaterally to impeach a decree of divorce made in another State, by proof that the court had no jurisdiction, even when the record purports to show jurisdiction and the appearance of the other party. *Andrews* v. *Andrews*, 188 U. S. 14, 39; *S. C.*, 176 Massachusetts, 92, 93. An attempt was made to avoid the authority of *Andrews* v. *Andrews* by the suggestion that there the respondent in the divorce suit had disappeared before the decree. But a respondent cannot defeat jurisdiction by disappearing. Indeed in strictness only the attorney disappeared, and the respondent simply ceased to defend the suit. The effect given to the statute of Massachusetts in that case depended wholly on contradicting the record of the divorce suit and proving the want of jurisdiction by proving the libellant's want of domicil in the State.

It very well may be that, if the Supreme Court of Washington had undertaken to deny the jurisdiction of the Kansas tribunal without evidence impeaching it, such an evasion of the Constitution would not be upheld. It may be that in fact some circumstances were adverted to by that court which hardly warranted an inference. But it had before it the testimony of the husband, Tull, from which it appeared that before he made the contract for a part of the land in question he had sold out his property and business in Kansas and had gone in search of what he called a new location, and that when he bought this land he decided to locate there. The land, it will be remembered, is in Spokane, Washington. Tull was there when the contract was made, and therefore there was ground for the court to find that at that moment he changed his domicil to Spokane. The contract was made on December 28,

1886, and the libel for divorce in Kansas was not filed until February 25, 1887. There was evidence warranting the finding, and that being so we take the facts as they were found. *Egan* v. *Hart*, 165 U. S. 188.

Decree affirmed.

MR. JUSTICE MCKENNA dissents.

JAMES *v.* APPEL.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 108. Argued December 17, 1903.—Decided January 4, 1904.

A statute copied from a similar statute of another State is generally presumed to be adopted with the construction which it already has received.

There is no unconstitutional assumption of judicial power, or anything inconsistent with the grant of common law jurisdiction to the Courts of the Territory, in the legislature of Arizona enacting that motions for new trials are deemed to have been overruled if not acted upon by the end of the term at which made, the question to be subject to review by the Supreme Court as if the motion had been overruled by the court and exceptions reserved.

THE facts are stated in the opinion.

Mr. J. F. Bowie, with whom *Mr. Thomas B. Bishop* was on the brief, for appellant:

Paragraph 837, Rev. Stat. Arizona (1887), is directory and not mandatory. Sutherland on Stat. Con. § 448; Black on Interp. of Laws, § 126; Endlich on Interp. § 436; 23 Am. & Eng. Ency. (1st ed.) 458; *Rawson* v. *Parsons*, 6 Michigan, 400; *People* v. *Doe*, 1 Michigan, 451; *Gomer* v. *Chaffe*, 5 Colorado, 383; § 201 C. C. Colorado, 1877; *Aspen County* v. *Billings*, 150

U. S. 31; *Broad* v. *Murray*, 44 California, 228, construing § 632, California Code; *Pearce* v. *Stickler*, 49 Pac. Rep. 727; 14 Am. & Eng. Ency. 902; *Larson* v. *Ross*, 56 Minnesota, 296; *Gribble* v. *Livermore*, 64 Minnesota, 296.

In *Dominus Rex* v. *Ingram*, 2 Salk. 594, it is held that the failure of the magistrate to perform his duties within the time required by law did not determine his authority to perform them, and such has been the rule ever since. The following cases from different States sufficiently show this to be the case. *People* v. *Cook*, 14 Barb. (N. Y.) 259, 290; *Gilleland* v. *Schuyler*, 9 Kansas, * 569, * 587; *Shaw* v. *Orr*, 30 Iowa, 355; *Bell* v. *Taylor*, 37 La. Ann. 56; *Neal* v. *Burrows*, 34 Arkansas, 491; *McCarver* v. *Jenkins*, 2 Heisk. 629; *Boykin* v. *State*, 50 Mississippi, 513; *McBee* v. *Hoke*, 2 Speers, 138; *State* v. *Carney*, 20 Iowa, 82; *Huecke* v. *Milwaukee*, 69 Wisconsin, 401; *State* v. *Pitts*, 58 Missouri, 556; *State* v. *Smith*, 67 Maine, 328; *Ex parte Holding*, 56 Alabama, 458; *Wood* v. *Chapin*, 13 N. Y. 559; *Gaston* v. *Scott*, 5 Oregon, 48. *McKun* v. *Ziller*, 9 Texas, 58; *Bass* v. *Hays*, 38 Texas, 128; *Ruff* v. *Hand*, 24 Pac. Rep. (Arizona) 257, are not controlling in this case.

Paragraph 842, Rev. Stat. Arizona does not of itself purport to render a judgment denying the motion for a new trial at the expiration of the term at which the motion is made.

The refusal or neglect of a court to act cannot be reviewed on appeal. *Green* v. *Shumway*, 14 Pac. Rep. 863; *Chambers* v. *Astor*, 1 Missouri, 191. Only judicial action can be reviewed by writ of error or appeal. *Gordon* v. *United States*, 117 U. S. 697, 704.

It is only from judicial decisions that appellate power is given to the Supreme Court. See, also, *Sanborn* v. *United States*, 27 C. Cl. 485; *Hicks* v. *Murphy*, 1 Mississippi, (Walker), 66; *Phelps Co.* v. *Bishop*, 46 Missouri, 68; *Ex parte Caldwell*, 3 Baxter, 98; *Inhabitants of Weymouth*, 56 Massachusetts, 335; *Bower* v. *Cook*, 39 Georgia, 27.

If, however, paragraphs 837 and 842, be regarded as mandatory and self-executing, they would not apply to the case at

bar, as the delay here was caused by the order of the judge continuing the cause, and is, in no way, attributable to counsel or to the plaintiff. *Evans* v. *Rees*, 12 Adol. & El. 167; *Freeman* v. *Tranah*, 74 E. C. L. 406, 415; Elliott on Appellate Procedure, § 117; *Jackson* v. *Carrington*, 4 Exch. 41; *Boody* v. *Watson*, 64 N. H. 169; *S. C.*, 9 Atl. Rep. 794, 814, citing *Edes* v. *Boardman*, 58 N. H. 580, 592; *Burke* v. *Concord R. R.*, 61 N. H. 160, 233; *State* v. *Hayes*, 61 N. H. 264, 330; *Sargent* v. *School District*, 63 N. H. 528, 530; 2 Atl. Rep. 641; *Whitney* v. *Whitney*, 14 Massachusetts, 88, 92; *The Generous*, 2 Dod. 322; *Hall* v. *Sullivan R. R.*, 21 Month. Law Rep. 138; *Lewis* v. *Commissioners*, 16 Kansas, 102; Dwarris's Statutes, 124; *Mattingby* v. *Boyd*, 20 How. 128; Broome's Legal Maxims, 86, 89; *Gray* v. *Brignardello*, 1 Wall. 627, 636; *Fishmongers Co.* v. *Robertson*, 3 M. G. & S. 970.

Sections 837, 842, Arizona Revised Statutes, do not apply to cases in which the hearing of the motion has been continued by order of court. *Caswell* v. *Ward*, 2 Douglass (Mich.), 374; *Burris* v. *Wise*, 2 Arkansas, 33, 41; *Caughlin* v. *Blake*, 55 Iowa, 634; *Burl* v. *Williams*, 24 Arkansas, 91; *Spreckels* v. *Hawaiian Co.*, 117 California, 377; *Wright* v. *Superior Court*, Supreme Court, California, June 26, 1903.

If the decision of the Supreme Court of Arizona be correct as to the interpretation of the statutes of Arizona, the statutes are void as an attempted usurpation by the Legislature of the judicial functions. §§ 1846, 1864, 1865, 1866, 1868, 1908, Rev. Stat. U. S. as to power of courts in Arizona; *Kilbourn* v. *Thompson*, 103 U. S. 168; *Butler* v. *Saginaw County*, 26 Michigan, 22, 27.

The creation of a department for the exercise of the judicial power constitutes of itself a delegation to that department of all the judicial power of the sovereignty except as otherwise limited by the Constitution itself. *Greenough* v. *Greenough*, 11 Pa. St. 489; *Alexander* v. *Bennet*, 60 N. Y. 204; *Van Slyke* v. *Ins. Co.*, 39 Wisconsin, 390; Cooley on Const. Law, 35, 104.

The general principle being that a grant of general powers

to one department of government impliedly excludes all other departments of government from the exercise of the powers granted to the first. Montesquieu, Esprit des Lois, 11, c. 6; Story on Const. 518, 525.

As to what a judgment is, see Black.'s Law Dict.; 3 Blackstone, 395; Bouvier's Law Dictionary; N. Y. Code, § 400; *Pennsylvania* v. *Wheeling Bridge Co.*, 18 How. 440; *State* v. *Fleming*, 46 Am. Dec. 73; 7 Humph. 152; *Ex parte Schrader*, 33 California, 279; *Sinking Fund Cases*, 99 U. S. 761; *Jones* v. *Perry*, 10 Yerger, 59; *S. C.*, 30 Am. Dec. 430; *Merrill* v. *Sherburne*, 8 Am. Dec. 52, 56; *S. C.*, 1 N. H. 199; *Taylor & Co.* v. *Place*, 4 R. I. (1 Ames) 324, 337; *De Chastellux* v. *Fairchild*, 53 Am. Dec. 570; *S. C.*, 15 Pa. St. 18; *Young* v. *State Bank*, 58 Am. Dec. 630; *S. C.*, 4 Indiana, 301; *Officer* v. *Young*, 26 Am. Dec. 268; *S. C.*, 5 Yerger, 301; *Hoke* v. *Henderson*, 25 Am. Dec. 675, 686; *S. C.*, 4 Devereux's Law, 1; *Saunders* v. *Cabaniss*, 43 Alabama, 173; Sedg. on Stat. & Con. Law, 166; Cooley's Con. Lim. * 91; *Marpole* v. *Cather's Admr.*, 78 Virginia, 239.

If the construction placed by the Supreme Court of Arizona upon paragraphs 837 and 842 be correct, these statutes are void, being in conflict with section 1866, U. S. Revised Statutes, the same being section 33 of the Organic Act of Arizona. *Ex parte Lathrop*, 118 U. S. 113, 117.

The grant of common law and chancery jurisdiction to the District Court certainly gives to that court power to hear and determine motions for a new trial. The origin and history of the practice of granting new trials is obscure, principally on account of its antiquity. Bouvier's Law Dict. New Trial; Blackstone, Book III, 387; Graham & Waterman on New Trials; *Queen* v. *Bewaley*, 1 P. Wms. 207, 213; *Witham* v. *Earl of Derby*, 1 Wils. 48, 56; *United States* v. *Hawkins*, 10 Pet. 125, 131; *Wood* v. *Gunton*, 1665, Michealmas Sup. Style, 466; *Bright* v. *Eynon*, 1 Burr. 391.

The right of a party to move for a new trial and the power of the court to determine such motion was well established

at common law prior to the American Revolution. When common law jurisdiction was granted by the organic act to the District Court of the Territories, this grant carried with it the power to hear and determine motions for new trials as that was a well recognized power of common law courts at the time of the grant of such power.

Mr. Frank H. Hereford, Mr. Seth E. Hazzard, Mr. C. W. Holcomb, Mr. W. C. Keegin, Mr. J. H. McGowan for appellee, submitted:

Paragraph 837, Rev. Stat. Arizona, 1887, is mandatory and not directory. Cases on appellant's brief distinguished. A court may adopt rules to govern its procedure with discretionary power to deviate from them where their application would be injurious or impracticable. *Grayson* v. *Virginia*, 3 Dall. 321; *United States* v. *Breitling*, 20 How. 252; 18 Ency. Pl. & Pr. 1241; *Hudson* v. *Parker*, 156 U. S. 277; *Giant Powder Co.* v. *Cal. V. P. Co.*, 6 Sawyer, 508.

The rule that a motion for a new trial may be continued to succeeding terms like other motions or proceedings, is subject to the proviso unless the statute requires said motion to be heard during the trial term. *Vallentine* v. *Holland*, 40 Arkansas, 338; *Walker* v. *Jefferson*, 5 Arkansas, 23; *Doddridge* v. *Gaines*, 1 MacArthur, D. C., 335; *England* v. *Duckworth*, 74 N. Car. 309; *Kane* v. *Burrus*, 2 Smed. & M. 313, which distinguishes cases cited on appellant's brief. See also *Gross* v. *McClaran*, 8 Texas, 341; *Bullock* v. *Ballew*, 9 Texas, 498; *Land* v. *State*, 15 Texas, 317; *Bass* v. *Hays*, 38 Texas, 129; *Wilcox* v. *State*, 31 Texas, 587; *Carter* v. *Commissioners*, 12 S. W. Rep. 985.

The object of construction and interpretation is to ascertain the intent of the legislature, and there can be no doubt that, by section 837, the Arizona legislature meant what the Texas courts had held for thirty-five years to be the meaning of the language adopted. In adopting and enacting a foreign statute decisions expounding it are adopted with it. *Tucker* v. *Oxley*,

5 Cranch, 42; *Pennock* v. *Dialogue*, 2 Pet. 18; *Cathcart* v. *Robinson*, 5 Pet. 280; *McDonald* v. *Hovey*, 110 U. S. 628; *Brown* v. *Walker*, 161 U. S. 600; *Henrietta Mining Co.* v. *Gardner*, 173 U. S. 130.

Neither paragraph 837 nor 842 as amended is open to objection that the legislature in enacting them exercised judicial powers. *Young* v. *State Bank*, 4 Indiana, 301; 6 Am. & Eng. Ency. (2d ed.) 1032; *Barkwell* v. *Chatterton*, 33 Pac. Rep. 940; *Railway Co.* v. *Backus*, 154 U. S. 421. If amendment to § 842 is void § 837 stands and justifies dismissal and this court will not determine whether the amendment is void or not. *Wayman* v. *Southard*, 10 Wheat. 46.

Appellant has misconstrued § 1866, Rev. Stat. See *Ferris* v. *Highby*, 20 Wall. 375; *Greeley* v. *Winsor*, 48 N. W. Rep. 204; *Hornbuckle* v. *Toombs*, 18 Wall. 648. Rehearings or new trials are not essential to due process of law either in judicial or administrative proceedings. *Railway Co.* v. *Backus*, 154 U. S. 421; *Montana Co.* v. *St. Louis M. & M. Co.*, 152 U. S. 160. The law involved in this case has received the sanction of Congress. *Clinton* v. *Englebrecht*, 13 Wall. 434; *Camon* v. *United States*, 171 U. S. 277.

Mr. Justice Holmes delivered the opinion of the court.

This is an appeal from a judgment of the Supreme Court of the Territory of Arizona dismissing an appeal because taken too late. The appellees recovered a sum from the appellant in the court of first instance, and after judgment was entered the appellant moved for a new trial. The judge who tried the case, being unable to attend, made an order in chambers continuing the motion to another term. At a later term, after several similar continuances, the motion was overruled, and the appellant then appealed to the Supreme Court of the Territory. These events took place before the passage of the Arizona Revised Statutes of 1901. (See par. 1479.) It is assumed that the appeal was too late if the judgment became final at

the term when it was rendered, Revised Statutes of Arizona, 1887, par. 849, and we may assume further that the ground of dismissal was the paragraph of the Revised Statutes, requiring that motions for new trials "shall be determined at the term of the court at which the motion shall be made," R. S. 1887, par. 837, and the further provision of par. 842. By the latter, as amended in 1891, "when upon motion a new trial is denied," a review by the Supreme Court is provided for, and it then is enacted that "in case there shall be no ruling on said motion for a new trial during the term at which it was filed then said motion shall be denied and the questions that may have been raised thereby shall be subject to review by the Supreme Court as if said motion had been overruled and exceptions thereto reserved and entered on the minutes of the court." Acts of 1891, No. 49, p. 69.

The Arizona par. 837 is copied from a similar section in the Texas code. Act of May 13, 1846, § 112, Hartley's Dig. Tex. Code, Art. 766, 1 Sayles, Texas Civil Stats. Art. 1374 [1372]. Long before its adoption in Arizona the latter section had been construed in Texas as mandatory and as discharging a motion by operation of law if not acted upon at the same term. It was held to put it out of the power of the court to postpone the motion for a new trial to the next term and then to act upon it. If the requirement could be avoided by a continuance it would be made almost nugatory. *McKean* v. *Ziller*, 9 Texas, 58; *Bullock* v. *Ballew*, 9 Texas, 498; *Bass* v. *Hays*, 38 Texas, 128. When a statute is taken in this way from another, even a foreign, State, it generally is presumed to be adopted with the construction which it has received. *Tucker* v. *Oxley*, 5 Cranch, 34, 42; *Henrietta Mining and Milling Co.* v. *Gardner*, 173 U. S. 123, 130; *Commonwealth* v. *Hartnett*, 3 Gray, 450. See *Coulam* v. *Doull*, 133 U. S. 216. On this ground as well as that of the meaning of the words, the act had been construed as in Texas by the Supreme Court of Arizona. *Ruff* v. *Hand*, 24 Pac. Rep. 257. In view of the history of the section we shall spend no more time upon the question. Even

were it more doubtful, we are of opinion that the amendment of 1891 to par. 842 makes the meaning plain. The words "then [necessarily after the end of the term] said motion shall be denied," show that the motion is disposed of at the end of the term. Furthermore they do not mean that an order must be made out of term because of the failure to make an order within it, but mean that the motion shall be barred by the lapse of time, adopting the decision of the year before in *Ruff* v. *Hand*, and save an exception as if the motion had been denied by the court. The amendment assumes or enacts that the motion is to be deemed overruled at the end of the term, and has for its object to give the party an exception in case he appeals from the judgment, so that the propriety of granting the motion may be reviewed along with the other matters brought before the Supreme Court. See *Spicer* v. *Simms*, 57 Pac. Rep. 610.

It is urged that at least the statute cannot be meant to operate when the postponement is for the convenience of the court, and the case is likened to those where a judgment or order is entered *nunc pro tunc* in order to prevent a loss of rights through a delay caused by the court itself. But there is no need of an exception in such a case. The party's rights are saved but transferred for consideration to a higher court, and were it otherwise we should hesitate to read the exception into such absolute words.

It is said that by the foregoing construction the legislature attempts an unconstitutional assumption of judicial functions. But this is a mistake, both in form and substance. In form because the legislature does not direct a judgment but merely removes an obstacle to a judgment already entered. (We need not consider whether a different construction would be adopted if the statute dealt with the time for entering judgments.) In substance, because we no more can doubt the power of the legislature to enact a statute of limitations for motions for a new trial than we can doubt its power to enact such a statute for the bringing of an action. It may be questioned whether

there would be any constitutional objection to a law making the original judgment final and doing away with new trials altogether. "Rehearings, new trials are not essential to due process of law, either in judicial or administrative proceedings." *Pittsburg, Cincinnati, Chicago & St. Louis Ry.* v. *Backus*, 154 U. S. 421, 426. See *Montana Co.* v. *St. Louis Mining & Milling Co.*, 152 U. S. 160, 171. The statute did not deal with the past or purport to grant or refuse a new trial in a case or cases then pending, but performed the proper legislative function of laying down a rule for the future in a matter as to which it had authority to lay down rules. Whether the attempt to grant a review of the motion in case of an appeal or writ of error was valid is not before us. But certainly it does not seem an extraordinary stretch of legislative power to say that if the right to have a motion considered is lost in the lower court by lapse of time, the motion may be considered on appeal. There is no judgment by the legislature but simply a qualification of the time limit if the case goes up.

Finally, it is argued that the sections construed as we construe them are inconsistent with the grant of common law jurisdiction to the courts by Congress. Rev. Stat. §§ 1868, 1908. It is said that the right to grant new trials was a well recognized incident of common law jurisdiction, and that it cannot be taken away or cut down by the territorial legislature. In view of the provision in § 1866, that the jurisdiction given by § 1908 "shall be limited by law," and indeed apart from it, we should hesitate to say that the territorial legislature was prevented by the grant of common law jurisdiction, in general words, from doing away with new trials altogether. A rule of practice like this does not touch jurisdiction in any proper sense. *Ferris* v. *Higley*, 20 Wall. 375, cited by the appellant, has no application. Apart from other differences, that was a case of an attempt to confer original jurisdiction in civil and criminal cases, both in chancery and common law, upon the probate courts. We certainly see nothing to prohibit the local legislature from making this not unusual or unreasonable rule.

See *Hornbuckle* v. *Toombs*, 18 Wall. 648; *Bent* v. *Thompson*, 138 U. S. 114; *Greely* v. *Winsor*, 1 So. Dak. 618, 631.

Judgment affirmed.

NEW YORK COUNTY NATIONAL BANK *v.* MASSEY.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 90. Argued December 11, 1903.—Decided January 4, 1904.

The balance of a regular bank account at the time of filing the petition is a debt due to the bankrupt from the bank, and in the absence of fraud or collusion between the bank and the bankrupt with the view of creating a preferential transfer, the bank need not surrender such balance, but may set it off against notes of the bankrupt held by it and prove its claim for the amount remaining due on the notes. *Pirie* v. *Chicago Title & Trust Co.*, 182 U. S. 438, distinguished.

THE facts are stated in the opinion.

Mr. Latham G. Reed, with whom *Mr. John M. Bowers* was on the brief, for appellant:

The certification of his findings by a referee in bankruptcy and the findings themselves are as binding as are the findings of fact of any referee or single judge or the verdict of a jury, unless manifestly unquestionably erroneous. *In re Carver*, 113 Fed. Rep. 138; *In re Stout*, 109 Fed. Rep. 794; *In re Covington*, 110 Fed. Rep. 143; *Railway Co.* v. *Gordon*, 151 U. S. 285.

A finding of fact dependent upon conflicting testimony by a judge, or master or referee, who sees and hears the witnesses testify, has every reasonable presumption in its favor, and may not be set aside and modified unless it clearly appears that there was an error or mistake upon his part. *Tilghman* v. *Proctor*, 125 U. S. 149; *Callaghan* v. *Myers*, 128 U. S. 666; *Chauncey* v. *Dyke Bros.*, 9 Am. B. Rep. 470.

A set-off necessarily involves a preference. The relation

of a depositor in a bank with the bank itself is that of debtor and creditor. *Bank of Republic* v. *Millard*, 10 Wall. 152; *Marine Bank* v. *Fulton Bank*, 2 Wall. 252; *Thompson* v. *Riggs*, 5 Wall. 663; *Davis* v. *Elmira Savings Bank*, 161 U. S. 288; *Scammon* v. *Kimball*, 92 U. S. 362; Hill on Trustees, 4th Am. ed. 173; *Scott* v. *Armstrong*, 146 U. S. 499.

Transfers made in the usual and ordinary course of a trader's business, or payments made at the time a debt matures and in the usual mode of paying debts, are *prima facie* valid. *Bank* v. *Campbell*, 14 Wall. 97; *Driggs* v. *Moore*, 1 Abb. C. C. 440.

If a transfer is made in the usual and ordinary course of business of the bankrupt, the burden of proof will rest upon the assignee. *Collins* v. *Bell*, 3 B. R. 587; *Scammon* v. *Cole*, 3 B. R. 393.

The bank was bound to deduct the amount of the bankrupt's deposit from the face value of the notes and was entitled to prove its claim for the balance of the indebtedness, and for that only. Sec. 68 of the bankruptcy law.

The bankruptcy law itself gives and enforces the right and duty of set-off, and includes the common law right (and makes a duty of it) of banker's lien. The act condemns, not every transfer, but only such as it expressly prohibits; which are only such as deplete or lessen the bankrupt's estate.

An exchange of values between an insolvent debtor and one of his creditors does not constitute a preference, because in such cases there is no diminution of the debtor's estate whereby creditors may be injured. *Cook* v. *Tullis*, 18 Wall. 332; *Clark* v. *Iselin*, 21 Wall. 378; *Fox* v. *Gardner*, 21 Wall. 480; *Sawyer* v. *Turpin*, 91 U. S. 120, 121; *Stevens* v. *Blanchard*, 3 Cush. 169.

Paying cash for property purchased; making a loan; depositing in bank; these are but exchanges of value. *Jaquith* v. *Alden*, 189 U. S. 82; *Pirie* v. *Chicago Trust Company*, 182 U. S. 438.

Recent decisions upon section 68 of the law hold that deposits are a proper set-off and within the contemplation of the act. *In re Myers*, 99 Fed. Rep. 691; *In Matter of Kalber*,

2 Nat. Bankruptcy News, 264; *Hough* v. *First Nat. Bank*, 4 Biss. 349; *Blair* v. *Allen*, 3 Dillon, 109; *Ex parte Howard Nat. Bank*, 2 Lowell, 487; *In re Petrie*, 5 Benedict, 110; *Ex parte Whiting*, 2 Lowell, 472; *Kelly* v. *Philan*, 5 Dillon, 228; *In re Farnsworth*, 5 Bissell, 223; *Robinson* v. *Wisconsin Bank*, 18 Bankruptcy Rep. 243; *In re Elsasser*, 7 Am. B. Rep. 215.

The bank had a banker's lien upon the balance of the general deposit account of all indebtedness then due to it. *Smith* v. *8th Ward Bank*, 31 App. Div. N. Y. 6; *In re Emslie*, 102 Fed. Rep. 291; *National Bank* v. *Insurance Co.*, 104 U. S. 71; *Bank of Metropolis* v. *N. E. Bank*, 1 How. 289; *Straus* v. *Tradesmen Nat. Bank*, 122 N. Y. 379, and cases cited; *People* v. *St. Nicholas Bank*, 44 App. Div. N. Y. 313; *Meyers* v. *N. Y. County Nat. Bank*, 36 App. Div. N. Y. 482.

The rule is that, in general, the assignee does not stand in a better predicament than the bankrupt himself and can claim only what the latter might claim. *In re Emslie*, 102 Fed. Rep. 291; *Winsor* v. *Kendall*, 3 Story, 507; *Fisher* v. *Hunt*, 2 Story, 582; *Foster* v. *Hackley*, 2 B. R. 406; *In re Leland*, 10 Blatch. 503; *In re Lyon*, 7 B. R. 182.

The bankruptcy act entirely recognizes liens, whether state or common law, so long as they were not liens given in violation of the specific terms of the act. *In re Fall City Shirt Co.*, 3 Am. Bankruptcy Rep. 437; *In re Byrne*, 3 Am. Bankruptcy Rep. 268; *In re Beck*, 2 Nat. Bankruptcy News Rep. 533; *In re Lowenstein*, 2 Nat. Bankruptcy News Rep. 71; *In re Brown*, 104 Fed. Rep. 762; *In re Gillette*, 104 Fed. Rep. 769.

A recent case, that of *In re Kellar*, 110 Fed. Rep. 348, distinguished.

The appeal is rightly taken. *Matthews* v. *Hardt*, 79 App. Div. N. Y. 570; *Pirie Scott Case*, 182 U. S. 436; *Hutchinson* v. *Olis*, 190 U. S. 552; *Trust Co.* v. *Bent*, 187 U. S. 237.

Mr. Louis Sturcke, with whom *Mr. Albert P. Massey* was on the brief, for appellee:

The making of these deposits by the bankrupts at a time

when they were insolvent and their appropriation by the bank in part satisfaction of the debt owed it by the bankrupts have given the bank a preference. Ignorance of the insolvency is immaterial. *Pirie* v. *Chicago Title & Trust Co.*, 180 U. S. 438.

The bank having received a preference, the doctrine of set-off cannot be invoked to undo and to make good what the statute has declared is a "preference." *Sawyer* v. *Hoag*, 17 Wall. 610, 622; *Traders' Bank* v. *Campbell*, 14 Wall. 87, 97; *Pearsall* v. *Nassau Nat. Bank*, 74 App. Div. N. Y. 89.

Cases on appellant's brief as to set-off distinguished, and see *In re Hays, Foster & Ward Co.*, 3 N. B. N. & R. 301. See *In re Kellar*, 110 Fed. Rep. 348; *Matter of Tacoma Shoe & Leather Co.*, 3 N. B. N. & R. 9; *Matter of Erik A. Christensen*, 3 N. B. N. & R. 231.

To say that the bank has a banker's lien does not save the transaction from being a preference under the Bankruptcy Act.

The lien of the bank does not come into existence until the debt to the bank becomes due. The very cases cited by the appellant bring out this point clearly.

There is nothing in the record showing any special agreement giving the bank a lien upon the deposits at the time when made, as was the case in *Hatch* v. *Fourth National Bank*, 147 N. Y. 184.

Even if there was a special agreement made at the time the notes were discounted by the bank, it is amply settled by the authorities decided under the present bankruptcy law that the lien would not attach until actual possession took place. *Wilson Brothers* v. *Nelson*, 183 U. S. 191; *Matthews* v. *Hardt*, 79 App. Div. N. Y. 570; *Matter of Fannie Mandel*, N. Y. Law Journal, Nov. 24, 1903.

MR. JUSTICE DAY delivered the opinion of the court.

This is an appeal from the judgment of the Circuit Court of Appeals for the Second Circuit, reversing the order of the

District Court affirming the order of the referee in bankruptcy, allowing a claim against the estate of Stege & Brother. This claim was allowed against the contention of the trustee of the bankrupt, that it could not be proved until the bank should surrender a certain alleged preference given to it in contravention of the bankrupt act. The Circuit Court of Appeals reversed the order of the District Court, holding that the bank must first surrender the preference before it could be allowed to prove its claim. 116 Fed. Rep. 342. The Circuit Court of Appeals made the following findings of fact:

"For a number of years past the bankrupts, George H. Stege and Frederick H. Stege, were engaged, in the city and county of New York, in the business of dealing in butter, eggs, &c., at wholesale, under the firm name and style of Stege & Brother. On January 27, 1900, they filed a voluntary petition of bankruptcy in the District Court, with liabilities of $67,232.49 and assets of $20,729.66, and upon the same day were duly adjudicated bankrupts. Among their liabilities there was an indebtedness of $40,000 to the New York County National Bank for money loaned upon four promissory notes for $10,000 each. The money was loaned to the bankrupts and the notes were originally given as follows:

"April 26, 1899, $10,000, 6 months, due October 26, 1899.

"April 26, 1899, $10,000, 7 months, due November 26, 1899.

"June 26, 1899, $10,000, 4 months, due October 26, 1899.

"August 2, 1899, $10,000, 4 months, due December 2, 1899.

"None of these notes were paid when they fell due, but were all renewed as follows:

"October 26, 1899, $10,000, 3 months, due January 26, 1900.

"November 26, 1899, $10,000, 75 days, due February 9, 1900.

"October 26, 1899, $10,000, 3 months, due January 26, 1900.

"December 2, 1899, $10,000, 69 days, due February 9, 1900.

"On January 23, 1900, in the morning, the bankrupts went to the New York County National Bank and asked the officers to have the two notes of $10,000 each, which fell due on January 26, extended. The bankrupts at that time informed the

bank officers that they were unable to pay the notes then about to fall due. In the afternoon of the same day, January 23, 1900, the bankrupts again called upon the bank officers, and at that time they delivered to them a statement of their assets and liabilities, which statement was not delivered until after the deposit of $3,884.47 had been made on that day. This statement as of January 22, 1900, showed their assets to be $19,095.67 and their liabilities $65,864.61.

"The bankrupts kept their bank account in the New York County National Bank since May 6, 1899. On January 22, 1900, their balance in the bank was $218.50. On the same day they deposited in that account $536.83; on January 23, 1900, $3,884.47; on January 25, 1900, $1,803.95, making a total of $6,225.25 deposited in the three days mentioned. Of this amount there was left in the bank account on the day of the adjudication in bankruptcy, January 27, 1900, the sum of $6,209.25, the bank having honored a check of Stege Brothers after the date of all these deposits.

"At the first meeting of creditors, February 9, 1900, the New York County National Bank filed its claim for $33,790.25.

"In its proof of claim the bank credited upon one of the notes which became due on January 26, 1900, the deposit of $6,209.25. The claim was allowed by the referee in the sum of $33,750.25, being $40,000 less the amount on deposit in bank ($6,209.25), and a small rebate of interest on the unmatured notes. Some of the creditors at this meeting reserved the right to move to reconsider the claim of the New York County National Bank; the referee granted this request. Afterwards the trustee, as the representative of the creditors, moved before the referee to disallow and to expunge from his list of claims the claim of the New York County National Bank unless it surrendered the amount of the deposit, namely, $6,209.25, which had been credited by the bank upon one of the notes. The referee denied that motion, and an appropriate order was made and entered. The trustee thereupon duly filed his petition to have the question certified to the District Judge. The District Judge on

the 25th day of November, 1901, made an order affirming the order of the referee. From that order an appeal was duly taken by the trustee to the Circuit Court of Appeals. The deposits were made in the usual course of business; at the time they were made Stege Brothers were insolvent."

As a conclusion of law, the Court of Appeals held that the deposit would amount to a transfer enabling the bank to obtain a greater percentage of the debt due to it than other creditors of the same class, and that allowance of the claim should be refused unless the preference was surrendered. This case requires an examination of certain provisions of the bankrupt law. Section 68 of that law provides:

"SEC. 68. Set-offs and counterclaims:

"(*a.*) In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor, the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid.

"(*b.*) A set-off or counterclaim shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate, or (2) was purchased by or transferred to him after the filing of the petition or within four months before such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent or had committed an act of bankruptcy."

Section 60 provides (prior to the amendment of February 5, 1903):

"SEC. 60. Preferred creditors: *a.* A person shall be deemed to have given a preference if being insolvent he has . . . made a transfer of any of his property, and the effect of the . . . transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other such creditors of the same class."

Section 57*g* provides (prior to amendment of February 5, 1903): "The claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender the preferences."

Considering, for the moment, section 68, apart from the other sections, subdivision *a* contemplates a set-off of mutual debts or credits between the estate of the bankrupt and the creditor, with an account to be stated and the balance only to be allowed and paid. Subdivision *b* makes certain specific exceptions to this allowance of set-off, and provides that it shall not be allowed in favor of the debtor of the bankrupt upon an unproved claim or one transferred to the debtor after the filing of the petition in bankruptcy, or within four months before the filing thereof, with a view to its use for the purpose of set-off, with knowledge or notice that the bankrupt was insolvent or had committed an act of bankruptcy. Obviously, the present case does not come within the exceptions to the general rule made by subdivision *b*. It cannot be doubted that, except under special circumstances, or where there is a statute to the contrary, a deposit of money upon general account with a bank creates the relation of debtor and creditor. The money deposited becomes a part of the general fund of the bank, to be dealt with by it as other moneys, to be lent to customers, and parted with at the will of the bank, and the right of the depositor is to have this debt repaid in whole or in part by honoring checks drawn against the deposits. It creates an ordinary debt, not a privilege or right of a fiduciary character. *Bank of the Republic* v. *Millard*, 10 Wall. 152. Or, as defined by Mr Justice White, in the case of *Davis* v. *Elmira Savings Bank*, 161 U. S. 275, 288: "The deposit of money by a customer with his banker is one of loan, with the superadded obligation that the money is to be paid, when demanded, by a check." *Scammon* v. *Kimball*, 92 U. S. 362. It is true that the findings of fact in this case establish that at the time these deposits were made the assets of the depositors were considerably less than their liabilities, and that they were insolvent, but there is nothing in the findings to show that the deposit created other than the ordinary relation between the bank and its depositor. The check of the depositor was honored after this deposit was made, and for aught that appears Stege Brothers

might have required the amount of the entire account without objection from the bank, notwithstanding their financial condition.

We are to interpret statutes, not to make them. Unless other sections of the law are controlling, or in order to give a harmonious construction to the whole act, a different interpretation is required, it would seem clear that the parties stood in the relation defined in section 68*a*, with the right to set off mutual debts, the creditor being allowed to prove but the balance of the debt.

Section 68*a* of the bankruptcy act of 1898 is almost a literal reproduction of section 20 of the act of 1867. So far as we have been able to discover the holdings were uniform under that act that set-off should be allowed as between a bank and a depositor becoming bankrupt. *In re Petrie*, 7 N. B. R. 332; *S. C.*, Fed. Cas. No. 11,040; *Blair* v. *Allen*, 3 Dill. 101; *S. C.*, Fed. Cas. No. 1483; *Scammon* v. *Kimball*, 92 U. S. 362. In *Traders' Bank* v. *Campbell*, 14 Wall. 87, the right of set-off was not relied upon, but a deposit was seized on a judgment which was a preference.

But it is urged that under section 60*a* this transaction amounts to giving a preference to the bank, by enabling it to receive a greater percentage of its debts than other creditors of the same class. A transfer is defined in section 1 (25) of the act to include the sale and every other and different method of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift or security. While these sections are not to be narrowly construed so as to defeat their purpose, no more can they be enlarged by judicial construction to include transactions not within the scope and purpose of the act. This section 1 (25), read with sections 60*a* and 57*g*, requires the surrender of preferences having the effect of transfers of property "as payment, pledge, mortgage, gift or security which operate to diminish the estate of the bankrupt and prefer one creditor over another."

The law requires the surrender of such preferences given to the creditor within the time limited in the act before he can prove his claim. These transfers of property, amounting to preferences, contemplate the parting with the bankrupt's property for the benefit of the creditor and the consequent diminution of the bankrupt's estate. It is such transactions, operating to defeat the purposes of the act, which under its terms are preferences.

As we have seen, a deposit of money to one's credit in a bank does not operate to diminish the estate of the depositor, for when he parts with the money he creates at the same time, on the part of the bank, an obligation to pay the amount of the deposit as soon as the depositor may see fit to draw a check against it. It is not a transfer of property as a payment, pledge, mortgage, gift or security. It is true that it creates a debt, which, if the creditor may set it off under section 68, amounts to permitting a creditor of that class to obtain more from the bankrupt's estate than creditors who are not in the same situation, and do not hold any debts of the bankrupt subject to set-off. But this does not, in our opinion, operate to enlarge the scope of the statute defining preferences so as to prevent set-off in cases coming within the terms of section 68*a*. If this argument were to prevail, it would in cases of insolvency defeat the right of set-off recognized and enforced in the law, as every creditor of the bankrupt holding a claim against the estate subject to reduction to the full amount of a debt due the bankrupt receives a preference in the fact that to the extent of the set-off he is paid in full.

It is insisted that this court in the case of *Pirie* v. *Chicago Title & Trust Co.*, 182 U. S. 438, held a payment of money to be a transfer of property within the terms of the bankrupt act, and when made by an insolvent within four months of the filing of the petition in bankruptcy, to amount to a preference, and that case is claimed to be decisive of this. In the *Pirie* case the turning question was whether the payment of money was a transfer within the meaning of the law, and it was held

that it was. There the payment of the money within the time named in the bankrupt law was a parting with so much of the bankrupt's estate, for which he received no obligation of the debtor but a credit for the amount on his debt. This was held to be a transfer of property within the meaning of the law. It is not necessary to depart from the ruling made in that case, that such payment was within the operation of the law, while a deposit of money upon an open account subject to check, not amounting to a payment but creating an obligation upon the part of the bank to repay upon the order of the depositor, would not be. Of the case of *Pirie* v. *Chicago Title & Trust Co.*, it was said in *Jaquith* v. *Alden*, 189 U. S. 78, 82: "The judgment below was affirmed by this court, and it was held that a payment of money was a transfer of property, and when made on an antecedent debt by an insolvent was a preference within section 60*a*, although the creditor was ignorant of the insolvency and had no reasonable cause to believe that a preference was intended. The estate of the insolvent, as it existed at the date of the insolvency, was diminished by the payment, and the creditor who received it was enabled to obtain a greater percentage of his debt than any other of the creditors of the same class."

In other words, the *Pirie* case, under the facts stated, shows a transfer of property to be applied upon the debt, made at the time of insolvency of the debtor, creating a preference under the terms of the bankrupt law. That case turned upon entirely different facts, and is not decisive of the one now before us. It is true, as we have seen, that in a sense the bank is permitted to obtain a greater percentage of its claim against the bankrupt than other creditors of the same class, but this indirect result is not brought about by the transfer of property within the meaning of the law. There is nothing in the findings to show fraud or collusion between the bankrupt and the bank with a view to create a preferential transfer of the bankrupt's property to the bank, and in the absence of such showing we cannot regard the deposit as having other effect than

to create a debt to the bankrupt and not a diminution of his estate.

In our opinion the referee and the District Court were right in holding that the amount of the deposit could be set off against the claim of the bank, allowing it to prove for the balance, and the Circuit Court of Appeals, in holding that this deposit amounted to a preference to be surrendered before proving the debt, committed error.

Judgment of the Circuit Court of Appeals reversed, and that of the District Court affirmed; cause remanded to latter court.

MR. JUSTICE MCKENNA dissents.

ROYAL INSURANCE COMPANY *v.* MARTIN.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF PORTO RICO.

No. 86. Argued December 8, 9, 1903.—Decided January 11, 1904.

This court has jurisdiction to review, on writ of error, a final decision of the Supreme Court of Porto Rico, where the value or sum in dispute exceeds $5000, exclusive of costs. The Circuit Court of Appeals Act of 1891 does not apply to such a case.

Where a policy of insurance excepts loss happening during invasion, rebellion, etc., unless satisfactory proof be made that it was occasioned by independent causes, a notice by the company, without demanding proof, that it will not pay the loss because it was occasioned by one of the excepted causes amounts to a waiver, and relieves the insured from producing such proofs before commencing suit, and how the loss was occasioned is for the jury to determine.

Where a policy for separate specified amounts on a building and goods contained in it provides that it shall cease to be in force as to any property passing from the insured otherwise than by due process of law without notice to, and endorsement by, the company, a transfer of all the goods by the insured to a firm of which he is a silent partner, the active partners having possession and control, is such an alienation as will avoid the policy in respect to the goods, but not as to the building separately insured.

THE facts are stated in the opinion.

Mr. William G. Choate for plaintiff in error:

This court has jurisdiction of this case. Act establishing the government of Porto Rico, act of April 12, 1900, c. 191, 31 Stat. 85.

The law determining the cases in which writs of error to and appeals from the Supreme Courts of the Territories of the United States may be taken, appears in the following statutes: Rev. Stat. § 702; act of March 3, 1885, c. 355, 23 Stat. 443; Circuit Court of Appeals act of March 3, 1891, c. 517, § 15, 26 Stat. 826, 828, and see *Shute* v. *Keyser*, 149 U. S. 649; *Aztec Mining Co.* v. *Ripley*, 53 Fed. Rep. 7; *S. C.*, 151 U. S. 79; *Folsom* v. *United States*, 160 U. S. 121; and *Simms* v. *Simms*, 175 U. S. 162, 166, where the effect of these statutes is considered, that the appellate jurisdiction of this court from Supreme Courts of the Territories remains unimpaired, except as such appellate jurisdiction is transferred to the Circuit Courts of Appeals by the act of 1891.

The suits of which the Circuit Court has jurisdiction in which an alien is a party are necessarily limited by the Constitution to "controversies between a State or the citizens thereof and foreign States, citizens or subjects" (Constitution, art. 3, sec. 2). This does not include under the term "citizens thereof" a citizen of Porto Rico; it necessarily means a citizen of one of the United States. And this limitation of suits in which an alien is a party to suits between aliens and citizens of the United States is recognized in the 6th section of the Circuit Court of Appeals act, which has received a construction excluding its application to suits between foreign States and a citizen of the United States. *Colombia* v. *Cauca Co.*, 190 U. S. 524, 526. And see *Snow* v. *United States*, 118 U. S. 346, 352; *Ex parte Wilder's S. S. Co.*, 183 U. S. 545; *Union Central Life Ins. Co.* v. *Champlain*, 116 Fed. Rep. 858.

On the merits the court below erred:

Upon the undisputed evidence in the case the policy was

voided by this change of interest in the stock of goods, a part of the property insured. *Germania Fire Ins. Co.* v. *Home Ins. Co.*, 144 N. Y. 195, 199; *Drennen* v. *London Assurance Co.*, 20 Fed. Rep. 657; *S. C.*, 113 U. S. 51; *London Assurance Co.* v. *Drennen*, 116 U. S. 461; *Card* v. *Phœnix Ins. Co.*, 4 Mo. App. 424. Cases in the Supreme Court of Iowa subsequent to the case of *Cowan* v. *State Ins. Co.*, 40 Iowa, 551, which is relied on by the defendant in error, distinguish that case on the ground that there was no provision in the policy in that case relating to a change of title or interest, but a provision merely in respect to a sale or conveyance which was held to mean a technical sale of the whole property. *Hathaway* v. *State Ins. Co.*, 64 Iowa, 229; *S. C.*, 20 N. W. Rep. 164; *Oldham* v. *Ins. Co.*, 90 Iowa, 225; *S. C.*, 57 N. W. Rep. 861; *Jones* v. *Phœnix Ins. Co.*, 97 Iowa, 275; *S. C.*, 66 N. W. Rep. 169, and see *Beggs* v. *Ins. Co.*, 88 N. Car. 141; May on Ins. (4th ed.) § 279; 3 Joyce on Ins. §§ 2293–2295, and note reviewing cases; 1 Biddle on Ins. § 224; Elliott on Ins. § 273; Porter on Ins. (2d ed.) 180.

The ruling of the court deprived the defendant of the right to have the verdict limited to the building if the condition did not affect the insurance on the building also. This defence of a change of interest was fairly raised by the special plea and also by the general issue. *Edson* v. *Weston*, 7 Cow. 280; Chitty on Pl. 6th Am. ed. 513; *Oscanyan* v. *Arms Co.*, 103 U. S. 261, citing 1 Chitty on Pleadings, 493; *Craig* v. *The State of Missouri*, 4 Pet. 410, 426; *Young* v. *Rummell*, 2 Hill (N. Y.), 278.

The policy was void, for the reason that the fire occurred, as the testimony shows, during an invasion, riot, etc.

A fair construction of this condition in the policy is that where a state of invasion or martial law exists in the neighborhood where the fire was, the company is not liable for the loss by fire, unless there be some evidence that the fire was attributable to some other cause. The presumption created by the policy is that it was attributable to the invasion. It is not enough that there was no evidence as to any other cause, as was the fact here. The policy required that there should

be affirmative evidence attributing the fire to some other cause. It may not be necessary to hold, in accordance with the literal interpretation of the condition, that the directors must be satisfied that there was not some other cause. It may well be that, if there was proof of some other cause, the mere fact that the directors were not satisfied by it would not be enough.

The case then was one where the evidence was undisputed of the existence of invasion in the very district of country where the property was situated and the main body of the invading troops was within three and a half miles of the property, and at the request of the owner of the property a detachment of soldiers was sent to the very place insured. The defendant's counsel might well have asked the court to rule that a state of invasion did exist at the place where the property was, but the instruction asked was simply that if the jury found the fact of invasion, etc., then the plaintiff could not recover. This the plaintiff in error was entitled to upon the state of the proof.

Mr. Fritz v. Briesen for defendant in error:

This court has no jurisdiction.

It is evident that Congress did not intend to have cases involving no more than questions of general law go to the Supreme Court of the United States.

Sections 5 and 6 of the Court of Appeals Act have received the consideration of this court in a number of cases. *Borgmeyer* v. *Idler*, 159 U. S. 458; *Voorhees* v. *Noyes Mfg. Co.*, 151 U. S. 135; *Rouse* v. *Letcher*, 156 U. S. 47; *Carey* v. *Houston & Texas Central Ry. Co.*, 161 U. S. 115; *Rouse* v. *Hornsby*, 161 U. S. 588; *Press Pub. Co.* v. *Monroe*, 164 U. S. 105; *Ex parte Jones*, 164 U. S. 691.

Nor is the case appealable under § 15 of the act relating to appeals from Territories. As to construction of act of Congress and ascertaining intent of Congress, see *United States* v. *Union Pacific R. R. Co.*, 91 U. S. 72; 1 Kent's Com. 162,

cited in *People* v. *Draper*, 15 N. Y. 532; *McLish* v. *Roff*, 141 U. S. 661, 666. Cases on plaintiff in error's brief distinguished.

This case is substantially one brought by a citizen of the United States against an alien.

It is admitted that a citizen of Porto Rico is not a citizen of the United States, but on the other hand he is not an alien, so that although this case would, strictly speaking, not be one between a citizen of the United States and an alien, it would on the other hand, not be one between an alien and an alien. Porto Rico is not a foreign country. *De Lima* v. *Bidwell*, 182 U. S. 198, 200; *Fourteen Diamond Rings* v. *United States*, 183 U. S. 176, 179. An alien means nothing more than a citizen or subject of a foreign State. *Milne* v. *Huber*, 3 McLean, 212; *S. C.*, 17 Fed. Cas. 405, 406.

Such an anomalous position has not been provided for directly by the Judiciary Act of March 3, 1891, but as to position of citizens of Porto Rico, see § 7, Foraker Act.

Congress could never have intended to deprive a United States citizen of his right to an appeal and in the same breath confer it upon a citizen of Porto Rico. *Lau Ow Bew* v. *United States*, 144 U. S. 47.

The court did not err in its rulings with reference to the defence that the transfer of the personal property covered by the policy from Francisco Martin, the assured, to Martin Brothers voided the policy.

The law and decisions in the States of the Union on this point are very conflicting and the question cannot be decided upon the authority of the decisions of any State or group of States, but the *lex loci contractus*, to wit, that of Porto Rico, should be understood. *Bank of the United States* v. *Donnally*, 8 Pet. 361, 372. No Spanish laws or decisions are submitted by counsel for plaintiff in error, so that no opportunity is given this court to arrive at a correct conclusion on this important point. This court cannot decide this question because it cannot be presumed to know the Spanish laws and decisions on the subject of partnership, fire insurance and construction of

contracts. Waiving, however, this fatal defect for the present, the question will be argued as a question of American law. There was no error in the court below. *Ayres* v. *Hartford Ins. Co.*, 17 Iowa, 176; 1 Biddell on Ins. 199; *Washington Fire Ins. Co.* v. *Kelley*, 32 Maryland, 421, 434; *Scanlon* v. *Union Fire Ins. Co.*, 4 Biss. 511; *Blackwell* v. *Insurance Co.*, 48 Ohio St. 533, 540; *Cowan* v. *Iowa State Ins. Co.*, 40 Iowa, 551, citing May on Insurance, pp. 463, 381, pp. 303, 278; *Hitchcock* v. *N. W. Ins. Co.*, 26 N. Y. 68; *West Branch Ins. Co.* v. *Helfenstein*, 40 Pa. St. 289; *Sherman* v. *Niagara Fire Ins. Co.*, 2 Sweeney, 470; *Fernandey* v. *Great Western Ins. Co.*, 3 Robertson, 457; *Hoffman* v. *Place*, 32 N. Y. 405, and see the Scotch case of *Forbes* v. *Border Counties Fire Office*, 11 Court of Sessions, 3d Series, 278.

The refusal of the judge to order the jury to return a separate verdict was not a reversible error. If the judge was correct in his ruling on the question of alienation, then no separate verdict was necessary. Defendant did not request a charge for a separate verdict until after the jury had returned its verdict when it was too late. *Pacific Express Co.* v. *Malin*, 132 U. S. 531, and see 22 Ency. Pleading & Practice, p. 912; *Texas & P. Ry. Co.* v. *Padgett*, 36 S. W. Rep. 300.

There was no error in the rulings of the court with reference to the ground of defence that the policy was void for the reason that the fire occurred during an invasion, riot, etc.

In case a loss by fire occur during the existence of an invasion or riot, the board of directors *may call for proof* that such loss was not occasioned by the invasion, and if such proof be not furnished, or, if furnished, be not reasonably satisfactory, no action on the policy may be maintained. The condition was inserted merely for the protection of the stockholders of the company, in that it placed a check upon the board of directors by providing that they should not pay certain claims without first calling for satisfactory proof that the loss was not due to certain casualties which were not insured against. *Braunstein* v. *Accidental Death Insurance Co.*, 1 Best & Smith,

783; *Baillie* v. *Assurance Co.*, 49 La. Ann. 658, 661. See also *La Societe, etc.*, v. *Wm. B. Morris & Co.*, 24 La. Ann. 347; *Monteleone* v. *Insurance Co.*, 47 La. Ann. 1563; *National Union* v. *Thomas*, 10 App. D. C. 277. It does not throw the burden of proof on the insured. *German Ins. Co.* v. *Frederick*, 58 Fed. Rep. 144; forfeitures, as this would be, are not favored in the law. 1 Wood on Fire Insurance (2d ed.), 161, citing *Hoffman* v. *Ætna Insurance Co.*, 32 N. Y. 405; *Reynolds* v. *Commerce Ins. Co.*, 47 N. Y. 597, and many other cases; and see *Insurance Company* v. *Eggleston*, 96 U. S. 572, 577; *Insurance Co.* v. *Norton*, 96 U. S. 234.

Mr. Justice Harlan delivered the opinion of the court.

This was an action by the executor of the insured on a policy of insurance made by the Royal Insurance Company, a British corporation, whereby that company insured Francisco Martin against loss or damage by fire to the amount of seven hundred pounds on a certain building at Coto Laurel, District of Ponce, Porto Rico, and for nine hundred pounds on the stock in trade contained in such building.

The declaration alleged and the fact was not disputed that during the term of the policy all the property insured was destroyed by fire. The case was tried by the court and a jury and a verdict was returned in favor of the plaintiff for $7623, the court refusing to require the jury to find the damages, separately, as to the building and the stock of goods; and for the above amount judgment was rendered against the company.

The defendant in error disputes the jurisdiction of this court to review the judgment below. If this position be well taken, the writ of error should be dismissed without considering the merits of the case. *Continental Nat. Bank* v. *Buford*, 191 U. S. 119. We must therefore examine the question of the jurisdiction, which depends upon the scope and effect of various statutory provisions, including those relating to the court established by Congress in Porto Rico. We will look at the statutes according to the respective dates of their enactment.

By section 702 of the Revised Statutes of the United States it is provided that "the final judgments and decrees of the Supreme Court of any Territory, except the Territory of Washington, in cases where the value of the matter in dispute, exclusive of costs, . . . exceeds $1,000, may be reviewed and reversed or affirmed in the Supreme Court, upon writ of error or appeal, in the same manner and under the same regulations as the final judgments and decrees of a Circuit Court. In the Territory of Washington the value of the matter in dispute must exceed $2,000, exclusive of costs. And any final judgment or decree of the Supreme Court of said Territory in any cause [when] the Constitution or a statute or treaty of the United States is brought in question may be reviewed in like manner."

This provision was modified by the act of March 3, 1885, entitled "An act regulating appeals from the Supreme Court of the District of Columbia and the Supreme Courts of the several Territories;" for by the latter act it was provided: "§ 1. That no appeal or writ of error shall hereafter be allowed from any judgment or decree in any suit at law or in equity in the Supreme Court of the District of Columbia, or in the Supreme Court of any of the Territories of the United States, unless the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars. § 2. That the preceding section shall not apply to any case wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute or an authority exercised under the United States; but in all such cases an appeal or writ of error may be brought without regard to the sum or value in dispute." 23 Stat. 443, c. 355.

Then came the act of March 3, 1891, "to establish Circuit Courts of Appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes." 26 Stat. 826. The 5th section of that act prescribes the cases that may be brought directly to this court from the District Courts or from the existing Circuit Courts of

the United States, while the 6th section provides that the Circuit Courts of Appeals "shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the District Court and the existing Circuit Courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law"—the judgments or decrees of the Circuit Courts of Appeals to be final "in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different States; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws and in admiralty cases." Further, by the same section: "In all cases not hereinbefore, in this [6th] section, made final, there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States when the matter in controversy shall exceed one thousand dollars, besides costs." The 13th section of the act provides: "Appeals and writs of error may be taken and prosecuted from the decisions of the United States Court in the Indian Territory to the Supreme Court of the United States, or to the Circuit Court of Appeals in the Eighth Circuit, in the same manner and under the same regulations as from the Circuit or District Courts of the United States, under this act." And the 15th section is in these words: "That the Circuit Court of Appeal *in cases* in which the judgments of the Circuit Courts of Appeal are made *final* by this act shall have the same appellate jurisdiction, by writ of error or appeal, to review the judgments, orders and decrees of the Supreme Courts of the several Territories, as by this act they may have to review the judgments, orders and decrees of the District Court and Circuit Courts; and for that purpose the several Territories shall, by orders of the Supreme Court, to be made from time to time, be assigned to particular circuits." 26 Stat. 826.

This brings us to the act of April 12, 1900, c. 191, entitled, "An act temporarily to provide revenues and a civil govern-

ment for Porto Rico, and for other purposes." 31 Stat. 77, c. 191.

By section 33 of that act it is declared, among other things, that the judicial power shall be vested in the courts and tribunals of Porto Rico as then established and in operation, under and by virtue of certain General Orders promulgated by military authority—the Chief Justice and Associate Justices of the Supreme Court of Porto Rico and the Marshal thereof to be appointed by the President, by and with the advice and consent of the Senate, and the judges of the district courts by the Governor, by and with the advice and consent of the executive council.

By the 34th section of that act Porto Rico was constituted a judicial district to be called the District of Porto Rico with a district judge, a district attorney and marshal to be appointed by the President, by and with the advice and consent of the Senate, and with a district court called the "District Court of the United States for Porto Rico," which court, in addition to the ordinary jurisdiction of District Courts of the United States, shall have jurisdiction of all cases cognizant in the Circuit Courts of the United States.

The section of the Porto Rico act upon which the question of our jurisdiction mainly depends is the 35th, which is in these words: "That writs of error and appeals from the final decisions of the supreme court of Porto Rico and the district court of the United States shall be allowed and may be taken *to the Supreme Court of the United States* in the same manner and under the same regulations and *in the same cases* as from the supreme courts of the Territories of the United States; and such writs of error and appeal shall be allowed in all cases where the Constitution of the United States, or a treaty thereof, or an act of Congress is brought in question and the right claimed thereunder is denied; and the supreme and district courts of Porto Rico and the respective judges thereof may grant writs of *habeas corpus* in all cases in which the same are grantable by the judges of the district and circuit courts of the

United States. All such proceedings in the Supreme Court of the United States shall be conducted in the English language." 31 Stat. 77, 85, c. 191.

It thus appears that writs of error and appeals may be prosecuted directly to this court from the District Court of the United States for Porto Rico, in the same manner, under the same regulations, and "in the same cases" as from the Supreme Courts of the Territories of the United States.

Could a case like the one before us have been brought directly to this court from the Supreme Court of one of the Territories of the United States? If so, our jurisdiction in this case cannot be disputed under the Porto Rico act.

The question just stated must be answered in the affirmative, if we look alone at section 702 of the Revised Statutes, and the act of March 3, 1885, c. 355; for, it is clear from the express words of those enactments that this court may review the final judgment of the Supreme Court of one of the Territories of the United States in any case, without regard to the sum or value in dispute, where the Constitution or a statute or treaty is brought in question, and in every other case whatever where the sum or value in dispute exceeds $5000, exclusive of costs.

Is this result, so far as the final judgments of the District Court of the United States for Porto Rico are concerned, affected by anything in the Circuit Court of Appeals act of 1891? We think not. That act, no doubt, contemplated a review by the appropriate Circuit Court of Appeals, first, of the final judgments of the United States court in the Indian Territory in all cases covered by section 702 of the Revised Statutes and the act of March 3, 1891; second, of the final judgments of the Supreme Courts of the other Territories of the United States in cases the judgments in which, by that act (§ 6), are made final. No provision is found in the act of 1891 for the review in a Circuit Court of Appeals of the judgment of the Supreme Court of a Territory of the United States in a case of the class the judgment in which, if rendered in a Circuit Court of Appeals, is not final. So that the jurisdiction

of this court to review the judgments of the Supreme Courts of the several Territories in that class of cases was the same after as before the passage of that act. *Shute* v. *Keyser*, 149 U. S. 649. Clearly this case is not of the class the judgment in which, if rendered in the Supreme Court of a Territory of the United States, to use the words of the act of 1891, is reviewable in a Circuit Court of Appeals under that act. It is not a patent, revenue or criminal case, nor one in which the jurisdiction of the court below depended entirely upon the opposite parties to the controversy being aliens and citizens of the United States or citizens of different States. But it is one which, if it had been determined by the Supreme Court of one of such Territories of the United States, could have been brought here directly, upon writ of error, after as well as before the passage of the act of 1891. Our conclusion must, therefore, be that the jurisdiction of this court cannot be denied by reason of any provision in the act of 1891.

This view is strengthened by what we deem the better construction of the Porto Rico act of 1900. That act does not refer to the Circuit Court of Appeals act of 1891, nor contain any provision looking to the assignment of Porto Rico to one of the established Circuits. This tends to show that it was the intention of the act of 1900 to establish a direct connection between this court and the United States Court for Porto Rico in respect of every case which, if determined by the Supreme Court of a Territory of the United States, could have been brought here under the statutes in force when the act of 1891 was passed. In our opinion, Congress did not intend that any connection should exist between the United States Court for Porto Rico and any Circuit Court of Appeals established under the act of 1891.

These views as to the scope and effect of the Porto Rico act of 1900 are not at all affected by the provisions in the acts relating to the reëxamination of the final judgments of the highest courts of the Indian Territory, Hawaii and Alaska. *Indian Territory*, 26 Stat. 826, c. 517, § 13; *Hawaii*, 31 Stat. 141, 158,

c. 339, § 86; *Alaska*, 31 Stat. 321, 345, c. 786. Those acts had exclusive reference to the particular Territories named—each, upon its face, showing that the final judgments of the courts of those Territories, at least in certain cases, should be reviewable, primarily, in a designated Circuit Court of Appeals of the United States. No such provisions are found in the act of 1900, and this court has not assumed to assign Porto Rico to any Circuit of the United States. The Territories of the United States, referred to in the 15th section of the act of 1891, are, in our opinion, those which it was contemplated would be assigned to some Circuit, and they do not embrace Porto Rico; and the words in the act of 1900, "in the same manner and under the same regulations and in the same cases as from the Supreme Court of a Territory of the United States," refer not to the act of 1891 but to those general statutes authorizing this court to review the final judgment of the Supreme Court of a Territory of the United States in every case, without regard to the sum or value in dispute, where the Constitution of the United States or a treaty thereof or an act of Congress is brought in question and the right claimed thereunder is denied, and in every other case where the sum or value in dispute exceeds $5000, exclusive of costs. If Congress had intended that the judgments of the United States Court for Porto Rico should, in any class of cases, be reëxamined in some Circuit Court of Appeals of the United States, it would have so declared by appropriate words. It did not so declare.

For the reasons stated, we hold that our jurisdiction to reexamine it cannot be questioned.

We come now to the merits of the case; our attention being first directed to the questions arising under the clause of the policy providing that it shall not cover "loss or damage by fire happening during the existence of any invasion, foreign enemy, rebellion, insurrection, riot, civil commotion, military or usurped power, or martial law within the country or locality in which the property insured is situated, unless proof be made to the satisfaction of the directors that such loss or damage

was not occasioned by or connected with, but occurred from a cause or causes independent of the existence of such invasion, foreign enemy, rebellion, insurrection, riot, civil commotion, military or usurped power or martial law."

As the words of the policy are those of the company, they should be taken most strongly against it, and the interpretation should be adopted which is most favorable to the insured, if such interpretation be not inconsistent with the words used. *National Bank* v. *Insurance Company*, 95 U. S. 673, 678, 679; *Liverpool &c. Ins. Co.* v. *Kearney*, 180 U. S. 132, 136; *Texas & Pacific Railway Co.* v. *Reiss*, 183 U. S. 621, 626. In this view the above words should be held to mean that the policy covered loss by fire occurring during the existence of (if not occasioned by nor was connected with) any invasion, foreign enemy, rebellion, insurrection, riot, civil commotion, military or usurped power, or martial law, in the general locality where the property insured was situated. If the loss so occurred, then the company was entitled to demand, before being sued, that proofs be furnished showing that the loss was not occasioned by or connected with, but was from causes independent of, such invasion, foreign enemy, rebellion, insurrection, riot, civil commotion, military or usurped power or martial law. But the company made no demand for proofs on this point. On the contrary, the formal production of such proofs was, in effect, waived; for the company assumed that what occurred, in the locality, at the time of the fire, constituted a riot, which relieved it from all liability. It, therefore, gave notice by its agents that as the fire and the destruction of the goods "were produced by a riot they were not compelled to pay," and that "the policy would not be paid." A general, absolute refusal to pay in any event, or a denial by the company of all liability under its policy, dispensed with such formal proofs as a condition of its liability to be sued, and opened the way for a suit by the assured in order that the rights of the parties could be determined by the courts according to the facts as disclosed by evidence. It was so held by this court in a case of fire

insurance, *Tayloe* v. *Fire Insurance Company*, 9 How. 390, 403; and the same principle was recognized as applicable in a case of life insurance. *Knickerbocker Life Insurance Co.* v. *Pendleton*, 112 U. S. 696, 709. To the same effect are authorities cited by text-writers. 2 May on Insurance (3d ed.), § 469; 2 Biddle on Insurance, § 1139; 2 Wood on Fire Insurance (2d ed.), § 445. Now, whether there was any substantial connection between the fire and military or other disturbance of the kind specified, existing in the locality where the property was situated, was a question of fact, and it was properly left to the jury. The court, referring to the above clause of the policy, charged the jury: "a fair construction of that condition, in the opinion of the court, is that in order to excuse this company from liability in case of loss of property by fire, that invasion by foreign enemy, rebellion, insurrection, riot, civil commotion, military or usurped power or martial law, must have been occurring within the section of the country where this loss occurred, or within the locality and within such radius of country where the loss occurred, that damage arose to property by reason of the existence of that rebellion, invasion, insurrection, civil commotion, military or usurped power, or martial law. And I further tell you, gentlemen, that if you believe from the evidence that this destruction of property did not occur from any of these causes, and occurred from a cause independent of the existence of any foreign enemy, rebellion, insurrection, riot, civil commotion, military or usurped power or martial law, then you should find, so far as this defence was concerned, for the plaintiff in damages whatever you think may have been his loss."

While there is some little confusion in this part of the record, we think that the trial court did not misconstrue the policy, nor commit any error upon this particular point of which the plaintiff was entitled to complain. It is to be taken that the jury found, upon the whole evidence, that the loss was occasioned by causes independent of the existence of any invasion, foreign enemy, rebellion, insurrection, riot, civil commotion,

military or usurped power, or martial law. The facts under this issue having been fairly submitted to the jury, its finding cannot be disturbed.

An important question remains to be considered. It arises out of the interest which the assured had in the property at the time of the fire. The evidence showed that the original policy was issued to Francisco Martin on the twelfth day of March, 1877, he being at that time the sole owner of the building and of the goods contained in it. The policy was renewed from year to year, the last one being dated March 12, 1898, and extending until March 12, 1899. The fire occurred in August, 1898, the assured being then alive. He did not die until October, 1899. Now, at the time of the fire, the goods insured had, by act of the assured, become, *in their entirety*, the property of Martin Brothers, a firm or society composed of two sons of the assured as active partners, and of himself as silent partner. The father turned over the business to the control and management of the two sons, and to them surrendered the custody of the goods constituting the stock in trade. At what date the sons acquired their interests in the goods and in the business does not distinctly appear. But it was before the fire; and of the change whereby the father ceased to be the sole owner of the goods described in the renewal policy and whereby also they became the property of the firm of Martin Brothers, no notice whatever was given to the company prior to the fire.

The question is whether such change in the ownership of the goods insured—no change occurring in the ownership of the building—discharged the company from all liability on the policy under that clause providing that the policy should cease "to be in force as to any property hereby insured which shall pass from the insured to any other person otherwise than by due operation of law, unless notice thereof be given to the company, and the subsistence of the insurance in favor of such other person be declared by a memorandum endorsed hereon by or on behalf of the company."

Upon the question whether an insurance policy, of the gen-

eral class to which the one in suit belongs, continues in force after a sale or transfer by the assured of his interest in the property insured, the adjudged cases are by no means in accord, and it will serve no useful purpose to make an extended review of them and show wherein they differ. It will be found upon examination that each policy contained language peculiar to itself, and upon that language the particular case turned. Of course, in every case, the fundamental inquiry must be as to the intention of the parties, to be gathered from the words of the policy; always, however, interpreting the policy most favorably for the insured, where it is reasonably susceptible of two constructions.

On the face of the policy in suit it appears that the buildings and the goods contained in them were insured separately, seven hundred pounds on the building and nine hundred pounds on the stock in trade. One construction of the policy is that if either the building *or* the stock in trade should pass from the assured to another person, then the policy should cease as to *all* the property insured. But another construction, the one most favorable to the assured, which is not unreasonable, and which is not forbidden by the words used, is that as the building and the stock in trade were separately insured the policy should cease to be in force only as to the particular property insured that passed from the assured without notice to the company. The latter is the better construction, and we hold that it is to be considered as if the building was covered by one policy and the goods by another. Whatever may have been the extent of the interest acquired by the firm of Martin Brothers in the goods, no interest in the building passed to them. The building remained, in its entirety, the sole property of the assured, up to the time of the fire, and the policy may reasonably be and therefore ought to be so construed as not to preclude a recovery in respect of its destruction by fire.

But in respect of the goods in question, the case depends upon other considerations. When the goods were insured they were in their entirety the sole property of Francisco

Martin, the assured. He was the legal owner of the whole of them. They were in his custody, and subject to his exclusive control. But at the time of their destruction by fire the ownership of the goods, in their entirety, had, by transfer from the assured, passed to Martin Brothers, and became, without notice to the company, subject to the exclusive control, in their entirety, of that firm. Such a change of ownership and control, it must be held, avoided the policy, unless it was kept alive by the mere fact that the assured although taking no active part in the business of the firm was yet a silent partner, and as such had some interest in the insured property. But that fact cannot be given the weight suggested without ignoring altogether the reasons which, it must be assumed, induced the company to incorporate into its policy the provision that if any property insured passed from the assured to another person without notice to the company, the policy should cease to be in force. It may well be that an insurance company would be willing to insure property owned by a particular person of whose character and habits its agent had knowledge or information, but unwilling to insure the same property if owned by that person in connection with others. Prudence requires that a company, before insuring against fire, should be informed as to the actual ownership of the property proposed to be insured, and know who, in virtue of such ownership, will be entitled to its custody and to control it during the term of the policy. The provision that the policy in this case should cease to be in force from the moment the insured property passed from the assured to others without notice to the company implied not only that the company relied upon the integrity and watchfulness of the assured, but that if he looked to the company for indemnity against loss by fire he must take care not to allow the property to "pass" from him to others, without notice to the insurer. The assured, without notice to the company, did pass the goods in question to a firm, each member of which thereby acquired an interest *in the whole of the goods* transferred. The ownership of the firm was in law

and in fact distinct from the original sole ownership of the assured. Practically, for all purposes of guarding the goods insured against destruction by fire, they passed to the active partners who were strangers to the property at the date of the policy—the assured, as a silent partner, retaining no interest in any particular part of the goods, and being under no obligation as between himself and the active partners, to care for the safety of the property. Its safety, after the transfer, depended altogether upon the watchfulness of the active partners in whose possession the goods were up to the fire. It only remained for the original sole owner, after passing the goods in their entirety to the firm of Martin Brothers, in which he was a silent partner, to receive such profits as accrued to him from their use in the business as conducted by the active partners.

We are of opinion that the case was not tried in accordance with a sound construction of the terms of the policy relating to the goods insured. The court proceeded upon the ground that there was no evidence of such alienation or change of ownership as avoided the policy in respect of the goods. In this error was committed, and a new trial must be had in conformity with the views we have herein expressed.

The judgment of the court below is reversed, and the cause is remanded with directions to set aside the judgment and grant a new trial.

Reversed.

WARD *v.* SHERMAN.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 25. Argued October 15, 16, 1903.—Decided January 11, 1904.

Where the holder of a defaulted mortgage on a cattle range and cattle accepts the property in payment of the debt in pursuance of a written contract and enters into possession, treating the property as his own for all purposes, the former owner cannot, in the absence of fraud or mistake, after three and a half years obtain a rescission of the contract and treat the vendee as merely a mortgagee in possession. The doctrine of laches applies.

The fact that the vendor failed to deliver part of the property and the vendee commenced an action for the value thereof, alleging such value as the unpaid balance of the original debt, does not amount to a repudiation on his part of the contract of sale, the affidavit accompanying the complaint stating that the debt sued for was not secured by mortgage or otherwise.

Where an action is not brought in proper form but the plaintiff's intention is manifest equity will not destroy rights on account of a mere technical mistake of counsel.

THE facts in this case are few and beyond dispute, most of them being shown by the averments in the answer of the defendant Sherman. On August 23, 1889, Ward, the plaintiff and appellant, sold to the defendants the Sunflower range, together with the cattle thereon and other personal property. A conveyance was by agreement made to the defendant Hardenberg, who, to secure a part of the purchase price, to wit, $25,000, evidenced by two notes of $12,500 each, made by Hardenberg and guaranteed by Sherman, executed a mortgage of the cattle and some other property. Thereafter the defendants incorporated themselves under the laws of the Territory of Arizona as the Sherman-Hardenberg Cattle Company, and transferred to it all of the property above mentioned,

subject to the payment of the two notes held by the plaintiff. On September 12, 1894, an agreement was entered into between the company and the plaintiff which, after reciting the indebtedness, reads as follows:

"Whereas, the said party of the second part is unable to pay to said party of the first part the said sum of $14,500 due on October 1, 1894, and has notified said party of the first part that it will be unable to pay said sum at said time; and

"Whereas, said party of the second part desires to deliver up and turn over to said party of the first part all of the property heretofore purchased by one David Hardenberg of the party of the first part, and for which said notes were given as a part of the purchase money:

"Now, therefore, in consideration of the promises and agreements of said party of the first part, the said party of the second part hereby agrees to and with said party of the first part to transfer and convey by proper deeds of conveyance and bills of sale all of the real and personal property heretofore purchased by the said David Hardenberg of the said party of the first part; also, all personal and real property owned by the said party of the second part in the Territory of Arizona, in whomsoever's name the same may now stand, to said party of the first part, and more particularly described as follows, to wit: The Sunflower Cattle Range in Maricopa County, Arizona Territory; all cattle, horses, mules or burros branded with either of the following brands: Diamond brand, thus: ◇; H. B. brand, thus: HB; also all wagons, mowing machines, farming implements and camp outfit, and everything pertaining to or used by said Sherman-Hardenberg Cattle Company, excepting only from the provision of said conveyance such cattle as shall have been sold and delivered by said Sherman-Hardenberg Cattle Company prior or to September 1, 1894, it being understood that all stock cattle which may have been sold subsequent to September 1, 1894, shall be accounted for by the party of the second part to said party of the first part.

"That in consideration of the said party of the second part

conveying to said party of the first part all of the property hereinbefore described within thirty days from the date hereof, and delivering possession of the same to said party of the first part or his authorized agent, in said county of Maricopa aforesaid, the said party of the first part hereby covenants and agrees to deliver to said David Hardenberg and one M. H. Sherman two promissory notes, each for $12,500, one of which matures on October 1, 1894, and one of which matures on October 1, 1897, heretofore executed by the said Hardenberg and Sherman to the party of the first part; also to release the said Hardenberg and Sherman from the payment of all interest due thereon, and to cancel and discharge a certain chattel mortgage executed by the said David Hardenberg to the said party of the first part, for the purpose of securing the payment of said notes, which said mortgage is now on file and of record in the office of the county recorder of Maricopa County, in the Territory of Arizona.

"In witness whereof, the said party of the second part, The Sherman, Hardenberg Cattle Company, has executed these presents in its corporate name, by its president, and the said party of the first part has executed these presents the day and year first above written."

The following instrument was also executed:

"PHOENIX, ARIZONA, *Sept.* 29, 1894.

"To J. M. WARD, ESQ.:

"The Sherman-Hardenberg Cattle Company hereby authorizes you to enter upon and take possession of all the property belonging to the Sherman-Hardenberg Cattle Company, in accordance with and as described in that certain contract entered into by and between the Sherman-Hardenberg Cattle Company and yourself, bearing date on the 12th day of September, A. D. 1894.

"That on receipt of said property you are to turn over to the Sherman-Hardenberg Cattle Company, at the office of C. F. Ainsworth in Phoenix, Arizona, the notes described in the

contract, and also to cancel the chattel mortgage held by you on the property therein referred to.

"THE SHERMAN–HARDENBERG CATTLE CO.,
"By C. F. AINSWORTH, *Its Secretary.*

"I hereby authorize H. C. Ward as my agent to rec. the above described property for me.

"J. M. WARD."

All the property mentioned in this agreement was turned over to Ward except, as he claimed, 104 head of cattle. Ward retained possession of the property and managed it as his own, but did not cancel the mortgage or surrender the notes, insisting that he was entitled to receive the 104 head of cattle or else their value.

On June 12, 1895, he commenced an action in the District Court for the county of Maricopa, in which he set forth a copy of the first of the notes, and alleged that there was due thereon the sum of $1500. At the same time he filed an affidavit for an attachment, in which he averred that the payment of the note was not secured by mortgage or lien upon any real or personal property, or any pledge of personal property, and that the amount due was $1500. No property was attached and no service of process made until May 6, 1899, and then only on the defendant Sherman, who thereupon filed an answer and counterclaim, which was in the nature of a cross-bill in equity, in which he set up the purchase from Ward, the organization of the company, the transfer to the company of the property purchased and the agreement for the delivery of the property to Ward and the return of the notes and cancellation of the mortgage, and alleged that though the property had been delivered the notes had not been returned nor the mortgage cancelled. He also alleged a transfer by the company to himself of all its rights and claims.

The trial court found the facts as above stated in respect to the original transactions between Ward and defendants, the organization of the company, the transfer to it and by

it to Sherman; and, further, in reference to the transaction between the company and Ward in 1894 it found as follows:

"5. That during the month of September, 1894, and before the maturity of the first note, the Sherman-Hardenberg Cattle Company attempted to make a settlement with the plaintiff, by agreeing to turn over to him the Sunflower range, all the cattle then on the range, also the desert wells, and other property which it had, which was not included in the mortgage, on condition that said plaintiff turn over and deliver up the two notes aforesaid, with the interest thereon, and cancel and satisfy the mortgage securing the same.

"6. That this contract was never carried out on the part of the plaintiff; but that acting under it he took possession of all the property of the Sherman-Hardenberg Cattle Company, as aforesaid, on or about October 1, 1894; but never turned over, delivered or cancelled said notes, or either of them; or satisfied or discharged the chattel mortgage securing the same. And that, on the contrary, he brought suit on one of said notes for the collection of a portion that he claimed to be due thereon. At the time he brought this suit on the note maturing October 1, 1894, the other note had not matured."

It thereupon adjudged that Ward was a mortgagee in possession, and after finding the disposition which he had made of the property entered a judgment in favor of the defendant Sherman for $17,173.50, and decreed the cancellation of the notes and mortgage.

By section 1 of an act of the territorial assembly, Laws Arizona, 1897, p. 127, it is provided that in a case appealed to the Supreme Court of the Territory the appellant may have the testimony taken in the trial transcribed and certified by the court reporter, and filed with the papers in the case, and that thereupon it shall "become and be a part of the record in said cause;" and be transmitted to the Supreme Court of the Territory with the other papers in the case. That was done in this case, and part of the record taken to the Supreme Court

of the Territory and brought here is the duly certified transcript of the testimony taken on the trial.

Section 2 of that act also provides that it shall not be necessary "to file with the Supreme Court any transcript, assignment of errors or other papers except as herein provided." Section 3 requires the plaintiff in error, or appellant, to make an abstract of the record for the benefit of the opposite party and the Supreme Court. Sections 4 and 5 are as follows:

"SEC. 4. Each party shall prepare and print or typewrite an argument of the points and authorities relied on. The briefs of both sides shall begin with a succinct statement of so much of the record as is essential to the questions discussed in them, referring to the printed abstract by folios and sufficient to dispense with the reading of the printed abstract on the argument. The brief of the plaintiff in error or appellant shall also next contain a distinct enumeration in the form of propositions of the several errors relied on, and all errors not assigned in the printed brief shall be deemed to have been waived. It shall not be necessary to assign or file any assignment of errors in the court below or Supreme Court, except those assigned in the brief of the plaintiff in error or appellant.

"SEC. 5. All rulings made by the court below in opposition to the plaintiff in error or appellant shall be taken as excepted to by the party appealing or suing out the writ of error, and when assigned as error in the brief shall be reviewed by the Supreme Court without any bill of exceptions or other assignment of errors as herein provided."

The record discloses that in the Supreme Court the appellee moved to strike from the files appellant's abstract of record. No action appears to have been taken upon this motion. The record also discloses that leave was given to the appellant to file a supplemental brief. Neither the original nor the supplemental brief, if one was filed, is before us.

Mr. A. B. Browne and *Mr. A. A. Hoehling, Jr.*, with whom *Mr. C. S. Wilson* was on the brief, for appellant.

Mr. C. F. Ainsworth for appellee.

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

The Supreme Court of the Territory, without considering the merits of the case, affirmed the judgment on the ground that the assignment of errors was insufficient, citing in its opinion from a rule of practice which had been prescribed by it and in force for many years: "All assignments of errors must distinctly specify each ground of error relied upon, and the particular ruling complained of. . . . An objection to the ruling or action of the court below will be deemed waived here, unless it has been assigned as error, in the manner above provided." Undoubtedly the assignment of errors was general in its terms. An application was made to the Supreme Court for leave to amend the assignment of errors, but it was denied. In a short *per curiam* opinion that court, after condemning the assignments as insufficient, said:

"The rules relating to assignments and specifications of error have been so long in force, and we have so often decided that a failure to make proper assignments amounts to a waiver of all errors which are not fundamental, that it would seem there should be no longer occasion for disregard of these plain requirements. In the absence of any assignment of error in this case, and none appearing upon the face of the record, the judgment must be affirmed."

We shall not stop to inquire whether the court erred in refusing to permit an amendment of the assignment of errors, but accepting its conclusion that the failure to make proper assignments is "a waiver of all errors which are not fundamental," and bearing in mind the provisions of section 5 of the statute of 1897, that all rulings made by the court below in opposition to the plaintiff or appellant are to be taken as excepted to, we proceed to inquire whether there was not a fundamental error which should have been corrected by the

Supreme Court. We are of opinion that there was. It may be assumed, as no objection was made on that account, that the counterclaim, which was in its nature a bill in equity for the redemption of the mortgaged property, was properly filed in this action to recover money. Can such a bill be sustained under the circumstances disclosed by the answer? It appears from that answer that the property was turned over to Ward to hold, not as mortgagee, but under a contract by which he was to take the property in satisfaction of the debt, cancel the mortgage and return the notes. In other words, according to the averments of the answer a contract of sale was made by the company to Ward, and under the contract of sale Ward took possession. Now, even if it be conceded that Ward's failure to perform was such a breach of the contract as entitled the company to rescind and thereafter to treat Ward as a mortgagee in possession, a bill in equity to enforce such a decision must be presented within a reasonable time. The right to rescind is an affirmative right, asserted by the vendor, the former mortgagor, and, being such, it must be asserted by him within a reasonable time. The answer alleges that on or about October 1, 1895, this agreement was made and the property delivered, but it was not filed until May 16, 1899, more than three years and a half thereafter. During all that time, Ward was in possession of the property, managing and dealing with it as his own. Can it be that a vendor can wait three years and a half, permit the vendee to deal with the property as his own—that property being of a value variable from year to year and requiring constant care to make it prosperous—give his time and labor to its management, take the chances of rise or fall in the market, and then, if it turns out that the business has been prosperous through his efforts, insist on account of some technical failure upon a rescission of the contract, and that the party who has been supposing himself the owner, and acting as such, shall be treated as a mortgagee in possession, and held to account for the success of his business efforts? In Pollock's Principles of Contracts, p. 515, the author says:

"The contract must be rescinded within a reasonable time, that is, before the lapse of a time after the true state of things is known, so long that under the circumstances of the particular case the other party may fairly infer that the right of rescission is waived."

See also *Grymes* v. *Sanders*, 93 U. S. 55; *McLean* v. *Clapp*, 141 U. S. 429, 432.

But was there any ground for the rescission of the contract? There was no fraud, mistake or false representations. There is no suggestion that the contract was not entered into with full knowledge or that it was unfair in any of its details. The complaint merely is that Ward was guilty of a breach of one of its stipulations. If so, the company was entitled to damages for that breach, but no damages are shown. The company paid nothing; has lost nothing. So far as disclosed it went out of business, and therefore the failure to release the mortgage could not have injured its business credit. But whatever may be the rights, other than a simple claim of damages for breach of contract, possessed by the company and transferred by it to the defendant Sherman, they are equitable in their nature, and in respect to them the general doctrine of laches applies. We have often had occasion to consider the question of laches. In *Galliher* v. *Cadwell*, 145 U. S. 368, 373, and *Penn Mutual Life Insurance Company* v. *Austin*, 168 U. S. 685, are collected the decisions of the court. In the former of these cases it is said, p. 372.

"They (the adjudicated cases) proceed on the assumption that the party to whom laches is imputed has knowledge of his rights, and an ample opportunity to establish them in the proper forum; that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless, or have been abandoned; and that, because of the change in condition or relations during this period of delay, it would be an injustice to the latter to permit him to now assert them." And again, p. 373:

"But it is unnecessary to multiply cases. They all proceed

upon the theory that laches is not, like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties."

And in the last case, p. 698:

"The reason upon which the rule is based is not alone the lapse of time during which the neglect to enforce the right has existed, but the changes of condition which may have arisen during the period in which there has been neglect. In other words, where a court of equity finds that the position of the parties has so changed that equitable relief cannot be afforded without doing injustice, or that the intervening rights of third persons may be destroyed or seriously impaired, it will not exert its equitable powers in order to save one from the consequences of his own neglect."

Apply these considerations to the case at bar. The property was turned over on a contract of sale. Ward was left in possession for over three years and a half without a suggestion of any claim that he was only a mortgagee in possession. He had a right to believe that he was the owner. If the contract had not been made he could have foreclosed his mortgage and acquired title by sale under foreclosure proceedings. He dealt with the property as his own. He gave his time, skill and labor to the work of caring for it. It is impossible to replace the parties in the situation they were in at the time the contract was made. It would be grossly inequitable to deprive him of the benefit of his time, skill and labor, and give it to the mortgagor, who all those years did nothing and gave no notice of any question of the completeness of Ward's title. It seems to us that the doctrine of laches applies with force, and that upon the pleadings the court should have adjudged the defendant not entitled either to a rescission of the contract or to hold the vendee as a mortgagee in possession.

If we look beyond the pleadings to the testimony (and that, as we have seen, was by virtue of the statute made a part of the

record of the case in the Supreme Court) the error of the trial court is even more apparent.

The agreement of September 12 provided for the transfer and conveyance of all cattle on the Sunflower range, branded with the named brands, "excepting only from the provision of said conveyance such cattle as shall have been sold and delivered by said Sherman-Hardenberg Cattle Company prior or to September 1, 1894, it being understood that all stock cattle which may have been sold subsequent to September 1, 1894, shall be accounted for by the party of the second part to said party of the first part." By this all the cattle belonging to the company on September 1 were to be transferred to the plaintiff, and if any of such cattle had been sold subsequently to September 1 they were to be accounted for by the company to the plaintiff. Further, the agreement stipulated for the delivery and cancellation of the notes and mortgage "in consideration of the said party of the second part conveying to said party of the first part all of the property hereinbefore described within thirty days from the date hereof, and delivering possession of the same to said party of the first part or his authorized agent, in said county of Maricopa aforesaid." By the undisputed testimony two lots of cattle, one of 69 or 70 head and the other of 34 or 35 head, were sold and delivered by the company to other parties than the plaintiff after the first of September. Therefore the company was to account for those cattle so sold and delivered, and the duty resting upon Ward to surrender and cancel the notes and mortgage was conditioned upon the delivery within the county of the property described within thirty days from September 12. In short, the terms of the contract were clear. Ward performed all that he was under obligations to perform. The default was on the part of the company. Ward took possession of the property delivered, managed it successfully for several years, and still the court held that the defaulting party could take advantage of its own default, appropriate the entire profits of Ward's care and ability, and upon that basis adjudged against Ward the

return of all the property then in his possession and the payment of over seventeen thousand dollars. But it is said that Ward himself repudiated the agreement because he brought suit on the first of the notes. There may have been a technical mistake in the form of the action, but there was no repudiation of the agreement, as is shown by the fact that the complaint only asked judgment for $1500, and that Ward filed with the complaint an affidavit for an attachment, in which he averred that the payment of the sum due was "not secured by any mortgage or lien upon real or personal property or any pledge of personal property." But equity will not destroy rights on account of a mere technical mistake of counsel. It may be conceded that Ward should have brought an action in form for the value of the cattle not delivered, but it is manifest that that value was all that he was seeking to recover.

The judgment of the Supreme Court of Arizona is reversed and the case remanded to that court with instructions to reverse the judgment of the District Court and remand the case to that court for further proceedings in conformity to the views herein expressed.

WABASH RAILROAD COMPANY *v.* PEARCE.

ERROR TO THE ST. LOUIS COURT OF APPEALS OF THE STATE OF MISSOURI.

No. 112. Submitted December 18, 1903.—Decided January 11, 1904.

Where not only the scope and applicability of the doctrine of subrogation is involved, but also the extent to which a common carrier is protected by the laws of the United States in paying customs duties exacted thereunder on goods in transit over its lines, a Federal question is presented, which, when properly set up in the state courts, is subject to review by this court.

A common carrier has, under the laws of the United States, a lien entitling it to possession until paid, on goods in transit over its lines for legal im-

port duties paid thereon by it either directly to the Government or to a connecting carrier which has already paid the same.

Where a contract of shipment, from a point without to a point within the United States over the lines of several carriers, provides that each carrier shall be liable only for loss or damage accruing on its own lines the last carrier is not responsible for damages resulting from an examination by customs officers at a point not on its own line, and different from the point to which the contract provided that the goods should be delivered in bond.

On June 25, 1895, Charles E. Pearce, the testator of the defendants in error, commenced his action in replevin in the Circuit Court of the city of St. Louis, Missouri, to recover from the railroad company four boxes of curios. After answer a trial was had before the court without a jury, resulting in a judgment for the plaintiff, which, on May 7, 1901, was affirmed by the St. Louis Court of Appeals. 89 Mo. App. 437. An application to transfer the case to the Supreme Court of the State on the ground that it involved the validity of a statute of or authority exercised under the United States was denied, *State ex rel.* v. *Bland*, 168 Missouri, 1, and thereupon it was brought here on writ of error.

The facts are undisputed, and are as follows: Pearce was the owner of the curios, and in Yokohama, Japan, shipped them to St. Louis. The bill of lading was issued by the Canadian Pacific Railway Company, and recited that the goods were shipped upon the company's steamer, Empress of India, to be carried to Vancouver, British Columbia, and thence over the Canadian Pacific and connecting lines to St. Louis, Missouri. The boxes were carried to Vancouver and thence by the Canadian Pacific Railway Company over its own and a connecting line controlled by it to St. Paul, Minnesota. Upon arrival at St. Paul the custom officers took possession of the boxes, opened and examined the contents, and duly assessed the duties thereon at $264.31, which sum was paid by the railway company and had to be paid in order to regain possession and forward the goods. The goods were thereafter delivered to the Chicago, Milwaukee and St. Paul Railway Company, by

it to the defendant at Given, Iowa, and by the latter carried to St. Louis. The inspection at St. Paul was in strict accordance with the laws of the United States and the duties exacted were properly chargeable upon the goods. When the defendant received the goods from the Chicago, Milwaukee and St. Paul Railway Company it became responsible under its traffic agreements for the payment of the charges then on the goods, including the custom duties, and has since paid those charges. On receipt of the goods in St. Louis they were tendered to the plaintiff upon payment of the charges. The goods were shipped in bond to St. Louis and this was so marked on the boxes. If they had been transported to St. Louis in bond, as they should have been, they would there have been opened and examined and retained in the custody and possession of the custom officers, not only during examination and inspection, but also until the duties were paid.

Mr. Wells H. Blodgett and *Mr. George S. Grover* for plaintiff in error:

The answer tendered a defence based upon an authority exercised under a statute of the United States. This confers jurisdiction upon this court to hear and determine this controversy. Section 709, Revised Statutes of the United States; U. S. Compiled Statutes, 1901, vol. 1, p. 575.

The government of the United States had, until the payment was made to it, a prior and paramount lien on the goods for the duty which Major Pearce has refused to pay. Overton on Liens, § 656, p. 709, and cases cited; *Hodges* v. *Harris*, 6 Pick. (Mass.) 360; §§ 3095 *et seq.*, Rev. Stat. U. S. 1878, pp. 594 *et seq.*; §§ 3058 *et seq.* Compiled Stat. U.S. 1901, vol. 2, pp. 2004 *et seq.*

The plaintiff in error has, also, a valid lien on the goods in question for the charges advanced by it to its connecting line, in the usual course of business. Ray on Freight Carriers, § 102, p. 407, and cases cited; Hutchinson on Carriers (2d ed.), § 478*a*, p. 541, and cases cited; Schouler on Bailments, p. 544, and

cases cited; *Wells* v. *Thomas*, 27 Missouri, 17; *Moore* v. *Henry*, 18 Mo. App. 41; *Armstrong* v. *Railway*, 62 Mo. App. 642; *Gerber* v. *Railway*, 63 Mo. App. 145.

The case here relied on by the defendants in error, *Mellier* v. *St. L. & N. O. Line*, 14 Mo. App. 281, is not in point, because there was no agreement here to transport the goods in question in bond; nor were they, as in the *Mellier case, supra*, lost in transit by reason of an attempted misdelivery to an irresponsible connecting carrier, who refused to receive them.

Under the contract of shipment in evidence, the plaintiff in error is not responsible for the injury and loss here claimed, as it is conceded that such injury and loss occurred beyond its own line. *Goldsmith* v. *R. R.*, 12 Mo. App. 479; *Orr* v. *R. R.*, 21 Mo. App. 333; *Myrick* v. *R. R.*, 107 U. S. 102; *Coates* v. *Express Co.*, 45 Missouri, 238; *Snider* v. *Express Co.*, 63 Missouri, 376; *Dimmitt* v. *R. R.*, 103 Missouri, 433; *Nines* v. *R. R.*, 107 Missouri, 475; *McCann* v. *Eddy*, 133 Missouri, 59.

The defendants in error cannot recover in this action, because the refusal of the plaintiff in error to deliver the goods until the charges were paid was a proper, and not a wrongful, act, and plaintiff in error has a perfect defence to this action under § 3100, U. S. Rev. Stat., with the subsequent amendments thereto. See authorities cited, *supra*.

Mr. Edward C. Kehr for defendants in error:

There is no Federal question in the case and the writ of error should be dismissed. The question was adjudicated between the parties by the Supreme Court of Missouri. *State* v. *Bland*, 168 Missouri, 1.

The Supreme Court of the United States is bound by the decision of the state court in regard to the meaning of the constitution and laws of its own State, and its decision upon such a state of facts raises no Federal question. *Turner* v. *Wilkes County*, 173 U. S. 461, 463; *Central Land Co.* v. *Laidley*, 159 U. S. 103.

The supposed subrogation by virtue of which the Wabash

Railroad Company claims to withhold the plaintiff's property, does not arise under any statute of or authority exercised under the United States. U. S. Rev. Stat. § 709.

To give the Supreme Court of the United States jurisdiction over the judgment of a state court, it must appear that the decision of a Federal question presented to that court was necessary to the determination of the cause, and that it was actually decided, or that without deciding it, the judgment rendered could not have been given. *Brown* v. *Atwell's Admr.*, 92 U. S. 327; *Citizens' Bank* v. *Board of Liquidation*, 98 U. S. 140; *DeSaussure* v. *Gaillard*, 127 U. S. 234; *Blount* v. *Walker*, 134 U. S. 607, 614; *Jersey City & B. R. R.* v. *Morgan*, 160 U. S. 288; *Sawyer* v. *Piper*, 189 U. S. 154.

Where the Supreme Court of a State decides a Federal question in rendering a judgment and also decides against the plaintiff in error on an independent ground not involving a Federal question and broad enough to maintain the judgment, the writ of error will be dismissed. *Hale* v. *Akers*, 132 U. S. 554, 564; *Murdock* v. *Memphis*, 87 U. S. 590, 634; *McManus* v. *Sullivan*, 91 U. S. 578; *Capital Bank* v. *Cadiz Bank*, 172 U. S. 425, 430.

St. Louis being a port of entry and delivery, the plaintiff was entitled under the laws of the United States to have his goods shipped and brought to St. Louis in bond, and at St. Louis to make his entry for the purposes of customs payment. The goods having been delivered to and received by the Canadian Pacific Railway, for transportation in bond to St. Louis, it became the duty of the carrier to transport the goods in bond to St. Louis, and, if so transported, they were not subject to examination and customs assessment at any point other than St. Louis. U. S. Rev. Stat. §§ 2994, 3102.

The carrier had no right to change the contract destination of the goods, nor to change their consignment from Schade & Co., St. Louis, to F. Jones, St. Paul, nor to do otherwise than to carry them in bond to St. Louis. *Mellier* v. *St. Louis & N. O. T. Co.*, 14 Mo. App. 281, 292.

The freight was prepaid to St. Louis. The carrier therefore has no freight lien on the goods. The money advanced in payment of the duties is no part of the cost of transportation and the carrier acquired no lien on the goods by paying them. *Steamboat Va.* v. *Kraft*, 25 Missouri, 76, 80; Hutchinson on Carriers (2d ed.), § 478.

The railroad company was not subrogated to the government's lien for the import duties. *Ætna Ins. Co.* v. *Middleport*, 124 U. S. 534, 547; *Hinchman* v. *Morris*, 29 W. Va. 673; *Griffing* v. *Pintard*, 25 Mississippi, 173; *Wallace's Estate*, 59 Pa. St. 401; *Mercantile Trust Co.* v. *Hart*, 76 Fed. Rep. 673; *Milwaukee & M. R. Co.* v. *Soutter*, 80 U. S. 517; *German Bank* v. *United States*, 148 U. S. 573, 580; *Wilkinson* v. *Babbitt*, 4 Dill. 207; Sheldon on Subrogation, § 241, p. 361.

Taxes are not debts. A tax is an impost levied by authority of government upon its citizens for the support of the State. *Carondelet* v. *Picot*, 38 Missouri, 125; *Blevins* v. *Smith*, 104 Missouri, 595; *State ex rel.* v. *Snyder*, 139 Missouri, 553.

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

Two questions are presented—one of jurisdiction and the other on the merits.

With regard to the first, the decision of the Supreme Court of the State is not controlling. It is not the province of a state court to determine our jurisdiction; and further, the Missouri statute, providing for a review of certain cases by the Supreme Court, is not identical with but more limited than section 709, Rev. Stat., which prescribes our jurisdiction over final judgments of state courts.

It is contended that the only question determined by the state court was the applicability of the equitable doctrine of subrogation, that no statute of Congress was suggested giving a right of subrogation in cases like this, and therefore that the decision of the state court rested upon a matter of general law. But the answer of the defendant, after stating the circum-

stances of the payment by the several carriers, alleged that it was "entitled to the first lien on said goods under the laws of the United States for the amount of said duties." Although no single statute was mentioned, it claimed a lien on the goods under and by virtue of the laws of the United States, and thus directly called for a determination of a Federal right. *Crowell* v. *Randell*, 10 Pet. 368; *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116, 142; *Furman* v. *Nichol*, 8 Wall. 44, 56; *Dooley* v. *Smith*, 13 Wall. 604. The question in fact presented and decided was not simply the scope and applicability of the doctrine of subrogation, but rather to what extent, considering the obligations cast by the revenue laws and the duties of common carriers as between themselves and the shipper, the carrier was protected by the laws of the United States in paying custom duties exacted under them. When we stop to consider the great volume of imports handled almost exclusively by common carriers, the owners or consignees being often in the interior of the country, this is obviously a question of supreme importance. And this question is solved not alone upon general principles of law, but involves an enquiry as to the effect of exactions made under authority of the statutes of the United States. We are, by section 709, Rev. Stat., given jurisdiction over the final judgments of state courts "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, privilege, or immunity specially set up or claimed." The contention of the railroad company is that payment of duties exacted under the statutes of the United States does not operate simply to release the goods, but also gives in cases like the present, to the carrier, the right and privilege of maintaining possession until it is reimbursed these duties. Is the statute to be considered simply as a demand for money, or does it also carry a grant to one situated as this carrier, of a right and privilege of possession? This right and privilege was specially set up and

claimed by the railroad company. Whether it existed was the substantial question presented and decided. And whether rightly or wrongly decided the presentation of the question, the claim of the right and privilege was, when denied by the state court, sufficient to give this court jurisdiction.

We pass, therefore, to consider the merits. Do the laws of the United States exacting the payment of duties at ports of entry justify the carrier in paying those duties, and give to it a lien therefor as against the owner? It must be remembered that the Government has not prescribed payment simply at the place of delivery, but has named the ports of entry at which, and at which only, payment can be made. Must the carrier insist that the owner shall be present at the place of entry to himself make payment, or, after notifying the owner, leave the goods in the hands of the Government officials to be held for the charges thereon, or, may the carrier pay the charges and maintain possession until reimbursed by the owner? It is unnecessary to consider what rights would exist if it were alleged that the goods imported were free from duty, or that there had been overcharges or wrongful conduct on the part of the Government officials. Here the regularity of the proceedings on the part of the Government officials and the correct amount of the duties collected are unquestioned.

We are of opinion that the custom laws of the United States are potent to fully protect the carrier in the payment of the legal duties charged upon goods in its possession. In order to fully understand the force and scope of any statute or body of statutes we must have regard to the conditions and circumstances for which the legislation was intended and under which it is to become operative. We are not narrowly to read the letter and ignore the state of affairs to which that legislation was intended and is applicable. As we have said, the great body of imports is subject to duties, and payment thereof is by statute specifically required to be made at certain places. These imports are brought in by carriers and distributed by them to the several places of destination.

It is unnecessary to cite authorities to the proposition that it is the common law duty of the carrier to receive, carry and deliver goods; that by virtue of this obligation it is entitled to retain possession until its charges are paid. Nor is this lien confined to the charges for its own transportation. The law is thus stated in Overton on Liens, sec. 135, p. 166:

"The lien attaches not alone for the particular item of charge for carriage due upon the goods, but for such other legal charges as the carrier, in the course of his duty, may have been compelled to expend upon their care, custody and preservation. As when a railway, in the transportation of live stock, as cattle, horses and swine, has been at expense of labor and money in feeding and preserving them, such expense is a legitimate charge in addition to their transportation. For the carrier is under special obligation to guard and protect such property, hence the propriety of a lien for such extraordinary expense and care. If a carrier, in the ordinary course of the business, pay back charges upon goods due to another carrier in the course of transportation, as they come to him, he may recover for such back charges and freight so paid; and the owner may seek his remedy for any damages done them against the party in whose hands it was done, or under his original contract of shipment."

See also Hutchinson on Carriers, sec. 478*a;* Ray on Freight Carriers, sec. 102. In Schouler on Bailments, p. 544, it is said:

"A common carrier, then, may usually retain particular goods, by virtue of his lien right, until the freight and charges due thereon for his whole transportation are paid or tendered him, and he cannot be compelled to give them up sooner. This lien, moreover, extends to all the proper freight and storage charges upon the goods throughout the whole of a continuous transit over successive lines; since the last carrier or final warehouseman may advance what was lawfully due his predecessors, and hold the property as security for his reimbursement."

In making payment to a connecting carrier of its freight

charges the carrier is not a mere volunteer, such as is referred to in *Ætna Life Insurance Company* v. *Middleport*, 124 U. S. 534.

All this was matter of common knowledge, and upon this the legislation in respect to duties was enacted. Is it to be supposed that Congress intended that protection to the carrier should depend upon the perhaps varying opinions of the courts of the different States as to whether in making payment the carrier was a mere volunteer, or whether it can be subrogated to the rights and remedies of the nation? It must be remembered that the importation of goods is a subject of national and not of state regulation, that such power of regulation continues until the final delivery of the imported articles, so that over the entire transportation of these goods to St. Louis, the place of delivery, the power of Congress was supreme and exclusive. It must also be remembered that bonded goods are, by section 2993, Rev. Stat., deliverable only to carriers designated by the Secretary of the Treasury, which are made responsible to the United States, and are required to give bond to the United States in such form and amount and with such conditions and security as the Secretary of the Treasury shall require. Is it not reasonable to hold that Congress—having in mind the duty of carriers in reference to transportation and delivery, their customary lien for charges, and their right to retain possession during transit—in directing the custom house officers to take goods out of a carrier's possession, inspect and hold until the duties are paid, intended that upon payment the Government lien should pass to the carrier with a view of enabling it to discharge its duty of carriage and delivery to the consignee? It was not necessary to specifically state that the Government's lien was transferred, for when Congress provided by statute for interrupting the carrier's common law right of possession, it is implied that the action necessarily taken by the carrier to regain possession shall work no injury to the rights which flow from possession. Such, it seems to us, is the fair import of this legislation, enacted, as it was, in view of the

well recognized rights and duties of carriers. The defendant should not, therefore, have been deprived of the possession of the goods without a repayment of the duties.

It is insisted, however, that the goods were shipped in bond to St. Louis, that the Canadian Pacific for its own convenience wrongfully changed their bonded destination to the port of St. Paul, and that during the examination and inspection at St. Paul some of the curios were broken, and some lost, whereas if they had been shipped in bond to St. Louis they might have been opened and examined in the presence of the plaintiff and injury and loss prevented. Conceding this, and that the Canadian Pacific by its wrongful act was liable for the injuries resulting to the plaintiff, the contract of shipment stipulated that each of the parties employed in the carriage should be liable only for loss or damage accruing upon its own road, and that such carriers should not be jointly liable, nor either for any loss or damage accruing upon the road of the other; so that whatever claim the plaintiff may have had for such injury and loss was only against the Canadian Pacific, and could not operate to prevent the defendant company from receiving that which by its payment it was entitled to.

The judgment of the St. Louis Court of Appeals is reversed and the case remanded to that court for further proceedings not inconsistent with this opinion.

CROSSMAN *v.* LURMAN.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 117. Argued December 18, 1903.—Decided January 11, 1904.

Chapter 661, § 41, 1893, of the Laws of New York, prohibiting the sale of adulterated food and drugs is not repugnant to the commerce clause of the Federal Constitution but is a valid exercise of the police power of the State.

A contract made in New York, for the sale of goods to be delivered and stored in New York on arrival from a foreign port is a New York contract governed by the laws of New York even though the buyers be residents of another State.

The Act of Congress of August 30, 1890, 26 Stat. 414, prohibiting importation into the United States of adulterated and unwholesome food is not such an action of Congress on the subject as deprives the States of their police power to legislate for the prevention of the sale of articles of food so adulterated as to come within valid prohibitions of their statutes.

The fact that a demand exists for articles of food so adulterated by fraud and deception as to come within the prohibitions of a state statute does not bring the right to deal therein under the commerce clause of the Constitution so that such dealings cannot be controlled by the State in the valid exercise of its police power.

A purchaser cannot be compelled to accept or to pay damages for non-acceptance of an article of food so adulterated as to come within the provisions of a state statute prohibiting the sale thereof because notwithstanding the adulteration it is equal in grade to a standard specified in the contract.

THE facts are stated in the opinion.

Mr. Frederic R. Kellogg, with whom *Mr. Arthur J. Baldwin* was on the brief, for plaintiffs in error:

The state statute so far as it is sought to affect a contract between citizens of the State of New York, as sellers, and citizens of another State, as buyers, and relating to goods which at the time of the contract were located in a foreign country, and which pursuant to the contract were to be imported into the United States, is unconstitutional as an interference with foreign and interstate commerce, and cannot be defended as an exercise of the police power of the State of New York. *Plumley* v. *Massachusetts* has no application to this case.

The universally recognized basis of the police power of a State is the right to protect the health, morals, safety and property of *its* citizens. *License cases*, 5 How. 504; *Sherlock* v. *Alling*, 93 U. S. 103; *Robbins* v. *Taxing District*, 120 U. S. 489; *Smith* v. *Alabama*, 124 U. S. 476; *Bowman* v. *R. R.*, 125 U. S. 465; *Dent* v. *West Virginia*, 129 U. S. 114, 122; *Brimmer* v. *Rebman*, 138 U. S. 282; *Crutcher* v. *Kentucky*, 141 U. S. 47; *United States* v. *Knight*, 156 U. S. 1; *West. Union T. Co.* v.

James, 162 U. S. 653; *Re Sanders*, 52 Fed. Rep. 807; *Hennington* v. *Georgia*, 163 U. S. 299; *Schollenberger* v. *Pennsylvania*, 171 U. S. 1, 24; *Railroad* v. *Ohio*, 173 U. S. 285.

It is universally accepted as the law that not only is this police power based upon the right of the State to protect *its own* citizens in matters of purely local concern, but further that the exercise of this power is limited *by the necessity* which exists for such protection. *Hannibal R. R.* v. *Husen*, 95 U. S. 465; *Mo. R. R.* v. *Haber*, 169 U. S. 628; *Walling* v. *Michigan*, 116 U. S. 446.

Plaintiffs in error were deprived of constitutional rights in that they were not allowed to show among other things that the coffees in question were imported for the purpose of being resold in the southern and southwestern States of this country and not in the State of New York, and that therefore the police power of the State of New York could have no proper operation with regard to such coffees, and not being allowed to show that colored coffees precisely like those in question had been for a large number of years, established and recognized commercial articles in various portions of the United States other than the State of New York, and that therefore the statute in question as applied to deliveries of such coffees in the original packages in which they were imported into the United States and to non-residents of the State of New York was unconstitutional and void. *Schollenberger* v. *Pennsylvania*, 171 U. S. 1, 7.

The goods in question, even in the light of the jury's verdict, are not such improper articles as to be deprived of the protection afforded by the Constitution of the United States to articles of commerce.

The State could not under the guise of its police power prevent the sale of these goods in New York in the original packages in which they were imported. *Schollenberger* v. *Pennsylvania*, 171 U. S. 1, 28; *Hornblank* v. *Lagarle*, 60 Fed. Rep. 191.

As Congress has in the exercise of its power enacted legislation as to the importation of adulterated foods pursuant to

the terms of which the coffees in question were not adulterated and were properly imported into the United States, and as these coffees had been inspected and admitted into the United States by the United States officials, a state statute in effect prohibiting the delivery of such coffees in the original packages in which they were imported is unconstitutional and void.

Mr. Charles Stewart Davison for defendants in error:

The statute covers the case of the admixture of any ingredient which may render such article injurious to the health of the person consuming it; and the case of the mixing with the food of any substance so as to injuriously affect its quality. It will be on all hands conceded that this general law of the State of New York is not in any wise or aspect an act passed in bad faith with the intent or for the purpose of indirectly effecting some other result than that which is apparent upon its face. The many attacks which have been made before this court on state statutes which have attempted to interfere with commerce with foreign nations or between the States under the guise of being an exercise of the police power of the particular State find no parallel here. Indeed, no such suggestion is made. The statute contemplates only proper objects, under the decisions of this court, and stands as a valid exercise of the police power of the State in the nature perhaps of an inspection law, and permitting the state authorities under it at any time to lawfully exclude from the State or confiscate any article of food obnoxious to its provisions. *Bowman* v. *Chicago & Northwestern R. R. Co.*, 125 U. S. 465; *Schollenberger* v. *Pennsylvania*, 171 U. S. 1; *Plumley* v. *Massachusetts*, 155 U. S. 461. See opinion of Court of Appeals by Mr. Justice Haight, 171 N. Y. 329. For similar statutes of other States, see Alabama, Code, § 4074, adopted 1866; Texas, Penal Code, art. 432, 1894; Mississippi, Rev. Stat. 1892, §§ 2095, 2096; Tennessee, Code 1884, § 4829 (M. and V. 5632); Louisiana, Rev. Stat. 751, Laws, 1880, act. 20, p. 23; Laws, 1882, act 82, p. 103; Missouri, Rev. Stat. 1889, § 3879, and see act

of Congress 1890, ch. 839, §§ 2, 3. As to attitude of defendant in error, see *Matter of Lurman*, 90 Hun, 303, 309.

MR. JUSTICE WHITE delivered the opinion of the court.

The law of the State of New York contained the following: "SEC. 41. Adulterations.—No person shall within the State manufacture, produce, compound, brew, distill, have, sell or offer for sale any adulterated food or drug. An article shall be deemed to be adulterated within the meaning of this act: . . . in the case of food, . . . (6) if it be colored or coated, or polished, or powdered, whereby damage is concealed, or it is made to appear better than it really is, or of greater value." Laws of the State of New York of 1893, c. 661, section 41, being chapter 25 of the General Laws of the State of New York.

With these provisions in force, in July, 1894, the firm of Crossman & Brothers, hereafter referred to as the sellers, residents of New York city, by contract made in New York, sold to the firm of Theodore G. Lurman & Company, hereafter referred to as the buyers, residents of Baltimore, five hundred bags of Rio coffee, one-half the bags to be No. 8 grade and the other half No. 9 grade. It was stipulated that the coffee was to be shipped from Rio Janeiro to New York city by a designated steamer, the coffee to be sound or to be made sound by the sellers. The grades 8 and 9 referred to in the memorandum of sale were standard types, bearing those numbers, established by the Coffee Exchange of the city of New York, and it was agreed that the coffee was to be of the average of such types, and differences arising on the subject were to be determined by a "grader," to be selected by each of the parties, the two to select a third in the event of a disagreement, his decision to be conclusive. It was stipulated that on the arrival of the steamer and the storage of the coffee in New York the buyers were to have the advantage of the first month's storage and fire insurance, free of expense.

In due time the named steamer reached the port of New York, and the five hundred bags of coffee were stored and delivery tendered in New York city to the buyers. Some of the coffee was accepted and the remainder was rejected, on the ground that it was adulterated, because it had been artificially colored by coating the beans with a yellow wash. Without going into the details of what transpired between the parties as a result of the refusal to accept the coffee, it suffices, for this case, to say that ultimately the graders provided for in the contract were named, and on their disagreement a third was selected, who decided that, although the coffee had been coated with the wash, its average quality was yet equal to the specified types of the Coffee Exchange referred to in the contract. The buyers refused to abide by this finding and to accept delivery and pay for the adulterated coffee. The sellers then disposed of the coffee for account of the buyers, and commenced this suit to recover the difference between the amount produced by the alleged sale and the contract price. During the course of the litigation two trials were had, and the cause was twice passed on by the appellate division of the Supreme Court in and for the first judicial department. On the first hearing in the Supreme Court it was held, in accord with a decision of the Court of Appeals of the State of New York, rendered in a collateral controversy which grew out of the refusal to accept the coffee, *In re Lurman*, 149 N. Y. 588, that if the coffee was adulterated, within the statute of the State of New York, the buyers were not bound to accept, despite the finding of the grader that it conformed to the types of the Coffee Exchange, referred to in the contract. Finally, all incidental questions being eliminated, the cause was tried on the distinct issue whether the coffee was adulterated within the provisions of the statute. There was a verdict and judgment for the buyers, which was affirmed by the appellate division of the Supreme Court in and for the first judicial department. The cause having been then taken to the Court of Appeals of the State of New York, the court affirmed the

judgment of the Supreme Court and remitted the record to that court. 171 N. Y. 329. Because of such remittitur this writ of error to the Supreme Court is prosecuted to review the judgment of the Court of Appeals.

Concerning the facts of the case the Court of Appeals said, p. 335:

"The coffee tendered by the plaintiffs, which was rejected, was of a low grade, containing many poor, withered and black beans. It, confessedly, was colored and the beans coated with a yellowish substance. It is not contended that the coloring matter improved the taste or added to the value of the coffee. It is claimed that the only purpose of the coloring was to hide the character of the poor beans and to make them appear of the same character as the good coffee. The jury has found by its verdict that it was so colored as to conceal the damaged portions, or make it to appear better than it really was, or of greater value to the ordinary, untrained observer. In other words, that it was adulterated for the purposes of fraud and deception."

Applying the provisions of the health laws of the State of New York concerning the adulteration of food products already referred to, it was decided that the court below had correctly held that there was no obligation on the part of the buyer to take delivery and pay for the coffee if fraudulently colored in violation of the prohibitions of the statute. Coming to consider the contention of the sellers, that the provision of the law of the State in question was repugnant to the commerce clause of the Constitution of the United States, the Court of Appeals said, p. 331:

"The States have no power to regulate commerce with foreign countries or with each other. This power has been delegated to the Congress of the United States, and that body can, by law, determine what shall or shall not be permitted to be imported. With the right of importation follows the right of sale in original packages, and therefore the States cannot prohibit the sale of articles of commerce within their borders.

The States cannot, under the guise of inspection, or under their reserved police powers, prohibit the importation into their jurisdictions of sound meat, under the pretense that it may be damaged or decayed, or Texan cattle for fear they may be diseased, or spirituous or malt liquors for fear that they may intoxicate, or oleomargarine for fear it may be adulterated. *Railroad Co.* v. *Husen*, 95 U. S. 465; *Bowman* v. *C. & N. W. Ry. Co.*, 125 U. S. 465; *Leisy* v. *Hardin*, 135 U. S. 100; *Schollenberger* v. *Pennsylvania*, 171 U. S. 1."

Having thus fully conceded the plenary operation of the Constitution of the United States upon interstate and foreign commerce, the court proceeded to decide that the statute of the State of New York which it upheld was not repugnant to the commerce clause of the Constitution, because the State in its enactment but exerted its reserved police power to legislate for the protection of the health and safety of the community and to provide against deception or fraud. In support of this theory the court cited from the decisions of this court, to which it had referred, as showing the general rule, and additionally fortified its conclusion by reference to and citations from the opinion of this court in *Plumley* v. *Massachusetts*, 155 U. S. 461.

All but three of the many propositions embraced in the assignment of errors and urged at bar rest on the contention that the Court of Appeals misconceived the extent of the police power of the State, and therefore erroneously decided that the law of the State of New York which was applied to the case was not repugnant to the commerce clause of the Constitution of the United States. We shall not at any length undertake to review the argument made at bar to sustain this proposition, since its unsoundness will be fully demonstrated by a mere reference to the previous decisions of this court, upon which the court below based its conclusions. Indeed, every contention here urged to show that the law of New York is repugnant to the Constitution of the United States was fully and expressly considered and negatived by the decision of this court in *Plumley* v. *Massachusetts, supra.* In that case a law of the

State of Massachusetts forbidding the sale of oleomargarine, which was artificially colored, was applied to a sale in Massachusetts of an original package of that article which had been manufactured in and shipped from the State of Illinois. In the course of a full review of the previous cases relating to the subject it was said, p. 472:

"If there be any subject over which it would seem the States ought to have plenary control, and the power to legislate in respect to which it ought not to be supposed was intended to be surrendered to the general government, it is the protection of the people against fraud and deception in the sale of food products. Such legislation may, indeed, indirectly or incidentally affect trade in such products transported from one State to another State. But that circumstance does not show that laws of the character alluded to are inconsistent with the power of Congress to regulate commerce among the States. For, as said by this court in *Sherlock* v. *Alling*, 93 U. S. 99, 103: 'In conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislating on all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution. . . . And it may be said generally, that the legislation of a State, not directed against commerce or any of its regulations, but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit.'"

Again, it was said, p. 478:

"And yet it is supposed that the owners of a compound which has been put in a condition to cheat the public into believing that it is a particular article of food in daily use and eagerly sought by people in every condition of life, are pro-

tected by the Constitution in making a sale of it against the will of the State in which it is offered for sale, because of the circumstance that it is an original package, and has become a subject of ordinary traffic. We are unwilling to accept this view. We are of opinion that it is within the power of a State to exclude from its markets any compound manufactured in another State, which has been artificially colored or adulterated so as to cause it to look like an article of food in general use, and the sale of which may, by reason of such coloration or adulteration, cheat the general public into purchasing that which they may not intend to buy. The Constitution of the United States does not secure to any one the privilege of defrauding the public."

The assertion that the statute of the State of New York which the court below applied is repugnant to the commerce clause of the Constitution of the United States being thus shown to be devoid of merit, there remains only to be considered the three propositions to which we have previously adverted. We shall briefly consider and dispose of them.

1st. It is insisted that, even although it was in the power of the State of New York to legislate for the prevention of fraud and deception by forbidding the sale of the adulterated food products, such prohibition could only operate upon contracts made within or intended to be executed within the State, and as the contract here in controversy was not of such character, therefore the law of the State of New York was erroneously held to control. This proposition is based on the assumption that because the buyers of the coffee were residents of Maryland, therefore the contract must be treated as having been made for the purpose of securing the shipment of the coffee from Rio Janeiro to the residence of the buyers, hence the city of New York was referred to in the contract merely as the port of entry. It is insisted, *per contra*, that this proposition was not relied upon at the trial, nor called to the attention of the Court of Appeals of the State of New York, and should not be now considered, because if it had been raised below it would

have been met by proof showing that the buyers, although residents of Maryland, were engaged in carrying on a business for the sale of coffee in New York city. The suggestion that the proposition was not made below is borne out by the fact that it was not referred to by the Court of Appeals of the State of New York or in the several opinions handed down by the Supreme Court of the State of New York during the course of the protracted litigation which the cause has engendered. Be this as it may, however, we think the proposition is devoid of merit. The contract of sale was made in New York; the storage and delivery in the city of New York was therein provided for. It was clearly, therefore, a New York contract and governed by the law of New York.

2d. It is urged that, even although there was power in the State of New York to legislate on the subject of adulteration of food, such legislation ceased to be operative as regards food products imported into the United States through the channels of foreign commerce after the passage of the act of Congress approved August 30, 1890, "providing for the inspection of means for exportation, prohibiting the importation of adulterated articles of food or drink, and authorizing the President to make proclamation in certain cases." 26 Stat. 414. The second section of that act, it is insisted, does not exclude from importation adulterated food but simply adulterated food which is mixed with any poisonous or noxious chemical, drug or other ingredient injurious to health, which it is urged was not the case with the coffee in question. The language of the section upon which this contention is based is as follows:

"That it shall be unlawful to import into the United States any adulterated or unwholesome food or drug, or any vinous, spirituous or malt liquors, adulterated or mixed with any poisonous or noxious chemical, drug or other ingredient injurious to health."

We think it unnecessary to determine whether the statute lends even color to the proposition, since we think it is clear that its effect, whatever be its import, was not to deprive the

State of its police power to legislate for the benefit of its people in the prevention of deception and fraud, and thus to control sales made within the State of articles so adulterated as to come within the valid prohibitions of the state statute.

3d. In the trial court the plaintiff tendered evidence to demonstrate that there was a demand in some portions of the country for artificially colored coffee, and to the ruling of the court excluding such testimony as irrelevant exception was saved. Although the Court of Appeals, in its opinion, did not make any special reference to the subject, it is insisted that the question was called to its attention, and that in affirming the judgment it in effect sustained the action of the trial court in excluding the testimony, and thereby deprived the plaintiff of rights secured under the Constitution of the United States. The effect of the evidence, it is argued, had it been admitted, would have been to show that coffee artificially colored as a means of fraud and deception was a recognized article of commerce, and therefore the right to deal in it was protected by the commerce clause of the Constitution of the United States, and such dealings could not, therefore, be controlled by the state law. To state the proposition we think is to answer it.

It, moreover, is disposed of by the decisions of this court to which we have previously referred. Besides, the question which the case involved was the right of the sellers to contract for and deliver in the State of New York an article so adulterated and fraudulent as to be within the prohibitions of the law of New York. Further, the proof tending to show that coffee so adulterated and artificially colored as to be the convenient means of accomplishing fraud and deceit was in demand in some places outside of the State of New York, could have no legitimate tendency to cause trade in the adulterated and fraudulently deceptive article to become legitimate commerce.

Affirmed.

STANISLAUS COUNTY *v.* SAN JOAQUIN AND KING'S RIVER CANAL AND IRRIGATION COMPANY.

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

No. 80. Argued November 13, 30, December 1, 1903.—Decided January 18, 1904.

A corporation although organized under a general statute may nevertheless thereby enter into and obtain a contract from the State which may be of such a nature that it can only be altered in case the power to alter was, prior thereto, provided for in the constitution or legislation of the State.

The provision in the California Water Act of 1862 that county boards of supervisors should regulate water rates but could not reduce them below a certain point does not amount to a contract with water companies, which would be impaired within the meaning of the Federal Constitution by a subsequent act either reducing the rates below such point or authorizing boards of supervisors to do so.

Statutes of California providing that the use of all water appropriated for sale, rental or distribution should be a public use and subject to public regulation and control are valid.

To regulate or establish rates for which water will be supplied is, in its nature, the execution of one of the powers of the State, and the right of the State to do so should not be regarded as parted with any sooner than the right of taxation should be so regarded, and the language of the alleged contract should in both cases be equally plain.

Although there is a limitation to the power of amendment when reserved in the constitution or statute of a State it is not confiscation nor a taking of property without due process of law, nor a denial of the equal protection of the laws, to fix water rates so as to give an income of six per cent upon the then value of the property actually used, even though the company had prior thereto been allowed to fix rates securing one and a half per cent per month, and if not hampered by an unalterable contract a law reducing the compensation as above is not unconstitutional.

THE county above named has appealed directly to this court from a decree of the Circuit Court of the United States for the Northern District of California, setting aside an ordinance adopted by the board of supervisors of Stanislaus County on June 24, 1896, designating the water rates which were to be charged by the company (appellee) to its water consumers for

the ensuing year. The appeal here is on the ground that the case involved the construction or application of the Constitution of the United States, under section 5 of the act of 1891. 26 Stat. 826.

The company was incorporated in 1871, under an act of the California legislature approved in 1853, Stat. of 1853, p. 87, as amended in 1862, Stat. of 1862, p. 540. After its incorporation and the obtaining of the necessary land the company built a canal or reservoir at a cost, as alleged, of about a million dollars, and it is averred that the property was and is of that value. Subsequently to the completion of its works the company furnished water for irrigating purposes to its customers at rates fixed by it, which were not interfered with by the board of supervisors up to the time of the adoption of the above-mentioned ordinance of June 24, 1896. Soon afterwards the company commenced this suit for the purpose of obtaining a decree setting the ordinance aside and declaring it to be null and void, and decreeing that the company was entitled to have the rates for supplying its water to its customers and the users thereof generally so fixed that they would in the aggregate furnish a reasonable and just compensation for the services rendered and a fair, just and equitable return therefor.

The act of 1862 provided in section 3, as follows:

"Every company organized as aforesaid shall have power, and the same is hereby granted, . . . to establish, collect and receive rates, water rents or tolls which shall be subject to regulation by the board of supervisors of the county or counties in which the work is situated, but which shall not be reduced by the supervisors so low as to yield to the stockholders less than one and one-half per cent per month upon the capital actually invested."

On March 12, 1885, the legislature passed an act, Cal. Stat. 1885, page 95, providing for the fixing by the board of supervisors of a county of the rates to be collected by water companies. Section 5 of that act authorized the various boards of supervisors in the State to regulate and control the water

rates that might be charged in their respective counties by any person, company, association or corporation, and provided:

"Said boards of supervisors, in fixing such rates, shall, as near as may be, so adjust them that the net annual receipts and profits thereof to the said persons, companies, associations and corporations so furnishing such water to such inhabitants shall be not less than six nor more than eighteen per cent upon the said value of the canals, ditches, flumes, chutes and all other property actually used and useful to the appropriation and furnishing of such water of each of such persons, companies, associations and corporations; but in estimating such net receipts and profits the cost of any extensions, enlargements or other permanent improvements of such water rights or waterworks shall not be included as part of the said expenses of management, repairs and operating of such works, but when accomplished may and shall be included in the present cost and cash value of such work. In fixing said rates, within the limits aforesaid, at which water shall be so furnished as to each of such persons, companies, associations and corporations, each of said boards of supervisors may likewise take into estimation any and all other facts, circumstances and conditions pertinent thereto, to the end and purpose that said rates shall be equal, reasonable and just, both to such persons, companies, associations and corporations and to said inhabitants."

The complainant alleges in its bill that prior to March 12, 1885, at the time of the passage of the act of that date, the company and its incorporators had actually invested under the authority of the act of 1862 a capital amounting to $971,113.13 in money, all of which was actually, reasonably and necessarily expended by the complainant in the purchase and construction of its canals and other property actually used in and useful to the appropriation and furnishing of the water, and that the property was on the last named date and still is of the reasonable worth of $971,113.13. The complainant averred that if the act of 1885 was construed as repealing,

altering or amending the provisions of the act of 1862, as to rates to be charged by the company, then that the act of 1885 was in violation of and repugnant to the provisions of article I, section 10, of the Constitution of the United States, and as thus construed the act of 1885 impaired the obligation of the contract between the State of California and the complainant, entered into under the authority of section 3 of the act of 1862.

It was also averred that the rates, as fixed by the board under the act of 1885, would result in taking the property of the complainant without due process of law, and in depriving it of the equal protection of the laws.

An answer was put in taking issue with the complainant on the averments in its bill, and a trial was had in the Circuit Court. That court held, 113 Fed. Rep. 930, that there was a contract under the act of 1862, as contended for by the complainant; that the act of 1885 could not be so construed as to permit the board of supervisors, in fixing water rates by its authority, to entirely disregard the capital actually invested in the property of the corporation under the act of 1862, and that if otherwise construed the act of 1885 would run counter to the constitutional provision that no law impairing the obligation of a contract should be passed, and the statute would be subjected to the further objection that, as so construed, the State would deprive complainant of its property without due process of law, and would also deny to it the equal protection of the laws as provided for in the Federal Constitution, and that such provision could not be held subordinate to the constitutional power conferred upon the state legislature to alter, amend or repeal the general laws concerning corporations. It was also said by the court that it was the duty of the board of supervisors to ascertain the amount of the capital actually invested in the corporation; that is to say, the amount of the capital actually paid in and invested in constructing the canals and acquiring the other property used and made useful in supplying water to the customers of the corporation in Stanislaus County, and this fact should have been considered by the

board in fixing the water rates which the complainant was entitled to charge under the statute; that when the board of supervisors fixed the rates no consideration was given by it to the evidence showing the amount of the capital actually put into the corporation, or the actual, reasonable and proper cost of the works; that the evidence establishes the fact that the board failed to perform its duty in this respect, and that by reason thereof it deprived the complainant of its property without due process of law, and denied to it the equal protection of the laws.

The court found that the evidence showed that the rate fixed by the board of supervisors reduced the income of the company considerably below six per cent upon the capital actually invested in the property of the corporation, and if a corresponding reduction were made in Fresno and Merced Counties its income would, under the most favorable conditions, be reduced to less than five per cent per annum on the value of the property as estimated by the board of supervisors.

The court also held that the company had waived the right to fix rates as high as permitted under the act of 1862, by failing to make them as high as therein permitted, prior to the passage of the act of 1885, and the act of 1885, "providing that the net annual receipts as adjusted by the board of supervisors should not be less than six nor more than eighteen per cent per annum, is therefore properly applicable to the regulation of complainant's rates."

Mr. James P. Langhorne, with whom *Mr. Duncan Hayne* and *Mr. Frederic D. McKenney* were on the brief, for appellants.

Mr. W. B. Treadwell for appellee.

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

First. The question which first arises in this case is whether

there was a contract with the company under the act of 1862, by reason of which the State could not thereafter authorize the board of supervisors to reduce the rates so low as to yield less than one and one-half per cent per month upon the capital actually invested.

The acts of 1853 and 1862 are general laws, the former providing for the formation of corporations of the character named therein, and the latter amending that act, and especially providing for the incorporation of canal companies and the construction of canals. No special charter was given the company directly from the legislature otherwise than is contained in the powers granted by the two acts above named. A company, although organized under a general statute, may nevertheless thereby enter into and obtain a contract from the State which may be of such a nature that it can only be altered in case power to alter was, prior thereto, provided for in the constitution or legislation of the State.

In *Salt Company* v. *East Saginaw*, 13 Wall. 373, it was said by Mr. Justice Bradley, in delivering the opinion of the court, page 378, that:

"Corporations formed under general laws in place of special charters, like the Ohio banks under the general banking law of that State, are entitled to the benefit of specific provisions and exemptions contained in those laws, which are regarded in the same light as if inserted in special charters. 'The act is as special to each bank,' says Justice McLean, delivering the opinion of this court, 'as if no other institutions were incorporated under it.' In such cases the scope of the act takes in the whole period for which the corporation is formed. The language means that, during the existence of any corporation formed under the act, the stipulation of exemption specified in it is to operate."

The language used in conferring power to fix rates in the act of 1862 is to be taken as if it were contained in a special charter granted by the legislature to this company. The question then arises whether language such as is contained in the third

section of that act, and which is set forth in the foregoing statement of facts, amounts to a contract to be protected by the Constitution of the United States? We think it does not.

It seems to us that language of this nature cannot properly be construed as a promise or pledge that the limitation as to rates may not be altered at any time when in the judgment of the legislature it may be proper so to do. Water rates which might have been perfectly reasonable at the time of the passage of the act of 1862, although amounting to one and one-half per cent per month upon the capital actually invested, might in the course of years become exceedingly burdensome to those who used the water and amount to a very unreasonable compensation to the company for the water it sold. Irrigation by means of corporations formed to supply water was in its infancy in 1862 in California, and the risks necessarily taken in the organization of such companies and the prosecution of their work were then not only very large but also extremely uncertain in character. Consequently, a rate of compensation was proper at that time which in the course of years and the accumulated experience as to the necessary cost of such works, and of their successful operation including the consideration of the risk attendant upon their operation, would make a water rate, as provided by the act of 1862, a very unreasonable overcharge. These facts must have been present in the minds of those who enacted the legislation of 1862, and it would be most unreasonable to suppose that it was intended by any such legislation to forever thereafter tie the hands of the State in regard to all companies organized under the act of 1862 and before the passage of the act of 1885.

The authority given by the act of 1862 enabled the board of supervisors to conditionally regulate the rates. There is no promise made in the act that the legislature would not itself subsequently alter that authority. The State simply authorized its agents, the boards of supervisors, to regulate rates, but not to reduce them below a certain point. We do not think that from this language a contract can or ought to be

implied that the State might not thereafter authorize the boards to reduce them, or that it might not itself do so directly. Even as between individuals, such an implication would not be a reasonable one from the language used, and as the contract, if it existed, would take away from the legislature its otherwise undoubted right of regulation upon a subject of great public importance, there is still less reason for implying a contract which would prevent the State from using its power to that end for the future. The language of this portion of the act applies to the boards and limits their right of reduction, leaving unhampered the right of the State to interfere directly or by authorizing the boards to reduce the rates below the point stated in the act. In order to make such a contract the language must be plain and susceptible of no other reasonable construction. *Freeport Company* v. *Freeport City*, 180 U. S. 587, 599, citing *Railroad Commission Cases*, 116 U. S. 307, 325.

In our belief, the language of the act of 1862 does not and was not intended to form a contract, but simply amounted to the statement of the then pleasure of the legislature, to so remain until subsequently altered by it. The cases heretofore decided in this court are authority for this view. Some of them are now referred to.

In *Rector &c. of Christ Church* v. *Philadelphia*, 24 How. 300, the following language was used in the statute: "The real property, including ground rents, now belonging and payable to Christ Church Hospital, in the city of Philadelphia, so long as the same shall continue to belong to the said hospital, shall be and remain free from taxes." A subsequent law provided that all property belonging to an association or incorporated company which was then by law exempt from taxation should thereafter be subject to taxation in the same manner as other property. The later law was held not to be in violation of the Constitution of the United States. It was held that language such as this was nothing but in the nature of a privilege, which existed only during the pleasure of and might be revoked by the sovereign power whenever it chose so to do.

Salt Company v. *East Saginaw*, 13 Wall. 373, *supra*, was a case where the court held that the language used was that conferring a bounty, and that it did not amount to a contract in such a sense that it could not be repealed, although it did grant an exemption from taxation of the property used for the purpose of obtaining salt. In regard to the language exempting the property from taxation the court said:

"The law in question says to all: You shall have a bounty of ten cents per bushel for all salt manufactured, and the property used shall be free from taxes. But it does not say how long this shall continue; nor do the parties who enter upon the business promise how long they will continue the manufacture. It is an arrangement determinable at the will of either of the parties, as much so as the hiring of a laboring man by the day."

In *Tucker* v. *Ferguson*, 22 Wall. 527, it was also held that an act of the legislature exempting property of a railroad company from taxation was not a contract to exempt it unless there were a consideration for the act; that, without it, the promise was of a gratuity spontaneously made, which might be kept, changed or recalled, at pleasure, and that the rule applies to the agreements of States made without consideration as well as to those of persons.

In *Welch* v. *Cook*, 97 U. S. 541, the act of the legislative assembly of the District of Columbia of June 26, 1873, exempted from general taxes for ten years thereafter such real and personal property as might be actually employed within the District for manufacturing purposes. It was held that the language did not create an irrepealable contract with the owners of such property, but simply conferred a bounty, liable at any time to be withdrawn.

In *Grand Lodge &c.* v. *New Orleans*, 166 U. S. 143, the language exempted the property from taxation "so long as it is occupied as a Grand Lodge of the F. and A. Masons;" and it was held that it did not constitute a contract between the State and the plaintiff, but was a mere continuing gratuity,

which the legislature was at liberty to terminate and withdraw at any time.

In *Wisconsin & Michigan Railway Company* v. *Power*, decided at this term, 191 U. S. 379, the language of the act was: "That the rate of taxation fixed by this act or any other law of this State shall not apply to any railway company hereafter building and operating a line of railroad within this State north of parallel forty-four of latitude, until the same has been operated for the full period of ten years, unless the gross earnings shall equal four thousand dollars per mile." After the railroad company had been organized, and while that act was in force and on June 4, 1897, the State passed a law levying a specific tax upon the property and business of every railroad corporation operated within the State. The road in question would have been entitled to the exemption stated in the prior law if it were in force. The railroad contended that it had a contract by virtue of the language above set forth. This court held that no contract arose from the language used, and that consequently the subsequent act providing for taxation did not violate the Federal Constitution in regard to contracts.

Sufficient cases have been cited to show that language quite as strong as that used in the act of 1862 does not amount to a contract. It is true that the cases cited involved questions of alleged contracts for exemption from taxation, in regard to which it has been said that no presumption exists in favor of a contract by a State to exempt lands from taxation, and that every reasonable doubt should be resolved against it. Statutes of California providing that the use of all water appropriated for sale, rental or distribution should be a public use and subject to public regulation and control are valid, *San Diego &c. Company* v. *National City*, 174 U. S. 739, and companies formed for the purpose of furnishing water for irrigation purposes have been held in that State to be public municipal corporations, and the use of the water for the purpose mentioned a public use. See cases cited in *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112, 159. To regulate or establish rates for which

water will be supplied is in its nature the execution of one of the powers of the State, and the right of the State so to do should not be regarded as parted with any sooner than the right of taxation should be so regarded, and the language of the alleged contract should in both cases be equally plain. *Owensboro* v. *Owensboro Waterworks Company*, 191 U. S. 358.

In our judgment the language of the act of 1862 did not amount to a contract that the rates for the use of water should never be lowered below the amount provided for in that act.

Second. But assuming there was a contract, we think the rates could be changed under that provision of the constitution of the State adopted in 1849, article 4, section 31, which provided:

"Corporations may be formed under general laws, but shall not be created by special act except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed."

This court has had frequent occasion to discuss the meaning and extent of the power thus reserved, as it exists in about all the States, either by constitutional or statutory provisions.

Tomlinson v. *Jessup*, 15 Wall. 454, held that the object of reserving a power to amend or repeal (p. 458) was:

"To prevent a grant of corporate rights and privileges in a form which will preclude legislative interference with their exercise if the public interest should at any time require such interference. It is a provision intended to preserve to the State control over its contract with the corporators, which without that provision would be irrepealable and protected from any measures affecting its obligation."

It was also said (p. 459):

"The reservation affects the entire relation between the State and the corporation, and places under legislative control all rights, privileges and immunities derived by its charter directly from the State."

In *Shields* v. *Ohio*, 95 U. S. 319, it was stated that by virtue of the power to alter, revoke or repeal an act, as provided in

the constituiton of Ohio, section 2, article 1, the legislature did not impair the obligation of a contract in prescribing rates for passenger transportation by a new consolidated company, although one of the original companies prior to the adoption of the constitution was organized under a charter which imposed no limitation as to rates.

In *Close* v. *Glenwood Cemetery*, 107 U. S. 466, it was again held that a power reserved in the legislature to alter, amend or repeal a charter authorizes it to make any alteration or amendment of the charter granted, subject to it, which will not defeat or substantially impair the object of the grant, or any rights vested under it, and which the legislature may deem necessary to secure either that object or any public right.

The same principle was decided in *Sinking Fund Cases*, 99 U. S. 700, 720; *New York &c. Railroad* v. *Bristol*, 151 U. S. 556, and *United States* v. *Union Pacific Railway*, 160 U. S. 1, 33.

Covington v. *Kentucky*, 173 U. S. 231, decided that language describing certain property, and providing that it should be and remain forever exempt from state, county and city tax, did not prevent the legislature from withdrawing such exemption and subjecting the property to taxation, in view of the statute that all charters and grants of the corporations should be subject to amendment or repeal at will of the legislature. Mr. Justice Harlan, in delivering the opinion of the court, said (p. 238):

"We are of opinion that the exemption from taxation embodied in that act did not tie the hands of the Commonwealth of Kentucky so that it could not, by legislation, withdraw such exemption and subject the property in question to taxation. The act of 1886 was passed subject to the provision in a general statute of Kentucky, above referred to, that all statutes 'shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed.' If that act in any sense constituted a contract between the city and the Commonwealth, the reservation in an

existing general statute of the right to amend or repeal it was itself a part of that contract."

To the same effect is *Knoxville Water Company* v. *Knoxville*, 189 U. S. 434.

These cases also hold that there is a limitation, even to the power of amendment when reserved in the constitution or a statute of a State. Some of the cases, although holding that the power to amend or repeal was properly exercised in them, also state that the power is not without limit; that the alterations must be reasonably made, in good faith and consistent with the scope and object of the act of incorporation, and that sheer oppression and wrong could not be inflicted under the guise of amendment or alteration; that beyond the sphere of the reserved powers the vested rights of property in corporations in such cases is surrounded by the same sanction and are as inviolable as in other cases. In reiterating this view of the power, we think that a mere reduction of rates, while still leaving reasonable, fair or just compensation for the use of the property, is not prohibited, and we are quite clear that, even assuming there was a contract, the legislature nevertheless had the power to so alter and amend the act of 1862 as to provide for the fixing of rates as set forth in the act of 1885.

It is not confiscation nor a taking of property without due process of law, nor a denial of the equal protection of the laws, to fix water rates so as to give an income of six per cent upon the then value of the property actually used, for the purpose of supplying water as provided by law, even though the company had prior thereto been allowed to fix rates that would secure to it one and a half per cent a month income upon the capital actually invested in the undertaking. If not hampered by an unalterable contract, providing that a certain compensation should always be received, we think that a law which reduces the compensation theretofore allowed to six per cent upon the present value of the property used for the public is not unconstitutional. There is nothing in the nature of confiscation about it.

The original cost may have been too great; mistakes of construction, even though honest, may have been made, which necessarily enhanced the cost; more property may have been acquired than necessary or needful for the purpose intended. Other circumstances might exist which would show the original rates much too large for fair or reasonable compensation at the present time. Notwithstanding such facts, are the shareholders in the company to be forever entitled to eighteen per cent upon this cost, and does a reduction in amount, as provided for in the act of 1885, take away property in violation of the provisions of the Federal Constitution? We think not.

In this case much of the total amount expended in the course of the construction of the works was not proved by those who made such expenditures, and the items and total amount of the cost of construction were only proved by the books. What such books did not prove was the reasonableness of that cost, its propriety or necessity. There were statements that appeared in the minutes of the meetings of the shareholders which were put in evidence, that showed at least a dispute as to the proper cost of the works, and at one of these meetings a shareholder said there had been a waste in the management of the affairs of the company amounting to $350,000, which was caused by the chief engineer who had been in charge of the canal, and that his mistakes had cost the company a good deal of money. There would seem to have been more of a dispute as to who was responsible for this loss than over the fact of loss. At another meeting held in December, 1881, the president had said in his remarks to the meeting that, in his opinion, with careful management the canal would pay a fair revenue on what it ought to have cost. Although these minutes did not conclusively prove the fact of the excessive cost of the work, yet where the books of the company were substantially the only evidence of the amount expended and there was no other satisfactory evidence of the reasonableness of the expenditures, it would not be surprising if the board should have

regarded the statements in the minutes relating to excessive cost as a justification, if not a requirement, for the reduction of the cost of construction, upon which rates might be fixed, by at least the amount mentioned, $350,000.

Other considerations, in the shape of facts, circumstances and conditions pertinent to the alleged cost of the work and appearing in the course of the inquiry, may have been considered by the supervisors and the conclusion arrived at, after a consideration of all the material facts, that the rates fixed would result in justice to both the company and the consumers, as called for by the act.

Judging by this record, we are unable to say the board of supervisors failed to provide just and fair compensation for the use of the property by the public.

In *San Diego Land Company* v. *National City*, 174 U. S. 739, it was held, (following *Smyth* v. *Ames*, 169 U. S. 466, 543, 544,) that what the company was entitled to demand in order that it might have just compensation was a fair return upon the reasonable value of the property at the time it was being used for the public. The appellants in that case contended that in fixing what were just rates the court should take into consideration the cost of the plant and of its annual operation, the depreciation of the plant, and a fair profit to the company above its charges for its services. It was observed by the court that undoubtedly all these matters ought to be taken into consideration and such weight be given them, when rates are being fixed, as under all the circumstances would be just to the company and to the public. The same principle is reaffirmed in *San Diego Land &c. Company* v. *Jasper*, 189 U. S.439, 442.

After taking such facts into consideration, the company might still be directed to receive rates that would be nothing more than a fair and just compensation or return upon the reasonable value of the property at the time it was being used for the supplying of the water to the public.

To take the amount actually invested into "estimation" does not mean necessarily that such amount is to control the

decision of the question of rates. Other language would have been employed to express that thought. The cost may be estimated, says the act, but that leaves open a reference to the other facts adverted to in the latter part of section 5, and it is upon a consideration of the whole case that the board is to determine what shall be reasonable, just and equal to all parties. The record would seem to show that the board did take these various matters into consideration in coming to the conclusion it did in regard to the value of the property, although giving much less weight to such alleged cost than the company thought was proper. The board added over $25,000 to the amount proved as the present cost of the construction of the canals, based on the prices of material, supplies and labor, of the date when the estimate was made, that estimate being $312,000, while the board fixed the valuation at $337,000.

Much of the capital was invested between twenty and thirty years ago, and to be able still to realize six per cent upon the money originally invested is more than most people are able to accomplish in any ordinary investment, and more than is necessary in order to give just compensation for property at the time it is used for the public purpose originally intended.

It is, of course, impossible to say what rates may be adopted in the other counties through which this canal runs, and that is one of the embarrassments under which the parties suffer from the language of the statute of 1885. Heretofore the company has fixed its own rates therein. Exactly how the question may be hereafter determined as to the percentage of income, where there are three different boards of supervisors who may fix rates for their respective counties, each differing from the other, is not made clear by the statute. The complainant admits that the rates provided for by the supervisors under the act of 1885, if applied to all three counties, would allow complainant an income of substantially six per cent on $337,000, being $25,000 more than the present cost of the work would be, as shown by uncontradicted and satisfactory evidence. Those rates exist in the other counties at present.

Hereafter, in case the other counties should fix rates in such manner that, taken as a whole, the rates in the three counties would not insure an income of at least six per cent, as provided for in the act of 1885, the company would of course not be bound to accept such rates, and a decree in this case would not bind it in regard to the propriety of rates for the future, as fixed by the ordinance of 1896 for the county of Stanislaus.

The judgment of the Circuit Court must be reversed and the bill dismissed without prejudice.

So ordered.

BEDFORD v. UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 23. Argued December 9, 1903.—Decided January 18, 1904.

Damages to land by flooding as the result of revetments erected by the United States along the banks of the Mississippi River to prevent erosion of the banks from natural causes are consequential and do not constitute a taking of the lands flooded within the meaning of the Fifth Amendment to the Federal Constitution. *Gibson* v. *United States*, 166 U. S. 269, followed; *United States* v. *Lynah*, 188 U. S. 445, distinguished.

THE appellants were owners of land on the Mississippi River, in the State of Louisiana, amounting to five thousand or six thousand acres, upon which were cabins, other buildings and fences. They brought suit in the Court of Claims for damages to their lands, alleged to have resulted from certain works of the United States. The damages consisted, as found by the court, of the erosion and overflow of about twenty-three hundred acres of the land. The works of the government and their operation are described by the court in the following findings:

"Prior to the spring of 1876 the Mississippi River flowed

around a narrow neck of land known as De Soto Point, and in going around this point flowed by the city of Vicksburg in a southwesterly direction. In the spring of 1876 De Soto Point became so narrow by erosion that the river broke through, leaving De Soto Point as an island, thereby shortening the distance of the stream about six miles, and taking its course immediately to the south with great velocity against the Mississippi bank at what is known as the cut-off of 1876. The result was that the city of Vicksburg was left some miles away from the main channel of the river, and the old channel in front of the city was continually filled up, making the approach from the river to the docks along the river difficult, if not impossible.

"Between 1878 and 1884 the United States constructed about 10,700 feet of revetment along the banks of the Mississippi River at Delta Point, Louisiana, for the purpose of preventing the further erosion of that point. The revetment consisted of willow mattresses weighted down by stones, and were placed on said banks below high-water mark. The revetment was neither upon nor in contact with the claimants' lands. The object of the construction was to prevent the navigable channel of the river from receding farther from the city of Vicksburg, which had been left some distance from the main channel of the river by the cut-off of 1876, as aforesaid. The revetment was repaired slightly in 1886 and 1889, and more extensively in 1894, all of which work was paid for from time to time out of the appropriations made therefor by Congress, as found in 20 Stat. 363, 366; 21 Stat. 181, 470; 26 Stat. 450, 1116.

"In making the improvement aforesaid the defendants did not recognize any right of property in the claimants in and to the right alleged to be affected, and did not assume to take private property in and by the construction of the revetment, but proceeded in the exercise of a claimed right to improve the navigation of the river.

"After the cut-off at De Soto Point in 1876 and the construction of the revetment, as aforesaid, the channel and cur-

rent of the Mississippi River were gradually directed toward the lands of the claimants, situated about six miles below said cut-off, and did, about the year 1882, reach said lands and thereafter erode and overflow about 2,300 acres of their lands, which overflow has ever since continued. About 400 acres of their lands so eroded and overflowed was prior to the death of said George M. Bedford, through whom the claimants claim title, and about 900 acres of which were overflowed thereafter and prior to said judicial sale, and the residue after said sale. Of the lands so overflowed about 1,300 acres thereof were cleared and in cultivation, of which about 700 acres were so cleared prior to May 2, 1895.

"The damage to the claimants, and each of them, by reason of the washing away of their lands during their respective ownership, as aforesaid, is in excess of $3,000.

"The cause of the deflection of the river upon the claimants' land was the cut-off, which shortened the distance of the stream six miles, and thereby increased the velocity of the current, and forced the current to turn, when it struck the Mississippi bank, at an abrupt angle. The revetment did not change the course of the river as it then existed, but operated to keep the course of the river at that point as it then was. If the revetment had not been built the cut-off would have continued to widen toward the Louisiana bank, and the channel would have continued to move in the same direction. With the widening of the cut-off and the shifting of the channel the angle of the turn below the cut-off would have gradually become less abrupt, and the deflection of the stream upon the claimants' land would have grown less, and the consequent injury to the claimants' land would have been decreased. To what extent the injury would have been decreased is conjectural. The injury done to the claimants' lands was an effect of natural causes; the injury caused by the government was by interrupting the further progress of natural causes, *i. e.*, the further change in the course of the river, and is also conjectural."

The court deduced from the facts that the claimants were

not entitled to recover, and dismissed their petitions. 36 C. Cl. 474.

Mr. John C. Chaney for appellants:

There is no difference between the taking of land by the Government for a navigable waterway for steamboat traffic for the public good and that of backing up water over a man's land through a public dam constructed so as to work such a result, as held in *United States* v. *Lynah*, 188 U. S. 445. The revetment as well as the dam appropriates the land and deprives the owner of its use.

It was a public statute which authorized the dam, and it was a public statute which authorized the building of the revetment. The officers of the law derived their authority, in both instances, from the same source. *Gibson* v. *United States*, 166 U. S. 273; *Gilman's case*, 3 Wall. 713, distinguished, and see the *Great Falls case*, 112 U. S. 645; *Pumpelly* v. *Green Bay Co.*, 13 Wall. 181; *Mill's case*, 46 Fed. Rep. 738.

The officers and agents of the United States took appellants' lands under sanction of authority and the Government is bound to make just compensation. The building and maintaining the revetment was duly authorized by Congress, as follows: 20 Stat. 363, 366; 21 Stat. 181, 470; 26 Stat. 450, 1116. An implied contract consequently arose to pay for the appropriation of this property. *Great Falls case, supra; Kohl* v. *United States*, 91 U. S. 367.

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 claimants' cause 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. *Sanford* v. *United*

States, 101 U. S. 341; *Boone Co.* v. *Peterson*, 98 U. S. 403; *United States* v. *Jones*, 109 U. S. 573; *Barron* v. *Baltimore*, 7 Pet. 243; *Withers* v. *Buckley*, 20 How. 84, and see *Sinnickson* v. *Johnson* and *Gardner* v. *Newburgh*, cited in *Pumpelly* v. *Green Bay Co.*, 13 Wall. 181; Angell on Water Courses, § 465*a*.

The power to take private property for public uses belongs to every independent government. It is an incident of sovereignty, and does not require constitutional recognition. This power is recognized by the Constitution of the United States wherein, by its Fifth Amendment, it declared that private property shall not be taken without just compensation. *United States* v. *Gettysburg Electric Ry. Co.*, 160 U. S 668; *High Bridge Lumber Co.* v. *United States*, 37 U. S. App. 234; *Barron, etc.*, v. *Mayor of Baltimore*, 7 Pet. 243; *Hallister* v. *Benedict Manufacturing Co.*, 113 U. S. 59; *United States* v. *Palmer*, 128 U. S. 262; *United States* v. *Berdan Fire & Ins. Co.*, 156 U. S. 552; *South Carolina* v. *Georgia*, 93 U. S. 4, 13; *Wisconsin* v. *Duluth*, 96 U. S. 379.

It is clear that what was a valuable plantation has been permanently swept away "as the necessary result of the work which the government has undertaken." *Pumpelly* v. *Green Bay Co.*, *supra*, says this is a "taking" of appellants' lands for public use, as stated in the opinion of the court in the *Lynah* case. See also Angell on Water Courses, § 465*a*; *Hooker* v. *New Haven & N. Co.*, 14 Connecticut, 146; *Rowe* v. *Granite Bridge Co.*, 21 Pick. 344; *Canal App.* v. *The People*, 17 Wend. 604; *Lockland* v. *North M. R. R. Co.*, 31 Missouri, 180; *Stevens* v. *Prop'r of Middlesex Co.*, 12 Massachusetts, 466; *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312; *Scranton* v. *Wheeler*, 179 U. S. 141; *Transportation Co.* v. *Chicago*, 99 U. S. 635.

Even if we are to restrict the ownership of appellants' lands to mere riparian rights, it is unfair to appropriate them without compensation. By the Encyclopedias England makes compensation where it takes such rights under its eminent domain.

The theory of our Government is that the rights of the in-

dividual when subordinated to the public necessities shall be compensated for. Private property is subject to public uses only when paid for. It matters not for what special purpose private property may be taken, it is subject to the limitations of payment cast by the Fifth Amendment.

Mr. Assistant Attorney General Pradt, with whom *Mr. Special Attorney William H. Button* was on the brief, for the United States:

This is a case sounding in tort and the Court of Claims has no jurisdiction of an action sounding in tort. *Schillinger* v. *United States*, 155 U. S. 161; *United States* v. *Lynah*, 188 U. S. 445.

The *Great Falls case*, 112 U. S. 645, was an implied contract and the *Langford case*, 101 U. S. 341, was not. Appellant's land was miles away from the revetment. The Government has never parted with the original right to navigable waters. *Gibson case*, 166 U. S. 272; *Shively* v. *Bowlby*, 152 U. S. 1; *Martin* v. *Waddell*, 16 Pet. 367; *Weber* v. *State Harbor Commissioners*, 18 Wall. 57; *Illinois Central R. R. Co.* v. *Illinois*, 146 U. S. 387.

Upon the American Revolution all the rights of the Crown and of Parliament vested in the several States, subject to the rights surrendered to the National Government by the Constitution of the United States. In England these rights only extended to waters in which the tide ebbs and flows. This was the early doctrine of the United States, but this court, *Genesee Chief* v. *Fitzhugh*, 12 How. 443, held that that test was not applicable, and that the true test was whether or not the waters were in fact navigable, and see *Scranton* v. *Wheeler*, 179 U. S. 141, and the Michigan case of *Lorman* v. *Benson*, cited therein; *Stockton* v. *Balt. & N. Y. R. R. Co.*, 32 Fed. Rep. 9, 20; *Gilman* v. *Philadelphia*, 3 Wall. 725; Cooley's Const. Lim. p. 643.

The United States is not responsible for the causes of the destruction of appellants' property but the injury is the effect of natural causes.

The United States did not undertake to appropriate any property but simply to preserve the property intrusted to its care, that is, the commercial interests of Vicksburg. Angell on Water Courses (7th ed.), § 333; *Barnes* v. *Marshall*, 68 California, 569; *Farquharson* v. *Farquharson*, 3 Bligh Pr. N. S. 421; *Gulf R. R. Co.* v. *Clark*, 101 Fed. Rep. 678, and cases cited.

The damage is too remote to constitute a taking. *Transportation Co.* v. *Chicago*, 99 U. S. 642; *Gibson* v. *United States*, 166 U. S. 269. The damages are not, and cannot be, proven, but are conjectural and speculative and cannot be recovered. *Howard* v. *Stillwell Co.*, 139 U. S. 199; *Central Trust Co.* v. *Clark*, 92 Fed. Rep. 293; *Cahn* v. *Telegraph Co.*, 40 Fed. Rep. 40.

Mr. Justice McKenna delivered the opinion of the court.

There is no dispute about the power of the government to construct the works which, it is claimed, caused the damage to appellants' land. It was alleged by appellants that they were constructed by the "United States in the execution of its rights and powers, in and over said river and in pursuance of its lawful control over the navigation of said river and for the betterment and improvement thereof." And also that the works were not constructed upon appellants' land, and their immediate object was to prevent further erosion at De Soto Point. In other words, the object of the works was to preserve the conditions made by natural causes. By constructing works to secure that object appellants contend there was given to them a right to compensation. The contention asserts a right in a riparian proprietor to the unrestrained operation of natural causes, and that works of the government which resist or disturb those causes, if injury result to riparian owners, have the effect of taking private property for public uses within the meaning of the Fifth Amendment of the Constitution of the United States. The consequences of the contention immediately challenge its soundness. What is its limit? Is only the government so restrained? Why not as well riparian pro-

prietors, are they also forbidden to resist natural causes, whatever devastation by floods or erosion threaten their property? Why, for instance, would not, under the principle asserted, the appellants have had a cause of action against the owner of the land at the cut-off if he had constructed the revetment? And if the government is responsible to one landowner below the works, why not to all landowners? The principle contended for seems necessarily wrong. Asserting the rights of riparian property it might make that property valueless. Conceding the power of the government over navigable rivers, it would make that power impossible of exercise, or would prevent its exercise by the dread of an immeasurable responsibility.

There is another principle by which the rights of riparian property and the power of the government over navigable rivers are better accommodated. It is illustrated in many cases.

The Constitution provides that private property shall not be taken without just compensation, but a distinction has been made between damage and taking, and that distinction must be observed in applying the constitutional provision. An excellent illustration is found in *Gibson* v. *United States*, 166 U. S. 269. The distinction is there instructively explained, and other cases need not be cited. It is, however, necessary to refer to *United States* v. *Lynah*, 188 U. S. 445, as it is especially relied upon by appellants. The facts are stated in the following excerpt from the opinion:

"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."

The question was asked: "Does this amount to a taking?" To which it was replied: "The case of *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166, answers this question in the affirmative." And further: "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." In both cases, therefore, it was said that there was an actual invasion and appropriation of land as distinguished from consequential damage. In the case at bar the damage was strictly consequential. It was the result of the action of the river through a course of years. The case at bar, therefore, is distinguishable from the *Lynah* case in the cause and manner of the injury. In the *Lynah* case the works were constructed in the bed of the river, obstructed the natural flow of its water, and were held to have caused, as a direct consequence, the overflow of Lynah's plantation. In the case at bar the works were constructed along the banks of the river and their effect was to resist erosion of the banks by the waters of the river. There was no other interference with natural conditions. Therefore, the damage to appellants' land, if it can be assigned to the works at all, was but an incidental consequence of them.

Judgment affirmed.

ROGERS *v.* ALABAMA.

ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

No. 407. Submitted January 4, 1904.—Decided January 18, 1904.

A motion to quash an indictment for murder was made on the ground that all colored men had been excluded from the grand jury solely because of their race and color, and because of a certain provision of the state constitution alleged to deny them the franchise in violation of the Fourteenth Amendment. These provisions were set out. The motion, about two octavo pages in length, was stricken from the files by the state court on the ground of prolixity, members of the grand jury not having to have the qualifications of electors.

Held, on error, that the reference of the motion to the constitutional requirements concerning electors as one of the motives for the exclusion of the blacks did not warrant such action as would prevent the court from passing on constitutional rights which it was the object of the motion to assert, and that the exclusion of blacks from the grand jury as alleged was contrary to the Fourteenth Amendment of the Constitution of the United States.

THE facts are stated in the opinion.

Mr. Wilford H. Smith for plaintiff in error:

The motion to quash the indictment, calling the attention of the court to the denial of rights claimed under the Federal Constitution, should not have been struck from the files without giving the plaintiff in error an opportunity to prove the allegations therein contained; and this action of the trial court and its refusal to permit the introduction of any evidence in support of said motion, was error. *Carter* v. *Texas*, 177 U. S. 442. The allegation of the denial of rights under the Fifteenth Amendment strengthened rather than weakened the motion to quash the indictment, and required investigation by the trial court.

The state court was in error in holding that because the statutes of Alabama do not require that jurors shall be qualified

electors that the second ground of the motion to quash was unavailing. It is utterly immaterial what the letter of the law is in this regard, if in fact and in truth those charged with its administration so enforced the law, it was the same as if it had been written in the statutes. *Yick Wo* v. *Hopkins*, 118 U. S. 356.

The motion to quash the indictment was not prolix, but contained essential averments; this court will not be controlled by the decision of the state court as to what form of language shall be used in pleading rights claimed under the Federal Constitution.

The action of the trial court in overruling the several motions of the plaintiff in error to quash the panel of petit jurors and refusing to allow the introduction of any evidence in support of the same was such an error as called for reversal in the Supreme Court of Alabama. *Carter* v. *Texas*, 177 U. S. 442; *Neal* v. *Delaware*, 103 U. S. 370; *Gibson* v. *Mississippi*, 162 U. S. 565.

Admitting for the sake of the argument that a motion to quash the panel of petit jurors on the ground of the denial of rights claimed under the Federal Constitution stands on the same footing with a motion to quash the venire for some trivial irregularity in its drawing, service, or return, the motion did not come too late, because it was made when the first juror was called and sworn to answer questions as to his qualifications, prior to his empanelment to serve as a juror, after said juror had been accepted by the solicitor for the State and tendered the defendant. *Peters* v. *The State*, 100 Alabama, 12; *Ryan* v. *The State*, 100 Alabama, 108; *Thomas* v. *The State*, 94 Alabama, 75.

A motion to quash the panel of petit jurors on the ground of the denial of rights claimed under the Federal Constitution stands on higher and different grounds from a motion to quash the venire for matters of form or irregularity contemplated in the Alabama decisions, and that the motion in this case did not come too late.

Plaintiff in error offered to introduce the testimony showing that jurors were selected from the registration lists, and that no negroes were selected to serve; that for ten years no negroes were drawn on any jury in that court; that the negroes are in the majority in that county, many of whom are qualified for jury service; that, out of five thousand qualified electors of the negro race in the county, only forty-seven were on the registration lists because they had been excluded from the lists and refused registration under the suffrage provisions of the Constitution of 1901, on account of their race and color, while all white men applying for registration were admitted and entered on such lists; and that, although qualified for jury service, all negroes were excluded from such service on account of their race and color and because not qualified electors enrolled on the registration lists. *Carter* v. *Texas*, 177 U. S. 442; *Williams* v. *Mississippi*, 170 U. S. 213; *Yick Wo* v. *Hopkins*, 118 U. S. 356.

The record shows a manifest denial of rights under the Federal Constitution by the authorities of the State, in the face of recent decisions of this court.

Mr. Massey Wilson, Attorney General of the State of Alabama, for defendant in error:

The Supreme Court of Alabama decided that the motion to quash the venire of petit jurors came too late; that it should have been made before the formation of the petit jury had begun; and that not having been made until after the State had been required to pass upon a juror, and had selected such juror, the motion should not have been entertained, regardless of its merits. 12 Ency. Pl. & Pr. 424; *Thomas* v. *State*, 94 Alabama, 74; *Ryan* v. *State*, 100 Alabama, 105, 188, distinguished.

The motion of the plaintiff in error was in effect a challenge to the array, which should have been made before the selection of the jury was entered upon. 12 Ency. Pl. & Pr. 316; 1 Thompson on Trials, § 113; *Gardiner* v. *People*, 6 Park. Cr. Rep. (N. Y. Supreme Ct.) 155, 199.

The question raised on the motion to quash the indictment was disposed of by the Supreme Court of Alabama on the ground of the prolixity of the pleading by which it was presented to the lower court. Section 3286 of the Code of Alabama; *Cotton* v. *Ward*, 45 Alabama, 359; *Davis* v. *Louisville & Nashville Railroad Co.*, 108 Alabama, 660; 20 Ency. Pl. & Pr. 44, 45; 21 Ency. Pl. & Pr. 226.

Mr. Justice Holmes delivered the opinion of the court.

This is a writ of error to the Supreme Court of Alabama, brought on the ground that the plaintiff in error, one Rogers, has been denied the equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution of the United States. Rogers was indicted for murder and in due time filed a motion to quash the indictment because the jury commissioners appointed to select the grand jury excluded from the list of persons to serve as grand jurors all colored persons, although largely in the majority of the population of the county, and although otherwise qualified to serve as grand jurors, solely on the ground of their race and color and of their having been disfranchised and deprived of all rights as electors in the State of Alabama by the provisions of the new constitution of Alabama. The motion alleged that the grand jury was composed exclusively of persons of the white race, and concluded with a verification. To show the reality of the second reason alleged for the exclusion of blacks from the grand jury list the motion, as a preliminary, alleged that the sections of the new constitution which were before this court in *Giles* v. *Harris*, 189 U. S. 475, were adopted for the purpose and had the effect of disfranchising all the blacks on account of their race and color and previous condition of servitude. On motion of the State this motion to quash was stricken from the files. Rogers excepted, but his exceptions were overruled by the Supreme Court of the State, seemingly on the ground that the prolixity of the motion was sufficient to justify the action of

the court below. The Civil Code of Alabama provides by § 3286, "if any pleading is unnecessarily prolix, irrelevant, or frivolous, it may be stricken out at the costs of the party so pleading, on motion of the adverse party."

We follow the construction impliedly adopted by the Supreme Court of Alabama, and assume that this section was applicable to the motion. We also assume, as said by the court, that the qualifications of the grand jurors are not in law dependent upon the qualifications of electors, and that any invalidity of the conditions attached to the suffrage could not of itself affect the validity of the indictment. But in our opinion that was not the allegation. The allegation was that the conditions said to be invalid worked as a reason and consideration in the minds of the commissioners for excluding blacks from the list. It may be that the allegation was superfluous and would have been hard to prove, but it was not irrelevant, for it stated motives for the exclusion which, however mistaken, if proved tended to show that the blacks were excluded on account of their race, as part of a scheme to keep them from having any part in the administration of the government or of the law. The whole motion takes two pages of the printed record, of the ordinary octavo size. A motion of that length, made for the sole purpose of setting up a constitutional right and distinctly claiming it, cannot be withdrawn for prolixity from the consideration of this court, under the color of local practice, because it contains a statement of matter which perhaps it would have been better to omit but which is relevant to the principal fact averred.

It is a necessary and well settled rule that the exercise of jurisdiction by this court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to deny the rights. It is well known that this court will decide for itself whether a contract was made as well as whether the obligation of the contract has been impaired. *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436, 443. But that is merely an illustration of a more general rule. On the same ground

there can be no doubt that if full faith and credit were denied to a judgment rendered in another State upon a suggestion of want of jurisdiction, without evidence to warrant the finding, this court would enforce the constitutional requirement. See *German Savings and Loan Society* v. *Dormitzer*, *ante*, p. 125. In *Chapman* v. *Goodnow*, 123 U. S. 540, 547, 548, where the parties sought to avoid the obligation of a former decree by new matter, this court said that the effect of what was done was not a Federal question, but proceeded to inquire in terms whether that ground of decision was the real one, or whether it was set up as an evasion and merely to give color to a refusal to allow the bar of the decree. We are of opinion that the Federal question is raised by the record and is properly before us. That question is disposed of by *Carter* v. *Texas*, 177 U. S. 442, and it was error not to apply that decision. The result of that and the earlier cases may be summed up in the following words of the judgment delivered by Mr. Justice Gray: "Whenever by any action of a State, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment of the Constitution of the United States. *Strauder* v. *West Virginia*, 100 U. S. 303; *Neal* v. *Delaware*, 103 U. S. 370, 397; *Gibson* v. *Mississippi*, 162 U. S. 565." Our judgment upon this point makes it unnecessary to consider a motion to quash the panel of the petit jury for similar reasons, which was disposed of as having been made too late.

Judgment reversed, and case remanded for further proceedings not inconsistent herewith.

SHAPPIRIO *v.* GOLDBERG.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 87. Argued December 9, 1903.—Decided January 18, 1904.

To ascertain its jurisdiction this court looks not to a single feature of the case but to the entire controversy.

Where the prayer for relief is either for conveyance of land worth less than $5000 or for a rescission of a contract of sale and repayment of the purchase money of over $5000, the necessary amount is involved to give this court jurisdiction of an appeal from the Court of Appeals of the District of Columbia.

Where the issues are mainly those of fact, in the absence of clear showing of error, the findings of the two lower courts will be accepted as correct.

Where a party desires to rescind on the ground of misrepresentation or fraud, he must upon the discovery of the fraud announce his purpose and adhere to it. If he continues to treat the property as his own the right of rescission is gone and he will be held bound by the contract.

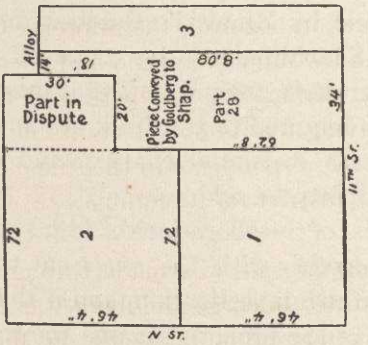
THIS was an action begun in the Supreme Court of the District of Columbia by Mary Shappirio and Jacob Shappirio, her husband, against Minnie D. Goldberg and George Goldberg, her husband, having for its object equitable relief because of alleged fraud of the respondents in the sale of certain property in Washington, District of Columbia, to the complainant, Mary Shappirio.

It appears that the sale was made through one Richold, a broker in real estate. George Goldberg was the owner of the property, and by memorandum made on May 11, 1900, authorized Richold to sell the property known as lots Nos. 1245 and 1247, being part of lot 28, square 977, fronting 34 feet on 11th street S. E., by eighty feet deep to an alley. Richold sold the property to Jacob Shappirio, for whom he was seeking an investment, for the price of $6000. The terms were cash, $100 having been paid down at the making of the sale. This

property, having two buildings upon it, and being part of lot 28, is described as follows:

"Beginning for the same at the southeast corner of said lot and running thence north on Eleventh street thirty-four (34) feet; thence west eighty (80) feet eight (8) inches to an alley; thence south on said alley fourteen (14) feet; thence east eighteen (18) feet; thence south twenty (20) feet, and thence east sixty-two (62) feet eight (8) inches to the place of beginning."

In the rear of the premises there was a strip 20 by 30 feet, having upon it a shed or stable, which, before the sale, was in the possession of Goldberg under an arrangement for its use, and was used by him in connection with the premises. This piece was not fenced off at the time of sale and might well be taken to be a part of the premises by any person examining the same without accurate knowledge of the extent of the property actually owned by Goldberg. The annexed plat shows the part of lot 28 covered by the description in the deed and the part of lot 2 in dispute:



Although the purchase was made by Jacob Shappirio, the deed was made to Mary Shappirio, June 5, 1900. On September 28, 1900, a conveyance by the owner of the title to lot 2 was made of the part of that lot in the rear of the premises to Minnie D. Goldberg, wife of George Goldberg, for the consideration of $300. Mary Shappirio and Jacob Shappirio on

June 5, 1900, executed a deed of trust upon the property conveyed to her in the sum of $4500. In the trust deed the property was accurately described.

After the property had been conveyed to Mary Shappirio it was rented to Goldberg, the vendor, who continued to occupy the same for eleven months. Upon asking a reduction of the rent, which was refused, Goldberg left the premises. On May 18, 1901, the present bill was filed, in which it was charged that Goldberg, in order to induce the sale in question, falsely represented that the property in the rear of lot 28 belonged to him, and would be included in the property sold, and notwithstanding the appearance of the property and the representations of Goldberg, the part conveyed did not include the part of lot 2 in the rear of lot 28; that George Goldberg afterwards purchased the property, part of lot 2, and caused the same to be conveyed to Minnie D. Goldberg, his wife, as a part of a scheme to defraud the plaintiff. That the wife was a party to the fraud, and had no interest in the property except to hold it for her husband.

The bill prays that this parcel of ground, part of lot 2, be decreed to be held by Minnie D. Goldberg for the use of the plaintiff, Mary Shappirio, and be conveyed to her. If this relief cannot be granted, the prayer is that the sale be rescinded, and Goldberg be required to pay back the amount of the purchase money, with costs and charges, and upon default of payment the property be sold.

A general denial of the allegations of fraud and deceit is made in the answer, together with the averment that the plaintiffs relied upon their own investigation, and if they were deceived as to the extent of the property, it was the result of the want of due care upon their part.

In the Supreme Court the bill of the complainants was dismissed, which decree was affirmed in the Court of Appeals.

Mr. Leo Simmons for appellants:

The evidence shows that the appellees have made false

statements: First, about the building of the stable; second, about the occupancy of the yard and stable; third, about the fact of Goldberg having said to Shappirio that the small piece of land and stable did not belong to him; and fourth, about the corroborative evidence in relation to the animals not being about the premises, at the time of the negotiation of the sale; and fifth, about Mrs. Goldberg having paid for the small piece of land with her own funds, each and every one of which was absolutely false, some admitted so and others proven so beyond doubt.

The decree below should be reversed and the case remanded with directions to enter a decree for the enforcement of the contract as originally made. If not the contract should be rescinded as prayed in the alternative.

The following authorities, among others, support appellant's contention. For what constitutes fraud and misrepresentation, see *Crosby* v. *Buchanan*, 23 Wall. 454; *Stewart* v. *Cattle Ranch Co.*, 128 U. S. 383; *Tyler* v. *Savage*, 143 U. S. 77; *Smith* v. *Richards*, 13 Pet. 26; *Henderson* v. *Henshaw*, 54 Fed. Rep. 320; Kerr on Fraud and Mistake, 81, 101; Pomeroy's Eq. § 877, 880; *Good* v. *Riely*, 153 Massachusetts, 585.

On question as to what time action should be begun, see *Dickerson* v. *Patterson*, 160 U. S. 586; *Pence* v. *Langdon*, 99 U. S. 578; *Kilborn* v. *Sunderland*, 130 U. S. 505; Kerr on Fraud and Mistake, 305; *Nesbit* v. *McFarland*, 92 U. S. 77; *Tyler* v. *Savage*, 143 U. S. 77; *Gallinger* v. *Newell*, 9 Indiana, 572; *Morston* v. *Simpson*, 54 California, 190.

Mr. Thomas M. Fields for appellees, submitted:

The appeal should be dismissed. The actual amount is only $6000 for the value of the property less the deed of trust of $4500. There is a want of necessary parties. On the merits appellants have no case. 14 A. & E. Ency. (2d ed.) 148.

When proofs of equitable grounds for relief fail, the jurisdiction of a court of equity also fails. Consent of parties cannot give equity jurisdiction of a case properly triable at law.

Palmer v. *Fleming*, 1 App. D. C. 528; *Offutt* v. *King*, 1 MacAr. 312; *Oelrichs* v. *Spain*, 15 Wall. 211; *Ford* v. *Smith*, 1 MacAr. 592; *Hess* v. *Horton*, 2 App. D. C. 81; *Pechstein* v. *Smith*, 14 App. D. C. 27; *S. C.*, 27 Wash. L. R. 168; *Townsend* v. *Vanderwerker*, 20 D. C. 197. Damages can be recovered for false representations. *Main* v. *Aukam*, 12 App. D. C. 375; *Dushane* v. *Benedict*, 120 U. S. 630.

Complainants cannot attack an instrument as fraudulent and void, and at the same time claim rights under it if the court should be of the opinion that it is valid. *Lamon* v. *McKee*, 18 D.C. 446; *Clark* v. *Krause*, 2 Mackey, 559. Where a bill charges fraud in fact, and complainant fails in his proof, he cannot be aided, under the prayer for general relief, upon a different theory. *Bailor* v. *Daly*, 18 D. C. 175; *Droop* v. *Ridenour*, 11 App. D. C. 224; *Connolly* v. *Belt*, 5 Cr. C. C. 405; *Morrison* v. *Shuster*, 1 Mackey, 190; *Murray* v. *Hilton*, 8 App. D.C. 281; *Neale* v. *Neale*, 9 Wall. 1. Where the record discloses facts sufficient to put a purchaser on notice, he is not an innocent purchaser without notice. *Elridge* v. *Life Ins. Co.*, 3 MacAr. 301; *Beckett* v. *Tyler*, 3 MacAr. 319; *Security Co.* v. *Garrett*, 3 App. D. C. 69; *Waters* v. *Williamson*, 21 D. C. 24; *Anderson* v. *Reid*, 14 App. D. C. 54; *Main* v. *Aukam*, 12 App. D. C. 375; *Washington Market Co.* v. *Claggett*, 29 Wash. L. R. 807; *In re Wagner*, 110 Fed. Rep. 931.

Fraud will not be presumed as matter of law or fact except under circumstances which do not admit of any other interpretation. *Tucker* v. *Moreland*, 10 Pet. 58; *Clarke* v. *White*, 12 Pet. 178; *McDaniel* v. *Parish*, 4 App. D. C. 213; *Harrison* v. *Nixon*, 9 Pet. 483; *Crocket* v. *Lee*, 7 Wheat. 522; *Nash* v. *Towne*, 5 Wall. 689. Fraud consists in intention, and that intention must be averred in pleadings. *Moss* v. *Riddle*, 5 Cranch, 351; *Voorhees* v. *Barnesteel*, 16 Wall. 16; *Eyre* v. *Potter*, 15 How. 42; *Farrar* v. *Churchill*, 135 U. S. 609; *Schreyer* v. *Scott*, 134 U. S. 405; *Simonton* v. *Winter*, 5 Pet. 141; *Jones* v. *Simpson*, 116 U. S. 609. Fraud is a question of fact. *Warner* v. *Norton*, 20 How. 448; *McLaughlin* v. *Bk. of Potomac*, 7 How. 220; *Davis* v. *Schwartz*, 155 U. S. 631, 647.

Where a party desires to rescind a contract upon the ground of mistake or fraud he must, upon the discovery of the facts, at once announce his purpose and adhere to it. If he be silent and continue to treat the property as his own he will be held to have waived the objection and will be conclusively bound by the contract, as if the mistake or fraud had not occurred. *McLean* v. *Clapp*, 141 U. S. 429; *Hennessy* v. *Bacon*, 137 U. S. 78; *Atlantic Delaine Co.* v. *James*, 94 U. S. 207; *Kimball* v. *West*, 15 Wall. 377.

When in a court of equity it is proposed to set aside, annul, or correct a written instrument for fraud or mistake in the execution, the testimony on which this is done must be clear, unequivocal, and convincing, and not a mere preponderance of evidence which leaves the matter in doubt. *United States* v. *Maxwell Land Grant Co.*, 121 U. S. 325; *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273; *United States* v. *Hancock*, 133 U. S. 193; *Simmons Creek Coal Co.* v. *Doran*, 142 U. S. 43; *Farnsworth* v. *Duffner*, 142 U. S. 43; *United States* v. *Des Moines, N. & R. Co.*, 142 U. S. 510; *Cissel* v. *Dutch*, 125 U. S. 171; *Chandler* v. *Pomeroy*, 143 U. S. 318; *Snell* v. *Ins. Co.*, 98 U. S. 85; *Howland* v. *Blake*, 97 U. S. 624; *Ins. Co.* v. *Nelson*, 103 U. S. 544; *Day* v. *Union India Rubber Co.*, 20 How. 216; *Noyes* v. *Coasting Co.*, 1 MacAr. & Mackey, 1; *McDaniel* v. *Parish*, 4 App. D. C. 213; *Clack* v. *Hadley*, 64 S. W. Rep. (Tenn.) 403; *Gough* v. *Williamson*, 50 Atl. Rep. (N. J.) 323; *Fulton* v. *Colwell*, 110 Fed. Rep. 54; *Harrington* v. *Ross*, 15 Wash. L. R. 220; *Smoot* v. *Coffin*, 4 Mackey, 407; *Moore* v. *Howe*, 87 N. W. Rep. (Iowa) 750; *Sherwood* v. *Johnson*, 62 N. E. Rep. (Ind.) 645; *Harper* v. *Baird*, 50 Atl. Rep. (Del.) 326.

False representations must be of an existing and ascertainable fact and not matter of opinion or advice and must be false and known to be false by the party making them at the time and on which the other party relied. *Cooper* v. *Schlesinger* 111 U. S. 148; *Slaughter* v. *Gerson*, 13 Wall. 379; *Farnsworth* v. *Duffner*, 142 U. S. 43; *Shields* v. *Hanbury*, 128 U. S. 584; Adams's Eq. * 177, * 178, and cases cited; *Finlayson* v. *Finlay-*

son, 17 Oregon, 347; *Southern Development Co.* v. *Silva*, 125 U. S. 247; *Gavinzel* v. *Crump*, 22 Wall. 308; *French* v. *Shoemaker*, 14 Wall. 314; *Security Co.* v. *Garrett*, 3 App. D. C. 69; *Clements* v. *Smith*, 9 Gill. 160; *Howard* v. *Carpenter*, 11 Maryland, 259; *Shields* v. *Barron*, 17 How. 130; *Grymes* v. *Sanders*, 93 U. S. 55; *Trammell* v. *Ashworth*, 39 S. E. Rep. (Va.) 593; *Sanders* v. *Lyon*, 2 MacAr. 452; *Begley* v. *Eversole*, 64 S. W. Rep. (Ky.) 513; *Brown* v. *Smith*, 109 Fed. Rep. 26; 53 Cent. L. J. 282, Oct. 1901.

The mere refusal of a party to perform a parol contract for the sale of lands is not such a fraud as will give a court of equity jurisdiction to interfere to enforce it. *Dunphy* v. *Ryan*, 116 U. S. 491; *Randall* v. *Howard*, 2 Black. 585; *Howland* v. *Blake*, 97 U. S. 624; *Purcell* v. *Coleman*, 4 Wall. 513; *Swan* v. *Seamens*, 9 Wall. 259; *Prevost* v. *Gratz*, 6 Wheat. 481; *Van Weel* v. *Winston*, 115 U. S. 228; *Wilson* v. *Wall*, 6 Wall. 83.

Courts will not assume to make a contract for the parties which they did not choose to make for themselves. *Morgan County* v. *Allen*, 103 U. S. 515. Nor will they incorporate into a sealed instrument any covenant not there and which cannot be legally implied from any other covenant therein, although the contract, as expressed, may seem much in favor of one party, and the omission of a covenant was clearly occasioned by mistake. *D. & H. Canal Co.* v. *Pennsylvania Coal Co.*, 8 Wall. 276; *Gavinzel* v. *Crump*, 22 Wall. 308; *Robbins* v. *Clarks*, 127 U. S. 622; *Philadelphia, W. & B. R. R. Co.* v. *Trimble*, 10 Wall. 367.

Both at law and in equity parol testimony is inadmissible to vary a written instrument. *Forsythe* v. *Kimball*, 91 U. S. 291; *Richardson* v. *Hardwick*, 106 U. S. 252; *Baltzer* v. *Raleigh R. R. Co.*, 115 U. S. 634; *Bailey* v. *Hannibal & St. J. R. R. Co.*, 17 Wall. 96; *Baker* v. *Nachtrieb*, 19 How. 126; *De Witt* v. *Berry*, 134 U. S. 309; *Seitz* v. *Brewers' Refrigerating Machine Co.*, 141 U. S. 510; *Culver* v. *Wilkinson*, 145 U. S. 205; *Johnson* v. *St. Louis, etc., R. R. Co.*, 141 U. S. 602; *Gilbert* v. *Moline Plow Co.*, 119 U. S. 491; *Van Winkle* v. *Crowell*, 146 U. S. 42; *Parish* v.

United States, 8 Wall. 489; *Emerson* v. *Slater*, 22 How. 28; *Oebucks* v. *Ford*, 23 How. 49; *Union Mutual Insurance Co.* v. *Mowry*, 96 U. S. 544; *Wadsworth* v. *Warren*, 12 Wall. 307; *Thompson* v. *Knickerbocker Life Ins. Co.*, 104 U. S. 252; *Sturm* v. *Boker*, 150 U. S. 312; *McCartney* v. *Fletcher*, 11 App. D. C. 1; *Seitz* v. *Seitz*, 11 App. D. C. 358; *Potomac* v. *Upper*, 109 U. S. 672; *Spofford* v. *Brown*, 1 MacAr. 223; *Linville* v. *Holden*, 2 MacAr. 329; *Burr* v. *Meyers*, 2 MacAr. 524; *Langdon* v. *Evans*, 3 Mackey, 1; *Snell* v. *Ins. Co.*, 98 U. S. 85; *Simmons* v. *Doran*, 142 U. S. 417; *Osborne* v. *Mortgage Co.*, 8 App. D. C. 481, and cases cited *supra.*

The remedy which the court affords on a void transaction is the replacement of the parties in *statu quo.* Adams's Eq. *191; *Moore* v. *Mass. Ben. Assn.*, 43 N. E. Rep. (Mass.) 298.

Consideration received must be returned or offered to be returned before deed will be set aside. *Cunningham* v. *Macon & B. R. R. Co.*, 156 U. S. 400, 425, citing *Collins* v. *Riggs*, 14 Wall. 492; Jones on Mortgages, § 1669; Pom. Equity, § 1220 *et seq.;* and see *Thompson* v. *Peck*, 115 Indiana, 512; *Frank* v. *Thomas*, 20 Oregon, 265; *Tarkington* v. *Purvis*, 128 Indiana, 182; Adams's Equity, *174, and cases cited; *Tiffany* v. *Boatman's Saving Institution*, 18 Wall. 375; *Farmers' Bank* v. *Graves*, 12 How. 51.

He who seeks equity must do equity, and cannot set aside the proceedings for collection of a debt without tendering the amount due. *McQuiddy* v. *Ware*, 20 Wall. 14.

Complainants' equities must preponderate and if equity does not preponderate in favor of the complainants they must fail. *Garnett* v. *Jenkins*, 8 Pet. 75; *Lalone* v. *United States*, 164 U. S 255; *Brant* v. *Virginia*, 93 U. S. 326; *Mutual* v. *Phinney*, 178 U. S. 343.

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

The first question raised for our consideration involves the

jurisdiction of this court on appeal, it being claimed that the matter in dispute, exclusive of costs, does not exceed the sum of $5000. By the act of February 9, 1893, chapter 74, 27 Stat. 434, jurisdiction to review the final judgments of the Court of Appeals of the District of Columbia is given where the matter in dispute exceeds the sum of $5000, exclusive of costs. In determining this question we may look to the allegations and prayer of the bill to ascertain the relief sought and the real extent of the controversy between the parties. The bill contains a prayer for the conveyance of the small strip of ground, which was purchased for $300, and if that were the only subject-matter of the suit, the amount required to give this court the right of review would not be in controversy. But if this relief is denied, the complainants seek, in the alternative, to have the contract rescinded and the payment of the sum of $6000, the purchase money, with costs and interest, decreed against the respondents. Upon the pleadings we are of opinion that this sum is also in dispute between the parties, and therefore this court has jurisdiction. To ascertain the right of jurisdiction in such a case we look not to a single feature of the case, but to the entire controversy between the parties. *Stinson* v. *Dousman*, 20 How. 461.

In this case the issues are mainly those of fact, and in the absence of clear showing of error the findings of the two lower courts will be accepted as correct. *Stuart* v. *Hayden*, 169 U. S. 1; *Dravo* v. *Fabel*, 132 U. S. 487. An examination of the record in the light of these findings does not enable us to reach the conclusion that error has been committed to the prejudice of the appellants.

As to what was said by Goldberg at the time of the purchase of the property in conversation with Richold, the broker, and at the time the premises were visited by Shappirio with a view to purchase, there is much conflict of testimony. The use of the premises as a connected whole might well lead the purchaser to believe, in the absence of accurate knowledge, that it was all under the ownership of one person, and would be

included in the sale of the property to him; and, as said by the Court of Appeals, we believe that Shappirio may have been ignorant of the true condition of the title. But it was also found by that court that a correct description of the property was given in the deed and recorded chain of title. Richold, who made the sale, was entrusted by Shappirio with the examination of the deed and title, and thirty days were given to complete the purchase. For this purpose Richold was the agent of Shappirio, and it not appearing in the proof that he was misled by the representations of Goldberg, or that by any scheme or plan he was kept from a full examination of the title and the description of the property contained in the deed furnished, he must be held chargeable with knowledge which the opportunity before him afforded to investigate the extent and nature of the property conveyed and which he undertook to examine for the purchaser. It is true that Richold testifies that he was misled by the silence of Goldberg and by the situation and use of the property, and stoutly denies that he had the knowledge which a reading of the accurate description of the deed would give. But he undertook to investigate the matter and report upon the title. A casual reading of the description in the deed or examination of the recorded plat would have shown that the premises were not of a uniform depth of eighty feet, and had the L-shape extension in the rear of the lot, which excludes any part of lot 2 from the premises conveyed. For the purpose of this examination Richold was the agent of Shappirio, and his knowledge and means of information must be imputed to the purchaser. There are cases where misrepresentations are made which deceive the purchaser, in which it is no defence to say that had the plaintiff declined to believe the representations and investigated for himself he would not have been deceived. *Mead* v. *Bunn*, 32 N. Y. 275. But such cases are to be distinguished from the one under consideration. When the means of knowledge are open and at hand or furnished to the purchaser or his agent and no effort is made to prevent the party from using them, and especially where the

purchaser undertakes examination for himself, he will not be heard to say that he has been deceived to his injury by the misrepresentations of the vendor. *Slaughter's Admr.* v. *Gerson*, 13 Wall. 379; *Southern Development Co.* v. *Silva*, 125 U. S. 247; *Farrar* v. *Churchill*, 135 U. S. 609; *Farnsworth* v. *Duffner*, 142 U. S. 43.

If this action is viewed as one to rescind a contract, in the light of the testimony and the findings of the courts below, the appellants stand upon no better ground.

It is well settled by repeated decisions of this court that where a party desires to rescind upon the ground of misrepresentation or fraud, he must upon the discovery of the fraud announce his purpose and adhere to it. If he continues to treat the property as his own the right of rescission is gone, and the party will be held bound by the contract. *Grymes* v. *Sanders*, 93 U. S. 55; *McLean* v. *Clapp*, 141 U. S. 429. In other words, when a party discovers that he has been deceived in a transaction of this character he may resort to an action at law to recover damages, or he may have the transaction set aside in which he has been wronged by the rescission of the contract. If he choose the latter remedy, he must act promptly, "Announce his purpose and adhere to it," and not by acts of ownership continue to assert right and title over the property as though it belonged to him. In the present case, some months before the beginning of this action, probably in October, 1900, Shappirio learned that the conveyance did not include the premises, part of lot 2, in the rear of lot 28. It may be that the mere lapse of time in this case would not of itself have defeated the right to rescind, as a purchaser has a reasonable time in which to make election of such remedy after discovery of the fraud, *Neblett* v. *Macfarland*, 92 U. S. 101, 105, but he cannot after such discovery treat the property as his own and exercise acts of ownership over it which show an election to regard the same as still his and at the same time preserve his right to rescission. In the present case, after discovering that the part of lot 2 had not been conveyed by the

deed, Shappirio collected rents for some months upon the property, corresponded with Goldberg as to future terms of rental, declined to reduce the rent, made some repairs upon the property and performed other acts of ownership. This conduct is wholly inconsistent with an election to undo the transaction and stand upon his right to rescind the contract.

We find no error in the judgment of the Court of Appeals affirming the decree of the Supreme Court, and it is

Affirmed.

COMMERCIAL NATIONAL BANK *v.* WEINHARD.

SAME *v.* WILLIAMS.

ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

Nos. 109, 110. Argued December 17, 1903.—Decided January 18, 1904.

Section 5205, Rev. Stat., is intended to, and does, confer upon a national banking association the privilege of declining to make the assessment to make good a deficiency in the capital after notice by the Comptroller of the Currency so to do and to elect instead to wind up the bank under § 5220. The shareholders and not the directors have the right to decide which course shall be pursued and an assessment made upon the shares by the directors without action by stockholders is void.

THESE actions were brought in the Circuit Court of the State of Oregon for Multnomah County upon separate demands to recover the value of stock severally held by Weinhard and Williams in the Commercial National Bank of Portland, Oregon; Williams owning sixty shares of the par value of $6000, and Weinhard one hundred shares of the par value of $10,000. By stipulation the cases were heard together in the Circuit Court; a jury being waived and a trial had to the court. The cases were considered together as one appeal in the Supreme Court of Oregon, which affirmed the judgment of the lower court, 41 Oregon, 359, assessing the value of the stock and giving

judgment in favor of the plaintiffs, now defendants in error. The same facts and questions are involved in the cases and they will be considered together. The one question arises from a motion on the part of the bank for nonsuit, on the ground that the plaintiffs below had introduced no testimony, as a part of the case in chief, tending to show the value of the stock for which a recovery was sought. As appears in the record much testimony was taken, and the Oregon Supreme Court regarding the stock as of some value, at least, it was held that if there was any error in overruling the motion for nonsuit, it was cured by the subsequent action in submitting testimony as to the value of the stock. In any event this feature of the case does not present a Federal question, and upon writ of error from the judgment of a state court we are to consider in the first instance only the Federal questions involved. If those were correctly decided the judgment must be affirmed. *Murdock* v. *City of Memphis*, 20 Wall. 590. The plaintiffs below recovered judgment for the value of the stock upon the theory that there had been a conversion thereof, because the board of directors and the stockholders directed the assessment resulting in the sale of the stock of the plaintiffs below in satisfaction thereof.

The Commercial National Bank of Portland was duly organized under the National Banking Act, and carried on business in the city of Portland, Oregon. It appeared that the capital of the bank had become impaired, and thereupon such proceedings were had that on December 5, 1896, the Comptroller issued the following notice to the bank:

"Treasury Department,
"Office of Comptroller of the Currency,
"Washington, D. C., Dec. 5, 1896.

"Whereas, it appears to the satisfaction of the Comptroller of the Currency that the capital stock of the Commercial National Bank, Portland, Oregon, has become impaired to an extent which makes necessary an assessment of two hundred

and fifty thousand dollars ($250,000) upon the shareholders of said association to make good such deficiency:

"Now, therefore, notice is hereby given to said association, under the provisions of section 5205 of the Revised Statutes of the United States, to pay the said deficiency in its capital stock by assessment upon its shareholders, *pro rata*, for the amount of the capital stock held by each, and if such deficiency shall not be paid, and said bank shall refuse to go into liquidation, as provided by law, for three months after this notice shall have been received by it, a receiver will be appointed to close up the business of the association, according to the provisions of section 5234 of the Revised Statutes of the United States.

"In testimony whereof, I have hereunto subscribed my name and caused my seal of office to be affixed to these presents, at the Treasury Department, in the city of Washington, and District of Columbia, this 5th day of December, A. D. 1896.

"JAMES H. ECKLES,

"*Comptroller of the Currency.*

"To the Commercial National Bank, Portland, Oregon."

After receipt of this notice, upon December 12, 1896, the board of directors passed this resolution:

"*Resolved*, That in accordance with the notice served upon this association by the Comptroller of the Currency, under date of December 5, 1896, and received by this bank on the 11th day of December, 1896, an assessment is hereby levied upon the shareholders of this bank of fifty per cent or $50 per share, payable at this bank on or before March 11, 1897.

"*And, resolved*, That the cashier of this bank be, and he hereby is, authorized and instructed to serve upon each shareholder of the bank a legal notice of the above assessment by sending such notice to each shareholder's address by registered mail."

Upon December 17, 1896, notice of this assessment was served upon each of the stockholders of the bank. The defendants in error having failed to pay this assessment, on

March 18, 1897, the board of directors passed a resolution directing the sale of the delinquents' stock to be made at public auction on May 5, 1897. In pursuance of this order, and on the day named, the stock was sold for the amount of the assessment. The Federal question is whether the board of directors in thus assessing and selling the stock of the defendants in error exceeded their powers under the National Banking Act; it being claimed that a valid assessment could only be made by the action of the stockholders, and that the sale by the directors upon this assessment was unlawful and amounted to a conversion of the stock.

Mr. E. S. Pillsbury for plaintiff in error.

Mr. Thomas O'Day, with whom *Mr. George H. Williams* and *Mr. George W. Durham* were on the brief, for defendants in error.

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

This case requires the construction of section 5205 of the Revised Statutes of the United States as amended. 3 Comp. Stat. 3495. The section is as follows:

"Every association which shall have failed to pay up its capital stock, as required by law, and every association whose capital stock shall have become impaired by losses or otherwise, shall, within three months after receiving notice thereof from the Comptroller of the Currency, pay the deficiency in the capital stock, by assessment upon the shareholders *pro rata* for the amount of capital stock held by each; and the Treasurer of the United States shall withhold the interest upon all bonds held by him in trust for any such association, upon notification from the Comptroller of the Currency, until otherwise notified by him. If any such association shall fail to pay up its capital stock, and shall refuse to go into liquidation, as

provided by law, for three months after receiving notice from the Comptroller, a receiver may be appointed to close up the business of the association, according to the provisions of section fifty-two hundred and thirty-four. And provided, That if any shareholder or shareholders of such bank shall neglect or refuse, after three months' notice, to pay the assessment, as provided in this section, it shall be the duty of the board of directors to cause a sufficient amount of the capital stock of such shareholder or shareholders to be sold at public auction (after thirty days' notice shall be given by posting such notice of sale in the office of the bank, and by publishing such notice in a newspaper of the city or town in which the bank is located, or in a newspaper published nearest thereto,) to make good the deficiency, and the balance, if any, shall be returned to such delinquent shareholder or shareholders."

The assessment in this case was made by the board of directors without any action of the stockholders of the association, and the defendants in error having failed to pay the same upon notice, their stock was sold as directed in the statute. It is claimed that an assessment by the directors without action of the stockholders was without authority of law and amounted to a conversion of the stock. This view was sustained in the Supreme Court of Oregon. The assessment ordered by the Comptroller was for the purpose of restoring the capital of the bank, and thus enabling it to continue its business. Ample power is conferred upon the Comptroller for this purpose. His action is in aid of other sections of the law preventing a withdrawal of the capital, or the making of dividends when losses have been sustained equal to the undivided profits. Sections 5202–5204, Rev. Stat. When the notice is received from the Comptroller by the bank under section 5205, the association has no authority to review or gainsay the necessity thereof. That question is concluded by the action of the Comptroller. The money to be raised for the continuance of the business may or may not be used in the liquidation of debts. The assessment is entirely different from that pro-

vided for in section 5151, calling upon the individual responsibility of shareholders for the payment of debts. Under the last named section the stockholder is required to pay such assessments as may be made, to meet the outstanding obligations of the bank, within the limit of an amount equal to the par value of the stock in addition to the amount invested therein. He has no election of payment, but is required to meet this liability, created by law for the benefit of creditors. Under section 5205 the amount paid is subject to the control of the board of directors in the continued operations of the bank. If the stockholders are to have a voice in making or declining to make the assessment, they may well hesitate to entrust more capital to the control of a board under whose management it has already been impaired. Certain powers are conferred by law upon the directors.

Section 5136 provides that the association shall have power—

"*Sixth.* To prescribe, by its board of directors, by-laws not inconsistent with law, regulating the manner in which its stock shall be transferred, its directors elected or appointed, its officers appointed, its property transferred, its general business conducted, and the privileges granted to it by law exercised and enjoyed.

"*Seventh.* To exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this Title."

And, again, by section 5145, it is declared that the "affairs" of the corporation "shall be managed by not less than five directors."

Thus the directors are given authority to transact the usual and ordinary business of national banks. Obviously, the

power conferred may be exercised in all usual transactions through the executive officers of the bank without consultation with the stockholders. In the present case the question to be dealt with is vital to the continuance of the life of the association, as only by complying with the requirement of the Comptroller in assessing a sum sufficient to make up the impaired capital of the bank can its business be continued. The shareholders by their contracts of subscription have agreed to pay in the amount of capital stock subscribed and to discharge the additional liability imposed by the statute. They have not contracted to meet assessments at the will of the directors to perpetuate the business of a possibly losing concern. It would be going far beyond the usual powers conferred upon directors to permit them to thus control the corporation. Corporate powers conferred upon a board of directors usually refer to the ordinary business transactions of the corporation. *Railway Company* v. *Allerton*, 18 Wall. 233. The assessment is required by the Comptroller, not by the directors. The association is to receive notice thereof, and action must be taken by the association to meet the requirements of the Comptroller under the statute. It is provided that if the association fail to pay up its capital stock, and refuse to go into liquidation, as provided by law, for three months after receiving notice from the Comptroller, a receiver may be appointed to close up the business of the association according to the provisions of section 5234. This important provision is entitled to much weight in determining the proper construction of the statute. The assessment may be avoided, and the amount required is not payable if the association decides to go into liquidation. Provision for voluntary liquidation is made in section 5220 wherein authority is given to liquidate upon a vote of shareholders owning two-thirds of the stock. Such liquidation does not prevent the assessment of stockholders under section 5151 for the benefit of creditors and the enforcement of the liability of the shareholders in an action by a receiver or directly by the creditors. Comp. Stat.

sec. 5234; sec. 2, Act of June 30, 1876, as amended, 3 Comp. Stat. 3509. The section referred to, 5234, directs the appointment of a receiver to take possession of the books, records and assets of the association, to collect the debts and claims belonging to it, and, among other things, if necessary to pay the debts of the association, to enforce the individual liability of the shareholders.

We are of opinion that section 5205 is intended to and does confer upon the association the privilege of declining to make the assessment to make good the deficiency to the capital, and to elect instead to wind up the business of the bank under section 5220, which provides for voluntary liquidation by a vote of two-thirds of the shareholders. The question is, who shall exercise this privilege and determine the future of the association—is it the directors or the shareholders who have this right of decision? The origin and continuation of the association would seem to be matters in which the owners and not the managers of the bank are primarily interested. If these are privileges of the shareholders and only exercisable by them, this case presents a total lack of the exertion of the power by those upon whom it is legally conferred, as no action of the shareholders was had in the present case in making the assessment. Action upon the Comptroller's order involves extraordinary action of the association, and determines its future operations or liquidation, and is not found within the powers conferred upon the directors for the management of the business of the bank. If this were not so, then the decision of a question of such vital importance is left to the directors, who may or may not be large holders of stock. As it is a matter foreign to the powers of such boards and not conferred by statute or required for the transaction of the business of the bank, we think it was intended to be vested in the shareholders. Whether a given power is to be exercised by the directors or the shareholders depends upon its nature and the terms of the enabling act. In certain instances the law specifically requires the action of the association to be taken by its

incorporators or shareholders. Sections 5133, 5134, 5136, 5143, Rev. Stat. These sections regulate matters not pertaining to the ordinary business of the bank entrusted to the directors. They deal with the exercise of those powers which concern the organization of the corporation, the amount of its capital stock and kindred matters.

In section 5205 the requirement of the Comptroller is that the association make the assessment. It is the "association" which is required to pay up the stock or go into liquidation. The payment of the assessments must come from the shareholders, and we are of the opinion that the statute contemplates action upon the alternatives presented in the statute by the association composed of its shareholders. It is true, as suggested by the learned counsel for the plaintiff in error, that it requires a two-thirds vote of the stockholders to put the bank into liquidation under section 5220; but if the assessment is not carried, and the shareholders have not a two-thirds vote favoring liquidation, the bank is put in liquidation, and the shareholders' liability is the statutory one for the benefit of creditors, and not a venture of more capital in the enterprise with a possible stockholders' liability upon the liquidation of the bank if it shall ultimately fail. Again, if the determination of this matter is entirely left to the directors, they may, by declining to make the assessment, force a liquidation of the bank, although the shareholders—the real owners of the property—be willing to make good the impaired capital and continue the business. On the other hand, if the directors may assess to make good impaired capital, the shareholder must pay the assessment or submit to the sale of his stock. Such extraordinary powers are far beyond those required in the management of the bank's affairs or conferred in the sections of the law defining those conferred upon the directors. In *Delano* v. *Butler*, 118 U. S. 634, 653, while the question was not directly involved, in speaking of assessments under the act, Mr. Justice Matthews, delivering the opinion of the court, said:

"The assessment imposed upon the stockholders by their own vote, for the purpose of restoring their lost capital, as a consideration for the privilege of continuing business, and to avoid liquidation under § 5205 of the Revised Statutes, is not the assessment contemplated by § 5151, by which the shareholders of every national banking association may be compelled to discharge their individual responsibility for the contracts, debts and engagements of the association. The assessment as made under § 5205 is voluntary, made by the stockholders themselves, paid into the general funds of the bank as a further investment in the capital stock, and disposed of by its officers in the ordinary course of its business. It may or may not be applied by them to the payment of creditors, and in the ordinary course of business, certainly would not be applied, as in cases of liquidation, to the payment of creditors ratably; whereas, under § 5151, the individual liability does not arise, except in case of liquidation and for the purpose of winding up the affairs of the bank. The assessment under that section is made by authority of the Comptroller of the Currency, is not voluntary, and can be applied only to the satisfaction of the creditors equally and ratably."

We concur in this reasoning. The assessment under section 5202 provides for a sum to continue the operations of the bank and if unpaid subjects the stock of the shareholders to sale to make good the deficiency in its collection. Shareholders are given the right to go into liquidation, subjecting themselves, it is true, to the liability of the assessment for the benefit of creditors under section 5151 to an amount equal to the par value of their stock, if needed to make good the indebtedness of the bank, but risking no further investment of new captial in the continued business of the bank. The choice of methods is with the shareholders, and to them is addressed the decision of the question and the making of the assessment if that course is determined upon. *Hulitt* v. *Bell*, 85 Fed. Rep. 98. In the present case the assessment was made by the directors without action by the shareholders, and, not being

within the statute, was void. It follows that the Supreme Court of Oregon properly affirmed the judgment of the lower court in which the value of the stock sold was recovered.

Judgment affirmed.

CHESEBROUGH *v.* UNITED STATES.

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

No. 152. Argued December 3, 4, 1903.—Decided January 25, 1904.

Texas paid voluntarily cannot be recovered back, and payments with knowledge and without compulsion are voluntary.

The purchase of stamps from a collector of internal revenue without intimating the purpose they are for, and without any protest made, or notice given, at the time, that the purchaser claims that the purchase is under duress, and the law requiring their use unconstitutional, is a voluntary payment, and a subsequent application to the commissioner to refund the amount is not equivalent to protest made, or notice given, at the time of the purchase.

Refusal by a vendee to accept a deed of conveyance without the stamps required by the war revenue act of 1898 is not such duress as relieves the vendor from making protest or giving notice at the time of the purchase to the collector from whom the stamps are purchased.

ROBERT A. CHESEBROUGH filed his petition in the District Court of the United States for the Southern District of New York, May 23, 1902, to recover the sum of six hundred dollars from the United States alleged to have been paid to the collector of internal revenue for the second district of New York for the purchase of certain internal revenue stamps to be affixed to a deed for the conveyance of real estate. Petitioner alleged that on May 28, 1900, he entered into an agreement with the Chesebrough Building Company to convey to that corporation certain real estate which he then owned and to execute and deliver a deed therefor on the fifth day of June, 1900. That on that day he made, executed and delivered to the corporation a deed of conveyance of the real estate and received the con-

sideration therefor. That at the time of the execution and delivery of the deed the act of Congress of June 13, 1898, "to provide ways and means to meet war expenditures, and for other purposes," was in force, which provided in part as follows:

"SEC. 6. That on and after the first day of July, eighteen hundred and ninety-eight, there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this act, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, shall be written or printed by any person or persons, or party who shall make, sign, or issue the same, or for whose use or benefit the same shall be made, signed, or issued, the several taxes or sums of money set down in figures against the same, respectively, or otherwise specified or set forth in the said schedule."

"Schedule A.

"Conveyance: Deed, instrument, or writing, whereby any lands, tenements, or other realty sold shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or purchasers, or any other person or persons, by his, her, or their direction, when the consideration or value exceeds one hundred dollars and does not exceed five hundred dollars, fifty cents; and for each additional five hundred dollars or fractional part thereof in excess of five hundred dollars, fifty cents."

"SEC. 7. That if any person or persons shall make, sign, or issue, or cause to be made, signed, or issued, any instrument, document, or paper of any kind or description whatsoever, without the same being duly stamped for denoting the tax hereby imposed thereon, or without having thereupon an adhesive stamp to denote said tax, such person or persons shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not more than one hundred dollars, at the discretion of the court, and such instrument, document,

or paper, as aforesaid, shall not be competent evidence in any court."

The petition then averred that "the Chesebrough Building Company, as was known to petitioner, was unwilling to accept the said deed of conveyance unless and until petitioner had placed thereon the stamps required by the aforesaid act, and that petitioner under compulsion of said law, and in order to receive from the purchaser the shares of stock named as the consideration for such conveyance, and in order to entitle such deed to be recorded under the provisions of said act, and to be received as evidence in the Federal Courts, as therein provided and in order to enable the petitioner to fulfill his aforesaid contract with said Chesebrough Building Company, to make, execute and deliver to said company a good and sufficient deed of conveyance of said real estate and premises, and in order to give to said company a good and clear title to said real estate and premises, free from doubt, did purchase from Charles H. Treat, the United States collector of internal revenue for the second district of New York, and place upon the said deed of conveyance stamps to the amount of six hundred dollars ($600) the proceeds of sale of which stamps your petitioner believes were thereupon by said collector paid over to the United States as required by law, and said moneys are now held by the United States."

It was further averred that prior to the institution of the action and in pursuance of the laws of the United States and the regulations of the Treasury Department in that behalf, petitioner made a written application on January 9, 1902, to the United States Commissioner of Internal Revenue for the refunding of the amount so paid by him for stamps as aforesaid, which application was denied. Petitioner then charged that the act was unconstitutional and void, and prayed judgment. To this petition a demurrer was filed on behalf of the United States, assigning the ground that the petition did "not state facts which would constitute a claim on the part of the claimant against the United States." The demurrer was sus-

tained and the petition dismissed, and this writ of error was thereupon allowed.

Sections 3220, 3226, 3227 and 3228 of the Revised Statutes are as follows:

"SEC. 3220. The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized, on appeal to him made, to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; also to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal taxes collected by him, with the costs and expenses of suit; also all damages and costs recovered against any assessor, assistant assessor, collector, deputy collector, or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty: *Provided*, That where a second assessment is made in case of a list, statement, or return which in the opinion of the collector or deputy collector was false or fraudulent, or contained any understatement or undervaluation, such assessment shall not be remitted, nor shall taxes collected under such assessment be refunded, or paid back, unless it is proved that said list, statement, or return was not false or fraudulent, and did not contain any understatement or undervaluation."

"SEC. 3226. No suit shall be maintained in any court for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until appeal shall have been duly made to the Commissioner of [*the*] Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of the Commissioner has been had therein: *Provided*, That if such decision

is delayed more than six months from the date of such appeal, then the said suit may be brought, without first having a decision of the Commissioner at any time within the period limited in the next section.

"SEC. 3227. No suit or proceeding for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, shall be maintained in any court, unless the same is brought within two years next after the cause of action accrued: *Provided*, That actions for such claims which accrued prior to June six, eighteen hundred and seventy-two, may be brought within one year from said date; and that where any such claim was pending before the Commissioner, as provided in the preceding section, an action thereon may be brought within one year after such decision and not after. But no right of action which was already barred by any statute on the said date shall be revived by this section.

"SEC. 3228. All claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, must be presented to the Commissioner of Internal Revenue within two years next after the cause of action accrued: *Provided*, That claims which accrued prior to June six, eighteen hundred and seventy-two, may be presented to the Commissioner at any time within one year from said date. But nothing in this section shall be construed to revive any right of action which was already barred by any statute on that date."

Mr. Paul Fuller and *Mr. F. R. Coudert, Jr.*, with whom *Mr. Henry M. Ward* was on the brief, for plaintiff in error:

This is a direct tax and is void because not apportioned. *Income Tax Cases*, 157, 158 U. S.; *Nicol* v. *Ames*, 173 U. S.

509; *Fairbank* v. *United States*, 181 U. S. 283; for definition of ownership see Austin on Jurisprudence, §§ 515, 518, 1103; Holland's Jurisprudence, 194. Alienability is not a less essential part of property than income or possession. It is a fundamental right, *United States* v. *Perkins*, 163 U. S. 625, whereas those of disposing or taking by testament are not fundamental. This differentiates *Magoun* v. *Trust Co.*, 170 U. S. 283; *United States* v. *Perkins*, 163 U. S. 625; *Knowlton* v. *Moore*, 178 U. S. 41. A general act making land inalienable would amount to depriving owners of property without due process of law. *Wynehamer* v. *The People*, 13 N. Y. 378. As to where taxes on sale of real estate fall, see Smith's Wealth of Nations, Art. 1, p. 685, and John Stuart Mill on Political Economy. For origin of stamp taxes, see Dowell's History, vol. II, p. 62, vol. III, p. 321, *et seq.* The tax has only been imposed once before in the United States in 1862, 12 Stat. 479. It was not included in the act of July 6, 1797, or that of August 2, 1813.

The Circuit Judge erred in the recent decision of *United States* v. *Thomas*, sustaining the constitutionality of tax on stock transfers. The argument that such a tax could not be apportioned would apply equally well to the income tax but did not find favor with the court.

The payment was not a voluntary one; the law presumes a payment made by threats or duress was not voluntary. *Swift Co.* v. *United States*, 111 U. S. 22, 28. The treasury regulations did not require a protest but an application for a refund which was made. Provisions of Revised Statutes for refunding internal revenue taxes are remedial. *Savings Bank* v. *United States*, 16 C. Cl. 335, 348; affirmed 104 U. S. 728; *Kaufman's Case*, 11 C. Cl. 669, affirmed 96 U. S. 570. The protest in customs cases is not the protest required by common law *Elliott* v. *Swartwout*, 10 Pet. 137, 152; *Erskine* v. *Van Arsdale*, 15 Wall. 75. The petition alleges that the statutory and departmental regulations were complied with. The action was properly brought under the Tucker Act. *Dooley* v. *United States*, 182 U. S. 222.

Mr. Assistant Attorney General Purdy for the United States:

The payment was purely voluntary and unless the Government confer the right to sue there can be no recovery. In this case there was no protest. Cooley on Taxation, 3d ed. p. 1495; *Elliott* v. *Swartwout*, 10 Pet. 137, 152; *Erskine* v. *Van Arsdale*, 15 Wall. 75; *Philadelphia* v. *Collector*, 5 Wall. 720, 730; *Real Estate Savings Bank* v. *United States*, 16 C. Cl. 335; *S. C.*, 104 U. S. 728; *Cheatham* v. *United States*, 92 U. S. 88; *Wright* v. *Blakeslee*, 101 U. S. 178; *Schmidt* v. *Trowbridge*, Fed. Cas. No. 12,468; *Stewart* v. *Barnes*, 153 U. S. 456; and see intimation in *Pollock* v. *Farmer's L. & T. Co.*, 157 U. S. 554, and cases cited in dissenting opinion, p. 606; *Pacific Steam Whaling Co.* v. *United States*, 187 U. S. 447, 453; *De Lima* v. *Bidwell*, 182 U. S. 1, 179.

The tax is an indirect and not a direct tax. The position of the Government on this point is set forth in the brief submitted on its behalf in *Thomas* v. *United States*, argued simultaneously with this case.

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

The rule is firmly established that taxes voluntarily paid cannot be recovered back, and payments with knowledge and without compulsion are voluntary. At the same time, when taxes are paid under protest that they are being illegally exacted, or with notice that the payer contends that they are illegal and intends to institute suit to compel their repayment, a recovery in such a suit may, on occasion, be had, although generally speaking, even a protest or notice will not avail if the payment be made voluntarily, with full knowledge of all the circumstances, and without any coercion by the actual or threatened exercise of power possessed, or supposed to be possessed, by the party exacting or receiving the payment, over the person or property of the party making the payment, from which the latter has no other means of imme-

diate relief than such payment. *Little* v. *Bowers*, 134 U. S. 547, 554; *Railroad Company* v. *Commissioners*, 98 U. S. 541, 544; *Radich* v. *Hutchins*, 95 U. S. 210, citing *Brumagim* v. *Tillinghast*, 18 California, 265, a case in respect of stamps purchased, in which the subject is discussed by Mr. Justice Field, then Chief Justice of California.

In *Railroad Company* v. *Commissioners*, Mr. Chief Justice Waite, speaking for the court, said:

"There are, no doubt, cases to be found in which the language of the court, if separated from the facts of the particular case under consideration, would seem to imply that a protest alone was sufficient to show that the payment was not voluntary; but on examination it will be found that the protest was used to give effect to the other attending circumstances. Thus, in *Elliott* v. *Swartwout*, 10 Pet. 137, and *Bond* v. *Hoyt*, 13 Pet. 266, which were customs cases, the payments were made to release goods held for duties on imports; and the protest became necessary, in order to show that the legality of the demand was not admitted when the payment was made. The recovery rested upon the fact that the payment was made to release property from detention, and the protest saved the rights which grew out of that fact. In *Philadelphia* v. *Collector*, 5 Wall. 730, and *Collector* v. *Hubbard*, 12 Wall. 13, which were internal-revenue tax cases, the actions were sustained 'upon the ground that the several provisions in the internal-revenue acts referred to warranted the conclusion as a necessary implication that Congress intended to give the tax-payer such remedy.' It is so expressly stated in the last case, p. 14. As the case of *Erskine* v. *Van Arsdale*, 15 Wall. 75, followed these, and was of the same general character, it is to be presumed that it was put upon the same ground. In such cases the protest plays the same part it does in customs cases, and gives notice that the payment is not to be considered as admitting the right to make the demand."

The stamps in question were purchased from the collector of internal revenue for the Second District of New York, for the

purpose of affixing them to a deed of conveyance to the Building Company, but the collector was not informed at the time of the purchase of the particular purpose, and no intimation was given him, written or oral, that petitioner claimed that the law requiring such stamps was unconstitutional and that he was making the purchase under duress. The petition did allege that the Building Company was unwilling to accept an unstamped conveyance and that the stamps were thereupon affixed in order to complete the transaction and obtain the consideration, but if that constituted duress as between Chesebrough and his building company it was a matter with which the collector had nothing to do. On the face of the petition the purchase was purely voluntary and made under mutual mistake of law if the law were unconstitutional. But it is said that protest or notice would have made this payment involuntary, and that because something over nineteen months after the payment petitioner made "a written application" to the Commissioner of Internal Revenue for the amount he had paid for the stamps, the ordinary rule did not apply, inasmuch as such an application was "the statutory equivalent of a common law protest or notice of suit."

The reference is to section 3220 of the Revised Statutes, which provides that the Commissioner of Internal Revenue, on appeal to him, may remit, refund and pay back all taxes erroneously or illegally assessed or collected, or that appear to have been unjustly assessed or excessive in amount, or in any manner wrongfully collected; and also "repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal taxes collected by him, with the costs and expenses of suit;" while sections 3226, 3227, and 3228 provide that no suit shall be maintained for the recovery of internal taxes alleged to have been erroneously or illegally assessed or collected "until appeal shall have been duly made to the Commissioner of the Internal Revenue;" or unless brought within two years after the cause

of action accrued; and that the claim for refunding shall be presented to the Commissioner within two years.

The words "until appeal shall have been duly made," appear to us to imply an adverse decision by the collector, at least a compelled payment, or official demand for payment, from which the appeal is taken.

In *Stewart* v. *Barnes*, 153 U. S. 456, this court treated the language as providing for "an appeal," and we think correctly. The opinion considered section 19 of the act of July 13, 1866, 14 Stat. 98, 152, c. 184, carried forward into section 3226, and section 44 of the act of June 6, 1872, 17 Stat. 230, 257, c. 315, from which sections 3227 and 3228 were drawn. We give them in the margin.[1]

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[1] Sec. 19, Act of July 13, 1866:

"SEC. 19. *And be it further enacted*, That no suit shall be maintained in any court for the recovery of any tax alleged to have been erroneously or illegally assessed or collected, until appeal shall have been duly made to the Commissioner of Internal Revenue according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of said Commissioner shall be had thereon, unless such suit shall be brought within six months from the time of said decision, or within six months from the time this act takes effect: *Provided*, That if said decision shall be delayed more than six months from the date of such appeal, then said suit may be brought at any time within twelve months from the date of such appeal."

Sec. 44, Act of June 6, 1872:

"SEC. 44. That all suits and proceedings for the recovery of any internal tax alleged to have been erroneously assessed or collected, or any penalty claimed to have been collected without authority, or for any sum which it is alleged was excessive, or in any manner wrongfully collected, shall be brought within two years next after the cause of action accrued and not after; and all claims for the refunding of any internal tax or penalty shall be presented to the Commissioner of Internal Revenue within two years next after the cause of action accrued and not after: *Provided*, That actions for claims, which have accrued prior to the passage of this act, shall be commenced in the courts or presented to the Commissioner of Internal Revenue within one year from the date of said passage: *And provided further*, That where a claim shall be pending before said Commissioner the claimant may bring his action within one year after such decision and not after: *And provided further*, That no right of action barred by any statute now in force shall be revived by anything herein contained."

This petition did not set up any ruling of the collector, either specific or resulting from a demand to which petitioner yielded under protest or with notice, and from which he appealed to the Commissioner, but averred that he "made a written application" to the Commissioner to refund the amount he had paid.

We do not say that this was not sufficient to justify action by the Commissioner, but the averment as it stands is not equivalent to stating a previous adverse decision appealed from. The inference is that the application was a mere afterthought, and if an afterthought, the payment was voluntary.

The Commissioner might nevertheless have allowed the claim, and doubtless would have done so, in the interest of justice, if there were no particular circumstances to discredit it, and the law had been held unconstitutional by this court. But he rejected it, and petitioner was remitted to his suit in no different plight so far as his cause of action was concerned than if he had not sought the Commissioner at all.

In *United States* v. *Savings Bank*, 104 U. S. 728, it was held that the allowance of a claim by the Commissioner was equivalent to an account stated between private parties and binding on the United States until impeached for fraud or mistake, and that if not paid on proper application through the accounting officers of the Treasury Department, an action might be maintained on it in the Court of Claims, while if the claim were rejected, an action might be prosecuted against the collector. It was not, however, ruled that in the latter situation a recovery could be had if the original payment had been voluntary and without objection.

It is one thing for the Government to correct mistakes, return overcharges, or refund amounts exacted without authority, when satisfied such action is due to justice, and quite another thing for the Government to be compelled to repay amounts which in its view have been lawfully collected.

By section 3220 authority is given and opportunity afforded to do what justice and right are found to require, and the conditions which govern contested litigation may well be regarded

as waived, but it does not follow that there is any statutory waiver of such conditions when the Government is proceeded against *in invitum*.

As we have said the purchase of these stamps was purely voluntary, and if, notwithstanding, recovery could be had, it could only be on protest or notice, and there was none such here, written or verbal, formal or informal.

It is argued that the provisions of section 3220 for the repayment of judgments against the collector rendered protest or notice unnecessary for his protection, but it was clearly demanded for the protection of the Government in conducting the extensive business of dealing in stamps, which were sold and delivered in quantities, and without it there would not be the slightest vestige of involuntary payment in transactions like that under consideration. And we find no right of recovery, expressly or by necessary implication, conferred by statute, in such circumstances.

Judgment affirmed.

SINGER MANUFACTURING COMPANY *v.* CRAMER.

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

No. 18. Argued March 18, 19, 1903.—Decided February 1, 1904.

Where it appears from the face of the patents that extrinsic evidence is not needed to explain the terms of art therein, or to apply the descriptions to the subject matter, and the court is able from mere comparison to comprehend what are the inventions described in each patent, and from such comparison whether one device infringes upon the other the question of infringement or no infringement is one of law and susceptible of determination on a writ of error.

Where the principal elements of a combination are old, and the devising of means for utilizing them does not involve such an exercise of inventive faculties as entitles the inventor to claim a patent broadly for their combination, the patent therefor is not a primary one and is not entitled to the broad construction given to a pioneer patent.

To prevent a broadening of the scope of an invention beyond its fair import, the words of limitation contained in the claim must be given due effect and the statement in the first claim of the elements entering into the combination must be construed to refer to elements in combination having substantially the form and constructed substantially as described in the specifications and drawings.

Where the patent is not a primary patent and there is no substantial identity in the character of two devices except as the combination produces the same effect, and there are substantial and not merely colorable differences between them, there is no infringement of the earlier patent.

THIS controversy relates to an alleged infringement by the petitioner, a New Jersey corporation, of United States letters patent No. 271,426, issued to the respondent on January 30, 1883, for "a new and improved sewing machine treadle." For convenience the petitioner will be hereafter referred to as the Singer Company and the respondent as Cramer.

The treadle device used by the Singer Company on its sewing machines, which it was charged infringed the Cramer patent, was covered by letters patent No. 306,469, dated October 14, 1884, issued to the Singer Company as the assignee of one Diehl.

The file wrapper and contents exhibit the following proceedings in the Patent Office respecting the Cramer patent. The

original application was filed on May 25, 1882, and was for the grant of letters patent to Cramer "as the inventor, for the invention set forth in the annexed specification." The specification and oath thereto read as follows:

"I, Herman Cramer, of the city of Sonora, in Tuolumne County, in the State of California, have invented certain improvements in a treadle, to be used in sewing machines, or other machinery where a noiseless treadle may be required, of which the following is a specification:

"My invention consists of the usual platform marked 'A' in Fig. 1 of diagram on treadle bar. The ends of said treadle bar, marked 'B,' are shaped like the letter V and rest in socket in lower end of a brace 'C,' the socket being  shaped, the brace 'C' cast in one piece, and the treadle bar and platform on the bar is also cast in one piece.

"The treadle bar rests in socket in brace 'C,' which is immediately above a cross-brace usually in machines to keep them from spreading apart, the nut on end of cross brace is marked 'D.' Letter 'M' immediately beneath cross brace and treadle bar is an oil receiver to retain any drippings of oil from the bearings of treadle bar.

"My invention consists in having the ends of the treadle bar V-shaped to fit in hole in brace 'C,' also  shaped to receive the ends of the treadle bar.

"This V-shaped treadle bar in brace 'C' entirely prevents noise from the treadle, is self-adjusting, and does away with the necessity of cones and set screws now in use. This I claim as my invention. Fig. 1 represents platform 'A' and treadle bar, the ends of which are V-shaped and marked 'B.'

"Fig 2 represents the lower end of brace 'C' with hole  shaped to receive the ends of treadle bar 'B.' 'D' represents nut on end of cross brace immediately below treadle bar.

"STATE OF CALIFORNIA, }
"*County of Tuolumne.* }

"Herman Cramer, the above-named petitioner, being duly

sworn, deposes and says that he verily believes himself to be the original and first inventor of the improvement in a noiseless self-adjusting treadle described in the foregoing specification, that he does not know and does not believe that the same was ever before known or used, and that he is a citizen of the United States."

The application was referred to the examiner, who, on May 29, 1882, wrote to Cramer, in care of his attorneys, as follows:

"The application is not prepared in conformity with the rules of the office. The specification is written on both sides of the pages, while the rules direct that it should be written on one side of each page only.

"No claim is appended to the specification. The oath is incomplete, as section 39 of the rules requires applicants to state under the oath if the invention has been patented to them, or with their knowledge and consent to others in any foreign country, and if so, the number, date and place of such patent or patents. Reference is made to the patent to G. W. Gregory, No. 256,563, April 18, 1882, which exhibits the alleged invention."

On August 3, 1882, the following substitute specification, concluding with an oath similar to that appended to the prior specification, was sent to the Patent Office:

"I, Herman Cramer, of the city of Sonora, in Tuolumne County, in the State of California, have invented certain improvements in a treadle and brace, to be used in sewing machines or other machinery where a noiseless treadle may be required, of which the following is a specification:

"My invention consists in a combination of the usual platform marked 'A,' in Fig. 1 of diagram on treadle bar. The ends of said treadle bar marked 'B' are to bear against mufflers.

"The treadle bar bearings are in and on brace 'C.' The treadle bar rests in socket in brace 'C,' which is immediately above a cross bar usually in machines to keep them from spreading apart.

"The nut on end of cross bar, is marked 'D.' Letter 'M,' immediately beneath cross bar, and treadle bar, is an oil receiver to retain any drippings of oil from the bearings of treadle bar.

"The treadle bar, mufflers and brace 'C' are held between the right and left legs of the machine by means of a brace bar underneath the treadle bar.

"This brace and socket or bearing in or on brace is in one piece.

"The treadle bar with mufflers on the ends, working or bearing in or on brace, entirely prevents noise from the treadle, is self-adjusting, and does away with the necessity for cones and set screws now in use.

"Fig. 1 represents platform 'A' and treadle bar, the ends of which may be V-shaped, or any shape to suit, marked 'B.'

"Fig. 2 represents the lower end of brace 'C.'

"'D' represents nut on end of cross bar immediately below the treadle bar.

"What I claim is a combination of brace 'C' with socket or bearing in it or on it, to receive the treadle bar with the mufflers at the ends of treadle bar or in or on brace 'C' in connection with said brace 'C,' and the treadle bar in connection with brace 'C' and mufflers to work in or on brace 'C,' substantially as set forth."

On August 14, 1882, the examiner wrote Cramer, in care of his attorneys, as follows:

"Applicant's amended claims are met by the patent to J. E. Donovan, June 28, 1881, No. 243,529, in view of which a patent is again refused."

Following this rejection there was filed a revocation of the power of attorney which had been executed by Cramer in favor of the attorneys who had theretofore conducted the proceedings, and an appointment of other attorneys for the further prosecution of the application. On October 17, 1882, the substituted attorney sent to the Patent Office a new drawing and an amendment of the specification on file, which amendment consisted in cancelling all the specification except the

signature and substituting for the matter so stricken out the following:

"Be it known that I, Herman Cramer, of Sonora, in the county of Tuolumne and State of California, have invented a new and improved sewing machine treadle; and I do hereby declare that the following is a full, clear, and exact description of the same, reference being had to the accompanying drawing, forming part of this specification.

"My invention relates to improvements in the bearings of sewing machine treadles, and it has for its object to provide means, first, to keep the treadle bearings rigidly in line and at a fixed distance apart to avoid friction, and second, to make its movement in use, noiseless. To this end my invention consists in the construction and combination of parts hereinafter fully described and claimed, reference being had to the accompanying drawings in which—

"Fig. 1 is a perspective view of a portion of a sewing machine showing my invention.

"Fig. 2 is a transverse vertical section through one bearing of the treadle.

"A represents the treadle provided with the usual pitman connection by which to run the sewing machine wheel. B represents the two trunnions cast as a portion of the treadle and extending from its side into loopholes in the common cast iron cross brace C. These trunnions are sharpened to an edge or corner along their lower sides, and the lower end of the loophole is hollowed to an angle more obtuse than the edge of the trunnion, to serve as a bearing for the same and permit the rocking motion common to treadles.

"C represents the usual cast iron double brace connecting the two end legs diagonally in a plane generally vertical. The lower ends of this brace are secured directly to the web of the legs by bolts *d*, and for convenience and strength I make the two ends of the common cross bar D serve as these bolts. The upper ends of the brace are secured as usual, either to the web of the legs or to the table of the machine near the legs.

"The treadle and its trunnion bearings are wholly independent of the cross bar D, except its service as stated, to hold the brace to the legs. The bearing holes in the brace are formed into long vertical loops to permit the entrance of the treadle.

"Pieces of leather F, or other soft material, cover the top and end of each trunnion, to serve as cushions to keep the same close in its bearing, to prevent the noise which would result were the trunnions permitted to bounce and thump endways, when the treadle is in motion. The leather F is fitted to the curve of the upper side of the trunnion, which is an arc of a cylinder, whose center of oscillation is the lower edge of the trunnion; the same leather also interposes between the end of the trunnion and the adjacent iron. *f* is a block serving as a mere backer to which the cushion F is attached. This block conforms to the back and top side of the cushion and fills the loophole in the brace above the trunnion. It also has tangs or projections *e*, resting in suitable recesses in the brace C, which are held between the brace and the web of the leg E, by which means the block and cushion are held in place. Below the bearings of the trunnions B I provide cups, M, attached to the ends of brace C, to catch the oil that usually drips from such bearings.

"By this construction my treadle bearings are rigidly fixed and in no way liable to get out of line or to require adjustment; the usual noise is prevented, and overflowing of oil is caught before it can do damage.

"I am aware that sewing machine treadles have before been provided with V-shaped bearings and I do not claim the same as my invention but—

"What I claim and wish to secure by letters patent is—

"1. The vertical double brace joining the legs of the two ends of a sewing machine, provided with holes through its lower extremities to serve as bearings, in combination with a treadle provided with trunnions fitted to oscillate in said bearings, substantially as specified.

"2. The sewing machine legs E, the vertical double brace C secured thereto and provided with holes to serve as bearings for the treadle A, and the treadle provided with trunnions B to oscillate in said bearings, in combination with the cushion F and the block *f*, as and for the purpose specified."

Accompanying the new specification was the following communication, signed by the attorney:

"A new oath is herewith filed. Gregory, referred to, pivots the grooved trunnions of his treadle upon knife edges secured within the upper loops of two collars, which are secured to the cross bar by means of set screws to keep them from turning. Donovan pivots his treadle upon its trunnions having sharpened edges, in grooves in the cross bar, where it is held by collars provided with flanges projecting over the trunnions. Applicant pivots his treadle upon the sharpened edges of its trunnions in loop holes in the two ends of the brace which is bolted to the legs of the machine by the two ends of the cross bar. This service of the cross bar might be as well performed by two short bolts; but the bar being a usual cross tie to stiffen the legs, applicant uses its ends as bolts to hold his brace ends to the legs. We have rewritten the specification to elucidate the inventor's claim. Should the case meet with favorable consideration a new drawing will be furnished. For the purpose of examination see pencil sketch on sheet of drawing filed."

On October 19, 1882, the examiner wrote Cramer, in care of his attorneys, as follows:

"The case has been reconsidered in connection with the substituted specification filed the 17th inst., and the examiner holds that the references previously cited—that of Gregory in particular—meets the alleged invention. The case is accordingly rejected."

To this letter the following reply was made by the attorneys for Cramer:

"The examiner will please notice that applicant's invention places both bearings of the treadle in the cross brace.

"By this means they may be made perfectly true in line

either by casting or drilling and they cannot be thrown out of line either by use or by the most awkward setting up.

"Therefore one source of friction is avoided. All the references have shown bearings made of two separate pieces which could readily be set up out of line or even be worked loose. The advantage is obvious.

"A reconsideration is respectfully asked."

This closed the correspondence. Soon afterwards notification was given that the patent had been allowed, and letters patent embodying the specification last above set forth, headed "Treadle for sewing machines," etc., were issued, bearing date January 30, 1883. The following is a *fac simile* of the drawing referred to in the specification:

Fig. 1.

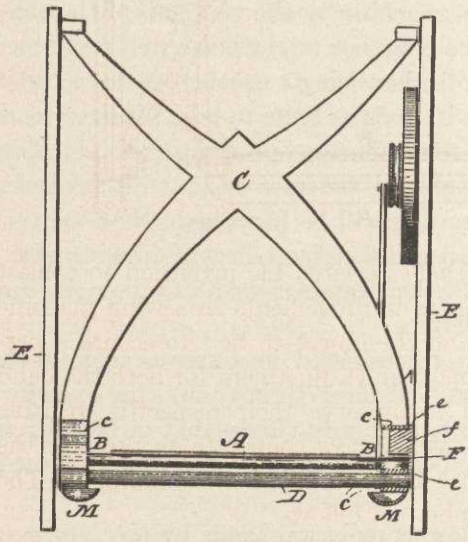
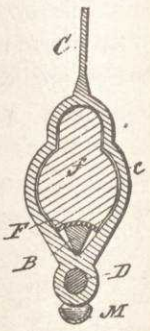
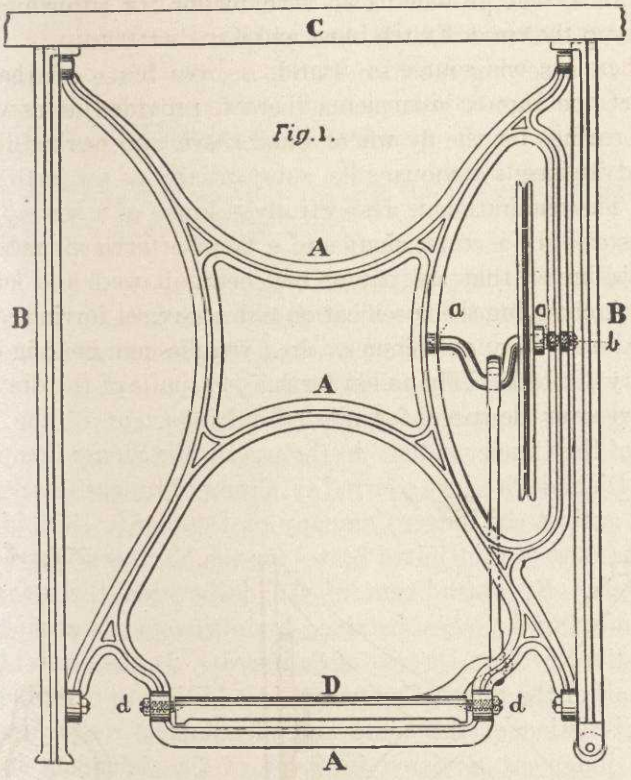


Fig. 2.



The alleged infringing device is delineated on the following *fac simile* of the first sheet of the drawing attached to the Diehl patent:



In this specification Diehl declared his invention to consist in "certain new and useful improvements in sewing machine stands and treadles;" and the object to be "to secure a permanent and reliable support and adjustment for both the band wheel and treadle and to preserve their respective relative positions, so that they will always coöperate to produce the best results with the least danger of friction or binding." The claims were five in number, as follows:

"1. In a sewing machine stand, a cross brace having supports for both the band wheel and the treadle integral with said brace.

"2. In a sewing machine stand, a cross brace having supports for both the band wheel and the treadle integral with

said brace, and provided also with means for adjusting and taking up the wear of such band wheel and treadle.

"3. In a sewing machine stand, a cross brace adapted to connect the legs or side pieces thereof, provided at one side with bearings for the fly wheel crank shaft, and having a support at its base for the treadle, substantially as set forth.

"4. The combination, with the cross brace of a sewing machine stand, of a crank shaft and a treadle, both mounted in the said brace, substantially as set forth.

"5. A cross brace for sewing machine stands, having at its base a cross bar, combined with a treadle mounted in said cross bar, substantially as set forth."

To recover damages for alleged infringement of the first claim of the Cramer patent, in the use by the Singer Company of the Diehl device just referred to, Cramer brought this action at law against the Singer Company on October 8, 1896, in the Circuit Court of the United States for the Northern District of California. By amendment of the declaration the recovery was limited to damages sustained by infringements committed within the Northern District of California. In the answer filed on behalf of the Singer Company—in addition to excepting to the jurisdiction of the court and pleading as *res judicata* a former judgment rendered in favor of the defendant in an action brought by Cramer against one Fry, an employé of the Singer Company, 68 Fed. Rep. 201—defences were interposed of want of novelty and utility and lack of invention, and infringement was denied.

A trial was had which resulted (by direction of the court, sustaining the plea of *res judicata*) in a verdict and judgment for the defendant. This judgment was reversed by the Circuit Court of Appeals for the Ninth Circuit. 93 Fed. Rep. 636. On a second trial a verdict was rendered for Cramer and judgment was entered thereon for the sum of $12,456. On appeal this judgment was affirmed by the Circuit Court of Appeals for the Ninth Circuit. 109 Fed. Rep. 652. A writ of certiorari was thereafter allowed by this court.

Mr. Charles C. Linthicum and *Mr. Charles K. Offield* for petitioner.

Mr. John H. Miller for respondent.

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

Sixty-eight exceptions were taken by the Singer Company during the trial of the action in the Circuit Court and were pressed upon the attention of the Circuit Court of Appeals in sixty-nine assignments of error. These exceptions were all in effect relied upon in the argument at bar; but from the view we take of the case it is unnecessary to consider and decide any other assignment than that based upon the exception to the refusal of the court, at the close of all the evidence, to instruct a verdict for the defendant on the ground that "no infringement whatever had been shown." As in each of the patents in question it is apparent from the face of the instrument that extrinsic evidence is not needed to explain terms of art therein, or to apply the descriptions to the subject matter, and as we are able from mere comparison to comprehend what are the inventions described in each patent and from such comparison to determine whether or not the Diehl device is an infringement upon that of Cramer, the question of infringement or no infringement is one of law and susceptible of determination on this writ of error. *Heald* v. *Rice*, 104 U. S. 737; *Market Street Cable Ry. Co.* v. *Rowely*, 155 U. S. 621, 625.

Whether error was committed in refusing to direct a verdict is then the question to be decided. The claims of the Cramer patent are two in number, and read as follows:

"1. The vertical double brace joining the legs of the two ends of a sewing machine, provided with holes through its lower extremities to serve as bearings, in combination with a treadle provided with trunnions fitted to oscillate in said bearings, substantially as specified.

"2. The sewing machine legs E, the vertical double brace C secured thereto and provided with holes to serve as bearings for the treadle A and the treadle provided with trunnions B to oscillate in said bearings, in combination with the cushion F and the block *f*, as and for the purpose specified."

Infringement is charged only in respect to the first claim. In substance the contention for Cramer is that the conception or idea of the practicability and desirability of utilizing a vertical double brace as a support for a sewing machine treadle was new with Cramer, and the combination devised by him produced such new and useful results and exhibited such an exercise of the inventive faculty as to cause the patent to be a pioneer, and, therefore, entitle the patentee to demand that the claim of the patent should be broadly and liberally construed. For the Singer Company it is contended that the availability of use of a vertical cross brace as a support for a sewing machine treadle was apparent to any person possessing ordinary mechanical skill, that the invention in question if patentable was in no just sense one of a primary nature, and that the combination described by Cramer is to be restricted narrowly to the mere details of the mechanism described as constituting the combination. We must first determine which of these contentions is correct.

Discussing the significance of the term "pioneer" as applied to a patented invention, this court, in *Westinghouse* v. *Boyden Power Brake Co.*, 170 U. S. 537, said (p. 561):

"To what liberality of construction these claims are entitled depends to a certain extent upon the character of the invention, and whether it is what is termed in ordinary parlance a 'pioneer.' This word, although used somewhat loosely, is commonly understood to denote a patent covering a function never before performed, a wholly novel device, or one of such novelty and importance as to mark a distinct step in the progress of the art, as distinguished from a mere improvement or perfection of what had gone before. Most conspicuous examples of such patents are: The one to Howe of the sewing

machine; to Morse of the electrical telegraph; and to Bell of the telephone. The record in this case would indicate that the same honorable appellation might safely be bestowed upon the original air-brake of Westinghouse, and perhaps also upon his automatic brake. In view of the fact that the invention in this case was never put into successful operation, and was to a limited extent anticipated by the Boyden patent of 1883, it is perhaps an unwarrantable extension of the term to speak of it as a 'pioneer,' although the principle involved subsequently and through improvements upon this invention became one of great value to the public."

To ascertain whether the patented invention of Cramer is entitled to be embraced within the term pioneer as just defined, we will consider it in connection with the state of the art.

In the history of the art it is unquestioned that long prior to the application by Cramer for the grant of the patent in question, devices similar to the vertical cross brace C and the lower cross bar or tie rod D, shown in the drawing of the Cramer patent, were commonly employed in sewing machines. This is conceded by Cramer in statements made in the progress of his application through the Patent Office. Thus, in the specification which forms a part of the patent the vertical brace C is referred to (italics not in original) as "the *common* cast iron brace C," and "the *usual* cast iron double brace;" while in the first of the proposed specifications as well as in that which was finally adopted, the lower bar or tie rod D is referred to (italics not in original) as "the *common* cross brace or cross bar." And in both the first and second specifications the usual purpose subserved in sewing machines by this cross bar was "to keep them (the machines) from spreading apart." It is, of course, obvious that such was also the purpose of the employment of the vertical double or cross brace.

The vertical double cross brace C, as shown in the Cramer drawing, is a solid piece of casting. But it is also an undisputed fact that long prior to the alleged invention of Cramer it was a well-known method of construction when revolving

or oscillating shafts were to be placed in bearings or supports, to have both bearings or supports of such shafts attached to a solid metal casting. Instances of such practices, testified to by witnesses, may be referred to. One was a device to hold a saw mandrel or saw arbor, the former being cast in one piece for the purpose of connecting both journals of the arbor to keep it in absolute line. Another device is the head stock of an ordinary engine lathe or machine lathe, where in order to have a proper working machine it is absolutely necessary that the shaft bearings shall be in exact alignment with each other and firmly in one place. Still another illustrative device employed for a great many years is embodied in a high speed engine. So, also, in the sewing machine art, as evidenced by the Willcox patent No. 106,242 of date August 9, 1870, to be hereafter noticed, the legs of sewing machines had long before Cramer's application been used as bearings for treadle bars, the bearings being cored out of the leg castings.

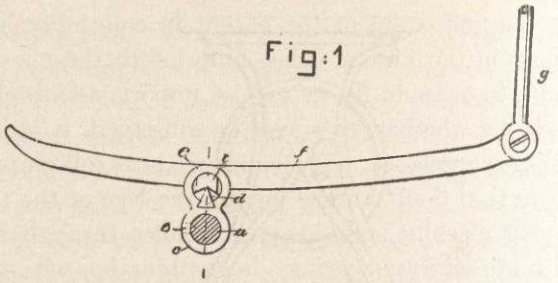
A vertical cross brace and a lower cross brace or tie rod being common adjuncts of sewing machines at the time of Cramer's alleged invention, and it being also customary to support the lower cross rod or brace in the web of the legs of sewing machines and to utilize the legs as bearings, and it being old in machinery to employ solid castings as bearings or supports for oscillating shafts where a fixed alignment was essential, we readily conclude that there was no merit in the mere conception or idea that a vertical double brace was capable of being advantageously utilized as bearings for sewing machine treadles, and that the devising of means for so utilizing such a brace did not involve such an exercise of the inventive faculty as entitled Cramer to assert in himself a right to claim a patent broadly for the use in combination of a vertical double brace and a sewing machine treadle. In view of this and of the fact that the principal elements of the Cramer combination were old, we hold that the Cramer patent was not a primary one, and that it is not, therefore, entitled to receive the broad construction which has been claimed for it. Let us, therefore,

examine the first claim of the patent in connection with the proceedings in the Patent Office anterior to the allowance of the patent, in order to fix its precise import, as a preliminary to considering whether, as correctly construed, it is infringed by the Singer appliance. The claim reads as follows:

"The vertical double brace joining the legs of the two ends of a sewing machine, provided with holes through its lower extremities to serve as bearings, in combination with a treadle provided with trunnions fitted to oscillate in said bearings, substantially as specified."

In the first specification sent to the Patent Office, the object sought to be attained is declared to be the elimination of the noise caused by the operation of a loose treadle, whether used in sewing machines or other machinery. The applicant evidently had in mind treadles which oscillated upon rigid bars and rested on cone bearings or analogous supports, attached to the rigid bars by set screws—such bearings needing adjustment from time to time as the friction of the parts from the operation of the treadle caused wear and looseness of the parts. It was recited that the treadle bar and the platform on such bar (*i. e.*, the foot rest) was to be cast as one piece. The invention was declared to consist "in having the ends of the treadle bar V-shaped to fit in hole in brace C, also heart shaped to receive the ends of the treadle bar."

The application based upon this first specification was rejected, as mentioned in the statement of facts, upon a reference to the patent to G. W. Gregory, No. 256,563, April 18, 1882, which the examiner stated exhibited "the alleged invention." Gregory termed his invention "An improvement in treadle supports for sewing machines." It is illustrated in the following *fac simile* of one of the figures of the drawing of the patent:



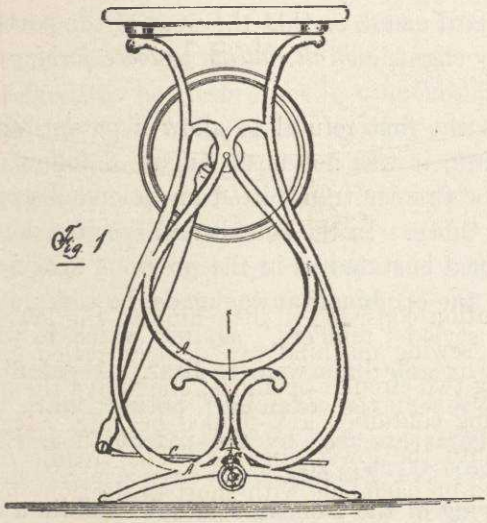
The invention consisted in attaching to the lower cross bar or rod of a sewing machine two devices styled collars, each collar having two circular openings, one above the other. The upper opening contained a V-shaped bearing. The cross bar was fitted into the lower opening. The treadle or foot rest was provided on each side with short projections termed ears, which fitted on the V-shaped bearings in the upper portion of each collar. The specification contained the following statement:

"I am aware that V-shaped or scale bearings are old in connection with the sewing machine treadles—as, for instance, a long rod to which the treadle is secured has been provided at its ends in the set frames of the machine stand with V-shaped bearings."

At the close of the descriptive portion of the specification it was further stated:

"I am aware that sewing machine treadles have had V-shaped bearings, as in United States patent Nos. 148,759 and 106,242; but neither of said patents show a bearing constructed in accordance with my invention."

No. 106,242 was a patent granted to C. H. Willcox on August 9, 1870. It covers the following device:



The device shows the character of treadle support now employed in the Willcox and Gibbs sewing machine. The stand is devoid of a vertical cross brace, the legs of the machine being braced near the bottom by the ordinary cross bar or tie rod. Just above this rod is exhibited the invention, being a "rockshaft B, beveled at the ends, and provided with V-shaped bearings *b*, extending to the center of motion of the rockshaft B, and supported in a V-shaped bearing seat *a*, in combination with a treadle movement." Elsewhere in the specification the bearings or supports in legs of the machine to receive the ends of the rockshaft B are referred to as "V-shaped bearings." The statement is also made that "The bar is prevented from having any undue lateral movement by the washers upon the ends of the tie rod *c*, which holds the lower part of the frame together." An alternate mode of construction of the bearings to support the rockshaft was thus described (italics not in original):

"The V-shaped seat of the bearings *a* may be formed of a separate piece of hard metal let into a groove in the frame, or otherwise applied to it, and the ends *b* may be formed also of

a piece of hard metal, so that the wear of the parts in contact will be very slight, *and all rattling or loose jarring motions entirely prevented.*"

Although the first refusal to allow a patent was made on May 29, 1882, it was not until August 3 following that the attorneys for Cramer transmitted an amended application to the Patent Office. In the substituted specification the object to be attained is stated as in the previous specification. An addition to the combination was made, however, in the use of what were styled "mufflers," against which it was said the ends of the treadle bars were to bear. A patent was again refused, however, the examiner noting that "applicant's amended claims are met by the patent to J. E. Donovan, June 28, 1881, No. 243,529."

The drawing of the Donovan patent exhibits a sewing machine stand, containing a vertical double brace. One form of treadle bar constituting a part of the invention was represented as situated just below the vertical cross brace and as having a rounded edge, supported in V-shaped bearings, in the legs or sides of the frame. A shoulder was indicated on each end of the bar, and a substitute device was also shown called a button fastener, which was to be attached from the outside of the frame to meet the end of the bar. It was said in the specification that the treadle bar might be made of cast iron and cast on and with the treadle. It was further stated (italics not in original).

"The bearing supports are preferably made by *coring out the frame* in the manner shown in the drawings. It is obvious that other forms of supporting these bearings may be provided."

Several modified forms of ordinary knife edge bearings and inclined fastening and adjusted devices were also shown. In such modified forms the treadle was represented as designed to oscillate on a rigid bar, in oblong grooves therein; lugs, having knife edge bearings underneath, being cast on each side of the treadle. Adjustable collars were shown, fastened to the shaft or bar, with inclined lugs or the side of the collars,

projecting laterally over and resting against shoulders on the lugs upon each side of the treadle. The object of the invention was declared to be (italics not in original) "to secure a more substantial table frame to the driving mechanism and to provide adequate means for the employment of V-shaped treadle bearings, *so as to obviate the difficulty heretofore occasioned by lost motion, consisting in vertical and endwise play of the treadle bar or shaft.*" It was further observed by the applicant just preceding his statement of claims as follows (italics not in original):

"Frequent attempts have been made to use knife edge bearings for the treadle in sewing machines, but *it has been found difficult to prevent lateral lost motion and to adjust the parts so as to compensate for their wear and to prevent rattling of the treadle which has been a serious objection in their employment.* My herein-described improvements have overcome all the serious objections hitherto attending their use."

Following the second rejection of his application, Cramer changed his attorneys as mentioned in the statement of facts. In the specification drafted by the new attorneys and which became the basis of the allowed patent, the asserted invention was limited to its use in sewing machines, eliminating the statement of its adaptability "in other machinery." Concerning the "mufflers," which in the previous specifications were simply referred to as bearing against the end of the treadle bars or as being on the ends of such bars, the following statement was made (italics not in original):

"Pieces of leather F, or other soft material, cover the top and end of each trunnion to serve as cushions *to keep the same close in its bearing, to prevent the noise which would result were the trunnions permitted to bounce, and thump endways, when the treadle is in motion.* The leather F is fitted to the curve of the upper side of the trunnion, which is an arc of a cylinder whose center of oscillation is the lower edge of the trunnion; the same leather also interposes between the end of the trunnion and the adjacent iron. *f* is a block serving as a mere backer to which

the cushion F is attached. This block conforms to the back and top side of the cushion and fills the loophole in the brace above the trunnion. It also has tangs or projections *e*, resting in suitable recesses in the brace C, which are held between the brace and the web of the leg E, by which means the block and cushion are held in place. Below the bearings of the trunnions B, I provide cups, M, attached to the ends of brace C, to catch the oil that usually drips from such bearings."

It is not a strained deduction that the elaborate provision just referred to, respecting the mode of use of and the purpose to be subserved by the mufflers, was in part at least induced by the statement in the Willcox and Donovan patents above quoted, concerning the difficulties which existed in connection with the use of knife edge or V-shaped bearings. Be this as it may, however, we are of opinion that the Patent Office, after twice refusing to allow the patent because of the prior patents referred to, was led to take favorable action, owing to the peculiar form of the described bearing when situated in a vertical cross brace such as was shown in the drawing, with the described accessories, and that it was the purpose of the Patent Office to limit the patent to the particular device of treadle bar and bearing described and shown when employed in combination with a particular form of vertical cross brace. And this view is supported by the claim in question. It contains words of limitation. It is recited therein that the combination is to be "substantially as specified," that is, as described in the specifications and shown in the drawings. *Westinghouse* v. *Boyden Power Brake Co.*, 170 U. S. 537, 558. On referring to the specification we find it there expressly declared that the invention consisted "in the construction and combination of parts hereinafter fully described and claimed, reference being had to the accompanying drawing." Nowhere, either expressly or by reasonable inference, is it asserted that simply the best or a preferable construction of the whole or any part of the combination is what is described. On the contrary, starting with the well-known vertical cross brace, a

usual accessory to sewing machines, a specific mode of construction of the treadle bar and of the bearings or supports in the vertical cross brace, is set forth, and the specification is concluded with the following declaration (italics mine):

"*By this construction* my treadle bearings are rigidly fixed and in no way liable to get out of line or to require adjustment; the usual noise is prevented, and overflowing of oil is caught before it can do damage."

To prevent a broadening of the scope of the invention beyond its fair import, in the light of the circumstances surrounding the issuance of the patent, the words of limitation contained in the claim must be given due effect, and, giving them such effect, the statement in the first claim of the elements entering into the combination must be construed to refer to elements in combination having substantially the form and construction substantially as described in the specification and shown in the drawing.

Having determined the proper construction of the claim of the Cramer patent, which is relied upon, it remains only to consider whether, as correctly construed, infringement resulted from the employment by the Singer Company of the device covered by the Diehl patent. We find no difficulty in reaching a conclusion on this branch of the case. The treadle supports devised by Diehl, though they serve the same purpose as the device described and shown in the Cramer patent, are substantially different in construction. Irrespective of the question whether the treadle in the Diehl device is hung in the vertical cross brace proper, or in an addition thereto properly to be regarded as the lower cross rod or cross tie of the machine, it is manifest that the bearing is essentially different in construction from that of Cramer, and is not adapted to receive an oscillating bar; while the treadle is not supplied with long projections fitted to oscillate in the vertical cross bar on bearings therein, but is constructed to turn on point center screws which fit tightly in circular openings in projections from the vertical cross bar. There is

no substantial identity in the character of the two devices, unless, by substantial identity, is meant every combination which produces the same effect. The differences between the Diehl device and the Cramer construction are substantial and not merely colorable.

The trial court should have granted the motion to direct a verdict for the defendant. In affirming the action of the trial court in overruling the motion, the Circuit Court of Appeals erred, and its judgment must, therefore, be reversed. The judgment of the Circuit Court is also reversed and the cause is remanded to that court with directions to grant a new trial, and for further proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE MCKENNA took no part in the decision of this cause.

SOUTH DAKOTA *v.* NORTH CAROLINA.

IN THE SUPREME COURT OF THE UNITED STATES.

No. 8. Original. Argued April 13, 14, 15, 1903; reargued January 8, 11, 12, 1904.—Decided February 1, 1904.

This court has jurisdiction over an action brought by one State against another to enforce a property right, and where one State owns absolutely bonds of another State, which are specifically secured by shares of stock belonging to the debtor State this court can enter a decree adjudging the amount due and for foreclosure and sale of the security in case of non-payment, leaving the question of judgment over for any deficiency to be determined when it arises.

The motive of a gift does not affect its validity, nor is the jurisdiction of this court affected by the fact that the bonds were originally owned by an individual who donated them to the complainant State.

Where a statute provides that a State issue bonds at not less than par to pay for a subscription to stock of a railroad company; and, after advertising for bids in accordance with the statute and receiving none, the bonds are delivered to the railroad company in payment of the subscription, the

transaction is equivalent to a cash sale to the company at par, and the State becomes the owner of the stock even though no formal certificates therefor are issued to it.

Under the special provisions of the statute involved the endorsement on bonds that each bond for $1000 is secured by an equal amount of the par value of the stock subscribed for by the State, is tantamount to a separation and identification of the number of shares mentioned and constitutes a separate and registered mortgage on that number of shares for each bond.

A holder of a certain number of such bonds may foreclose on the specific number of shares securing his bonds and the holders of other bonds and of liens on the property of the railroad company are not necessary parties to the foreclosure suit.

By an act passed in 1849, chap. 82, Laws, 1848–49, the North Carolina Railroad Company was chartered by the State of North Carolina with a capital of $3,000,000, divided into 30,000 shares of $100 each. The State subscribed for 20,000 shares. The statute authorized the borrowing of money to pay the state subscription and pledged as security therefor the stock of the railroad company held by the State. In 1855 a further subscription for 10,000 shares was authorized by statute, chap. 32, Laws, 1854–55, to be issued on the same terms and with the same security. At the same session an act was passed incorporating the Western North Carolina Railroad Company, chap. 228, Laws, 1854–55, which authorized a subscription by the State and the issue of bonds secured by the stock held by the State in said company. On December 19, 1866, a further act was passed, chap. 106, Laws, 1866–67, entitled "An act to enhance the value of the bonds to be issued for the completion of the Western North Carolina Railroad, and for other purposes," which, after referring to the prior acts of the State authorizing the issue of bonds and stating that a portion of them had already been issued, added:

"And, whereas, it is manifestly the interest of the people of the whole State, that the residue of the bonds, when issued, shall command a high price in market; therefore,

"Sec. 1. *Be it enacted by the General Assembly of the State of North Carolina, and it is hereby enacted by the authority of the*

same, That the public treasurer be, and he is hereby, authorized and directed, whenever it shall become his duty under the provisions of said acts, passed at the sessions of 1854–55 and 1860–61, to issue bonds of the State to the amount of fifty thousand dollars or more, to mortgage an equal amount of the stock which the State now holds in the North Carolina Railroad, as collateral security for the payment of said bonds, and to execute and deliver, with each several bond, a deed of mortgage for an equal amount of stock to said North Carolina Railroad, said mortgage to be signed by the Treasurer and countersigned by the Comptroller, to constitute a part of said bond, and to be transferable in like manner with it, as provided in the charter of said Western North Carolina Railroad Company; and, further, that such mortgages shall have all the force and effect, in law and equity, of registered mortgages without actual registry."

Under this last act bonds were issued in the sum of $1000 each, having this indorsement:

"State of North Carolina, Treasury Department,

"RALEIGH, July 1, 1867.

"Under the provisions of an act of the general assembly of North Carolina entitled 'An act to enhance the value of the bonds to be issued for the completion of the Western North Carolina Railroad Company, and for other purposes,' ratified 19th December, 1866, ten shares of the stock in the North Carolina Railroad Company, originally subscribed for by the State, are hereby mortgaged as collateral security for the payment of this bond.

"Witness the signature of the public treasurer and seal of office, and the counter-signature of the comptroller.

"KEMP P. BATTLE,

"S. W. BURGIN, *Comptroller.* *Public Treasurer.*"

These bonds ran thirty years and became due in 1897. In 1879 the State of North Carolina appointed commissioners to adjust and compromise the state debt, and all of the last men-

tioned bonds have been compromised with the exception of about $250,000. Simon Schafer and Samuel M. Schafer, either individually or as partners, owned a large proportion of these outstanding bonds, having held them for about thirty years. In 1901 Simon Shafer gave ten of these bonds to the State of South Dakota. The letter accompanying the gift was in these words:

"Office of Schafer Brothers, No. 35 Wall Street,

"NEW YORK, September 10th, 1901.

"Hon. Charles H. Burke.

"Dear Sir: The undersigned, one of the members of the firm of Schafer Bros., has decided, after consultation with the other holders of the second-mortgage bonds issued by the State of North Carolina, to donate ten of these bonds to the State of South Dakota.

"The holders of these bonds have waited for some thirty years in the hope that the State of North Carolina would realize the justice of their claims for the payment of these bonds.

"The bonds are all now about due, besides, of course, the coupons, which amount to some one hundred and seventy per cent of the face of the bond.

"The holders of these bonds have been advised that they cannot maintain a suit against the State of North Carolina on these bonds, but that such a suit can be maintained by a foreign State or by one of the United States.

"The owners of these bonds are mostly, if not entirely, persons who liberally give charity to the needy, the deserving and the unfortunate.

"These bonds can be used to great advantage by States or foreign governments; and the majority owners would prefer to use them in this way rather than take the trifle which is offered by the debtor.

"If your State should succeed in collecting these bonds it would be the inclination of the owners of a majority of the total issue now outstanding to make additional donations to such

governments as may be able to collect from the repudiating State, rather than accept the small pittance offered in settlement.

"The donors of these ten bonds would be pleased if the legislature of South Dakota should apply the proceeds of these bonds to the State University or to some of its asylums or other charities.

"Very respectfully,

"SIMON SCHAFER."

Prior thereto, and on March 11, 1901, the State of South Dakota had passed the following act, Session Laws, South Dakota, chap. 134, p. 227:

"An act to require the acceptance and collections of grants, devises, bequests, donations, and assignments to the State of South Dakota.

"*Be it enacted by the Legislature of the State of South Dakota:*

"SEC. 1. That whenever any grant, devise, bequest, donation or gift or assignment of money, bonds or choses in action, or of any property, real or personal, shall be made to this State, the governor is hereby directed to receive and accept the same, so that the right and title to the same shall pass to this State; and all such bonds, notes or choses in action, or the proceeds thereof when collected, and all other property or thing of value, so received by the State as aforesaid shall be reported by the governor to the legislature, to the end that the same may be covered into the public treasury or appropriated to the State University or to the public schools, or to state charities, as may hereafter be directed by law.

"SEC. 2. Whenever it shall be necessary to protect or assert the right or title of the State to any property so received or derived as aforesaid, or to collect or reduce into possession any bond, note, bill or chose in action, the attorney general is directed to take the necessary and proper proceedings and to bring suit in the name of the State in any court of competent jurisdiction, state or Federal, and to prosecute all such suits, and is author-

ized to employ counsel to be associated with him in such suits or actions, who, with him, shall fully represent the State, and shall be entitled to reasonable compensation out of the recoveries and collections in such suits and actions."

This act was passed on the suggestion that perhaps a donation of bonds of Southern States would be made to the State. On November 18, 1901, the State of South Dakota, leave having been first obtained, filed in this court its bill of complaint, making defendants the State of North Carolina, Simon Rothschilds (alleged to be one of the holders and owners of the bonds originally issued by the State and secured by a pledge of the stock in the North Carolina Railroad Company under the acts of 1849 and 1855) and Charles Salter (alleged to be one of the holders of the bonds issued under the act of 1855 and 1866 on account of the subscription to the Western North Carolina Railroad Company), the two individuals being made defendants as representatives of the classes of bondholders to which they severally belong. In it the plaintiff, after setting forth the facts in reference to the several issues of bonds and its acquisition of title to ten, prayed that an account might be taken of all the bonds issued by virtue of these statutes; that North Carolina be required to pay the amount found due on the bonds held by the plaintiff, and that in default of payment North Carolina and all persons claiming under said State might be barred and foreclosed of all equity and right of redemption in and to the thirty thousand shares of stock held by the State, and that these shares or as many thereof as might be necessary to pay off and discharge the entire mortgage indebtedness, be sold and the proceeds after payment of costs be applied in satisfaction of the bonds and coupons secured by such mortgages; and also for a receiver and an injunction.

Defendant Rothschilds made no answer. On April 2, 1902, the State of North Carolina and the defendant, Charles Salter, filed separate answers. North Carolina in its answer denied both the jurisdiction of this court and the title of the plaintiff; averred that the bonds were not issued in conformity with the

statute; admitted the ownership of thirty thousand shares of stock; denied that the mortgages were properly executed or that they had the effect of conveyances or transfers either in law or equity of said stock, or conferred any lien by way of pledge or otherwise upon the same; denied that she ever had any compact or agreement whatever other than that contained in the Constitution of the United States with South Dakota, or that South Dakota had ever informed North Carolina of any claim against her, or made any demand in respect to it, or any effort to settle or accommodate. Salter's answer was mainly an admission of the allegations of the bill with a claim that all the stock should be sold in satisfaction of the mortgage bonds of which he was charged to be the representative. Testimony was taken under direction of the court before commissioners agreed upon by the parties.

Mr. Wheeler H. Peckham, with whom *Mr. R. W. Stewart* was on the brief, for complainant:

This court has jurisdiction as the suit comes within the precise terms of Art. III of the Constitution. Where the language used in a constitution or statute is plain, clear and free from ambiguity there is no room or occasion for interpretation, and the language must be construed according to its plain meaning and intent. One citation is sufficient—*Bate Refrigerating Co.* v. *Sulzberger*, 157 U. S. 1. "*Quoties in verbis nulla est ambiguitas ibi nulla expositio contra verba fienda est.*" *Everard* v. *Poppleton*, 5 Q. B. 183; *Gadsby* v. *Barry*, 8 Scott, N. R. 804. The decision in *Chisholm* v. *Georgia*, 2 Dall. 419, that the suit would lie was the occasion for the Eleventh Amendment to the Constitution, but as it limited to the event of a citizen suing a State it became conclusive proof that, as to suits between two or more States, or suits by a State against citizens of another State, it was intended that the provisions of the original Constitution should stand. See Curtis on U. S. Const. 2d ed. 15.

A State is also liable to be sued by the United States in this

Court. *United States* v. *Texas*, 143 U. S. 621; on an action of debt. *United States* v. *North Carolina*, 136 U. S. 211.

The United States also may be sued by a State in this court pursuant to a statute. *Minnesota* v. *Hitchcock*, 185 U. S. 373, and see *Cohens* v. *Virginia*, 6 Wheat. 406.

The ground of the jurisdiction is that the States have by adopting the constitution *agreed* to submit controversies between themselves to the determination of this court. *Rhode Island* v. *Massachusetts*, 12 Pet. 720. No exception was made of any possible case which might arise. The settlement of claims by diplomacy or by war was taken away by the Constitution, and it was necessary to make some provision to take their place. Such provision was made by the organization of this court and giving it this jurisdiction. It is most just that the jurisdiction should be exercised where the plaintiff's claim is for the collection of debt; for, when a State enters into the markets of the world as a borrower, she for a time lays aside her sovereignty and becomes responsible as a civil corporation. *Louisiana* v. *Jumel*, 107 U. S. 740; *Murray* v. *Charleston*, 96 U. S. 445. The cases of New Hampshire and New York against Louisiana can be distinguished from this case.

The State of Dakota is competent to become the owner and holder of these bonds. *Texas* v. *White*, 7 Wall. 700. It is incident to the sovereign power both to draw and purchase bills. *United States* v. *Bank*, 12 Pet. 377. Also to become a donee, whether by legacy or otherwise. *Matter of Meriam*, 141 N. Y. 479, 484; *Estate of Cullom*, 5 Misc. N. Y. 173, aff'd 145 N. Y. 593; *United States* v. *Fox*, 94 U. S. 315.

Subd. 1, section 10, article II, of the Constitution, which forbids a State to enter into any agreement or compact with another State, does not affect the right of the complainant to hold these bonds; the compacts or agreements intended are of a political nature, such as could be made between sovereigns only and not ordinary business agreements. *Union Branch R. R. Co.* v. *East Tenn. & Geo. R. R.*, 14 Georgia, 327; 2 Story Com. §§ 1354 and 1401, *et seq.* A promise to pay money is not

an agreement of the character intended to be prohibited. See 4 Dall. 456; 96 U. S. 445; *Holmes* v. *Jennison*, 14 Pet. 572, citing *Vattel*.

There is nothing in the answer or proofs respecting the gift in controversy in this suit which affects the jurisdiction. The gift was absolute and the State had a right to accept it. See B. R. Curtis in N. Am. Review, January, 1844, and vol. 2, p. 93 of Curtis's Life.

It is impossible to impute to the complainant any improper motive, any more than if the gift had been by a legacy rather than by gift *inter vivos*. But motive, even in a complainant, is immaterial. The only question is, has the complainant a right? Whether acquired with good, bad or indifferent motives is quite immaterial. *Morris* v. *Tuthill*, 72 N. Y. 575; *Rice* v. *Rockefeller*, 134 N. Y. 174; *Ramsey* v. *Gould*, 57 Barb. 398; 2 Morawetz on Corporations, § 259, and cases cited; *Pender* v. *Lushington*, L. R. 6 Ch. Div. 75; *Phelps* v. *Nowlen*, 72 N. Y. 39; *McDonald* v. *Smith*, 1 Pet. 620, 624; *Barney* v. *Baltimore*, 6 Wall. 280; *Smith* v. *Kernochan*, 7 How. 198; *Dickerman* v. *Northern Trust Co.*, 176 U. S. 181; *Toler* v. *R. R. Co.*, 67 Fed. Rep. 177.

When the State owns the whole interest, legal and beneficial, in the bonds sued on, which interest it was empowered to acquire and did acquire by virtue of the act of the legislature, by a donation from individuals, it makes no difference that the motive of the donor was the hope that the State would bring suit on the bonds.

The assignment of the bonds of the defendant State to the complainant State carried with it the mortgage of the railroad stock created by the legislature of the defendant State to secure the bonds. *Converse* v. *Michigan Dairy Co.*, 45 Fed. Rep. 18.

The endorsement and delivery operated as an assignment of the mortgage and transferred to the holder of the notes the same equitable rights in the mortgage which he had in the notes. *Cooper* v. *Ulmann*, Walk. Ch. 251; *Briggs* v. *Hanno-*

wald, 35 Mich. 474; *Carpenter* v. *Longan,* 16 Wall. 271; *Kennicott* v. *Supervisors,* 16 Wall. 452; *Ober* v. *Gallagher,* 93 U. S. 199. In these cases though only a portion of the notes or bonds were acquired by the complainant the transfer enabled the complainant to foreclose, because an assignment of a part of the debt, or of one or several bonds or notes, secured by the mortgage carries with it a *proportional* interest in the mortgage.

The defendant State made a statutory mortgage to secure the whole issue of the bonds sued on. The act provided for mortgaging an equal amount of stock as collateral security for the payment of said bonds. Plainly, the whole amount of shares of stock became security for the whole amount of the bonds. 3 White and Tudor's Leading Cases in Equity, 3d Am. ed., Wallace's notes to the cases of *Row* v. *Dawson* and *Ryall* v. *Rowles,* pp. 369 and 646.

The mortgage is simply security for the debt, and whatever transfers the debt carries with it the mortgage. *English* v. *Carney,* 25 Michigan, 178.

A mortgage given to secure several obligations stands as security for the whole, and if a mortgagee assigns one of the obligations to a third person, the mortgage in equity stands as security for all the obligations, as well for the one assigned as those retained. *Kortlander* v. *Elston,* 52 Fed. Rep. 180, 183; *Matter of Bronson,* 150 N. Y. 20; *Jermain* v. *L. S. Ry. Co.,* 91 N. Y. 483, 492. As to undivided fractional interests in the whole, see *Flynn* v. *Brooklyn City R. R. Co.,* 158 N. Y. 504; *Matter of Fitch,* 160 N. Y. 94; 1 Morawetz on Corp. §§ 234, 237. As to rights of the second mortgage bondholders, see *Sager* v. *Tupper,* 35 Michigan, 134; *Wheeler* v. *Menold,* 81 Iowa, 647.

In any aspect of this case, the first and second mortgage bondholders, upon the general principles of equity, being interested in the funds, must be made parties. Story Eq. Pl. 97, 112; *Florida* v. *Georgia,* 17 How. 510; see also *California* v. *So. Pac. R. R.,* 157 U. S. 229; *Minnesota* v. *Northern Securities Co.,* 184 U. S. 199; *Washington State* v. *Northern Securities Co.,* 185 U. S. 255.

As to making the holders of first mortgage bonds parties, see *Heffner* v. *Life Ins. Co.*, 123 U. S. 747, 754, and cases cited; *Jerome* v. *McCarter*, 94 U. S. 734; *Sutherland* v. *L. S. Co.*, 1 Cent. L. Jour. 127; *McClure* v. *Adams*, 76 Fed. Rep. 899; *Murdock* v. *Woodson*, 2 Dillon, 188; *Board* v. *Min. Pt. R. R.*, 24 Wisconsin, 93; *Campbell* v. *Texas R. R.*, 2 Woods, 263.

The certificate upon the bond, with regard to security for ten shares, being no part of the statute, cannot affect the construction of the statute, as to which the rule is that what is implied in it is as much a part of it as what is expressed.

The intention of the maker of the statute being as much within the statute as it is within the letter, the court has to ascertain the meaning; which was to mortgage all the stock to secure all the bonds, each proportionately. *United States* v. *Babbitt*, 1 Black, 61; *County of Watson* v. *Nat. Bank*, 103 U. S. 770.

As to former litigation in regard to legislation of North Carolina concerning this road, see *Swasey* v. *North Carolina*, 1 Hughes, 17; *R. R. Co.* v. *Swasey*, 23 Wall. 405; *Christian* v. *Atlantic & Nor. Car. R. R. Co.*, 133 U. S. 233 For other cases as to *pro rata* distribution, *Toler* v. *East Tenn. R. R. Co.*, 67 Fed. Rep. 168; *Claflin* v. *S. C. R. R.*, 8 Fed. Rep. 118; *Pollard* v. *Bailey*, 21 Wall. 520; *Barry* v. *M. K. & T. Ry.*, 34 Fed. Rep. 829.

In such cases, equities adjudged against parties served with process are binding upon all persons of the same class, although absent from the litigation, because of the vicarious representation in the present litigants of the same class to which they belong. *Morton* v. *New Orleans R. R.*, 75 Alabama, 590, 611. See also *Knickerbocker Trust Co.* v. *Penacook Mfg. Co.*, 100 Fed. Rep. 814; *Dickerman* v. *Nor. Trust Co.*, 80 Fed. Rep. 450.

The construction of the clauses of the Constitution giving jurisdiction to this court over controversies between States and between States and citizens of other States should be liberal in the extreme to favor such jurisdiction and to carry out the beneficent purposes by the Constitution sought to be obtained.

Mr. Robert D. Gilmer, Attorney General of the State of North Carolina, *Mr. George Rountree*, *Mr. James E. Shepherd* and *Mr. James H. Merrimon* for the defendant, State of North Carolina :

The court is without jurisdiction to make any decree against the State of North Carolina in this cause. A sovereign cannot be sued. *Belknap* v. *Schild*, 161 U. S. 10; *The Siren*, 7 Wall. 152; *Smith* v. *Weguelin*, L. R. 1869, 8 Eq. 198; *Briggs* v. *Light Boats*, 11 Allen, 157. This rule applies to suits brought in the Federal courts against either of the States of this Union. *Beers* v. *Arkansas*, 20 How. 527; *New Hampshire* v. *Louisiana*, 108 U. S. 76; *Cunningham* v. *M. & B. R. R.*, 109 U. S. 446; *Hans* v. *Louisiana*, 134 U. S. 1; *Louisiana* v. *Texas*, 176 U. S. 1. The State did not consent to the exercise of jurisdiction by pleading to the merits. *Rhode Island* v. *Massachusetts*, 12 Pet. 657; *Minnesota* v. *Hitchcock*, 185 U. S. 373; 12 Ency. Plead. & Prac. pp. 127, 188, 191; *Penn* v. *Lord Baltimore*, 1 Vesey, Sr. 444; Justice Iredell's opinion in the *Chisholm Case*, 2 Dall. 429.

Apparently, there was bill, answer and proof in *New Hampshire* v. *Louisiana*, 108 U. S. 76, and yet the court dismissed the cause for want of jurisdiction.

This court has jurisdiction of the parties, provided it be such a "controversy between two or more States" as is contemplated in the grant of judicial power by Art. III, sec. 2, of the Constitution, and if it be not such a controversy the objection may be taken at any time. Equity Rule, 29; 1 Foster's Fed. Prac. 241, 249, 535, 536; *Indiana* v. *Tolliston Club*, 53 Fed. Rep. 18. The only authority competent to give consent for the State to be sued is the general assembly of the State. *Moody* v. *State Prison*, 128 N. Car. 12. This has not been done. If a State consents to be sued the consent can be withdrawn at any time, as it has been by the protest of the State. *Beers* v. *Arkansas*, 20 How. 527; *Mighell* v. *Sultan of Johore*, 1894, 1 Q. B. 149; Judgment of Lord Esher.

The State did not consent to be sued in a cause like this by becoming a member of the United States and subscribing to the Constitution. The present suit is not such a "controversy between two or more States" as was contemplated by the

Constitution of the United States. There are many cases in which this court has decided against the jurisdiction which seemed to come within the words of the Constitution. *Kentucky* v. *Dennison*, 24 How. 66; *Mississippi* v. *Johnson*, 4 Wall. 475; *Georgia* v. *Stanton*, 6 Wall. 50; *New Hampshire* v. *Louisiana*, 108 U. S. 76; *Wisconsin* v. *Pelican Insurance Co.*, 127 U. S. 265, 287; *Hans* v. *Louisiana*, 134 U. S. 1; *Louisiana* v. *Texas*, 176 U. S. 1.

The grant was of "judicial power," hence, controversies not properly subject, according to the accepted principles of jurisprudence, to judicial determination, were not included. *Louisiana* v. *Texas*, 176 U. S. 1, 18. The word "controversies" is not defined in the Constitution, but *all* controversies were not intended, because the word "all," which had been used in the preceding grants, was dropped here and purposely. 2 Bancroft's History of the Constitution, 199, 200, 212; *Rhode Island* v. *Massachusetts*, 12 Pet. 721.

The controversies intended by the framers of the Constitution were naturally akin to those with which they had become familiar from the experience of the colonies, such as those growing out of claims for soil, territory, jurisdiction and boundary. *United States* v. *Texas*, 143 U. S. 621, 639; Story on the Constitution, §§ 1674, 1675.

The dispute must arise directly between the States and not be an assumed quarrel. As to the nature of the controversy, see The Federalist, No. 80. Until recently this court has entertained jurisdiction only in boundary disputes. In each of the only two cases recently brought, *Missouri* v. *Illinois*, 180 U. S. 208; *Kansas* v. *Colorado*, 185 U. S. 125, the controversy arose directly between the contending States, and was not factitious—made by the voluntary action of the complaining State by assuming a controversy already existing and with which it had no proper concern. Practices such as were complained of in *Missouri* v. *Illinois*, and *Kansas* v. *Colorado*, as well as the cases of disputed boundary, might lead to war between independent nations; but surely there was no absolute necessity in order to prevent an "appeal to the sword" for a tribunal to collect ordinary debts; loans due by a State to

private individuals, and which they, being unable to collect, voluntarily assign to another State.

While writers on international law differ somewhat among themselves, many of those of greatest authority say that it is the practice of nations, when petitioned by their citizens, to intervene for the enforcement of obligations due by other nations to them, to make a distinction between such obligations as are contractural—loans voluntarily entered into with a knowledge of all the risks and the inability of collection by suit—and such as are tortious. They generally refuse to interfere for the collection of debts, but do, for the redress of other kinds of grievances. 1 Halleck International Law, 435, and note; Hall's International Law, 3d ed. 277; *New Hampshire* v. *Louisiana*, 108 U. S. 76.

And such has been the practice of England and the United States. Wharton's Digest Int. Law, § 231; 5 Am. State Papers, 1823 (For. Rel.), 403; British Quarterly Review, Jan. 1876, p. 54; Mr. Balfour in the House of Commons, December 15, 1902, as to Venezuelan question.

But it is understood that the contention of complainant's counsel is that this suit is brought in vindication of its property rights, and there are several cases in which this court has entertained original bills to protect the proprietary rights of a State against injury or infringement by *individuals*, such as *Georgia* v. *Brailsford*, 2 Dall. 402; *Pennsylvania* v. *Wheeling Bridge Company*, 13 How. 618; *Texas* v. *White*, 7 Wall. 700; *Florida* v. *Anderson*, 91 U. S. 667; *Alabama* v. *Burr*, 115 U. S. 413.

The fact that the suit is brought in vindication of the property rights of the complaining State is also not conclusive. In *New Hampshire* v. *Louisiana*, 108 U. S. 76, and *Wisconsin* v. *Pelican Insurance Co.*, 127 U. S. 265, property rights were involved; but the court declined jurisdiction on account of the nature of the title and the method and purpose of its acquirement, and see as to validity of assignment, *Walker* v. *Bradford Bank*, 12 Q. B. D. 1883, 84, 511.

As to the sovereignty of the States, see *Pennoyer* v. *Neff*, 95 U. S. 714; *Lane County* v. *Oregon*, 7 Wall. 71; *Martin* v. *Hunter*, 1 Wheat. 325; *Buckner* v. *Finaley*, 2 Pet. 586; Cooley

Const. Lim. 29; The Federalist, XXXII; Woodrow Wilson, The State, 469; *Mayor &c.* v. *Miln*, 11 Pet. 102; *United States* v. *Guthrie*, 17 How. 284; *Stanley* v. *Schwalby*, 147 U. S. 508; *Kentucky* v. *Denison*, 24 How. 66; *Cherokee Nation* v. *Georgia*, 5 Pet. 1.

As to the general rule of sovereignty the nature of things opposes the opinion that the judicial tribunals should be competent to determine that the government is a debtor. Dalloz Jur. Gen. Verbo. Tresor. Pub., No. 383; Dufour, Droit, Adm't, 4, 629; 3 Proudhon Dom. de Prop., No. 826, p. 67.

The history of our country shows that the government has habitually determined the claims to be adjusted; the medium of payment, and the persons to be paid; Confederations, Union and States have exercised their sovereign rights. Hamilton's Report in 1792 and 1795; 2 Cong. Annals, 1792; 3 Cong. Annals, 1362; 2 Pitkin Civil Hist. 336; 3 Writings Gallatin, 121, 143; Ordronaux on Constitutional Legislation, 283.

A State is not liable to suit upon its bonds either by an individual or another State. Such suits against States were unheard of at the time of the adoption of the Constitution and the power to bring them would not have been included if the proposition had been made. *Bank of Washington* v. *Arkansas*, 20 How. 530, 532; Webster's Opinion to Baring Bros. & Co., 1836, Works, vol. 1, p. 637; *Briscoe* v. *Bank*, 11 Pet. 257, 321; *Crouch* v. *Credit Foncier*, 8 Q. B. 1872, 73, 374, 384; Hamilton's Report, 1795; Annals of Cong. 1793, 5, 3d Congress, p. 1635.

What was not contemplated by the framers of the Constitution is not included in the grant of judicial power. Campbell, J., in dissenting opinion, *Florida* v. *Georgia*, 17 How. 513. This view was apparently adopted by Marshall, C. J., in his decision as to the status of Indian tribes, in *Cherokee Nation* v. *Georgia*, 5 Pet. 1.

A suit cannot usually be maintained against a State to compel the payment of its debts, as it might necessitate an interference with, if not the complete control and direction of, the legislative function of assessing, levying, collecting and distributing taxes, which is, as yet, beyond the competency of courts; there is no means of rendering the decree effective,

unless this court is prepared to appoint a receiver with the extraordinary powers of taking charge of and administering the affairs of a delinquent State. The separation and careful demarkation of the functions of government into executive, legislative and judicial, is the distinguishing characteristic of our Constitution, state and national, and neither department can transgress its proper bounds. *People ex rel. Broderick* v. *Morton*, 156 N. Y. 136; *Cherokee Nation* v. *Georgia*, 5 Pet. 1; Dicey on Conflict of Laws, 38; Miller on the Constitution, 314, and notes by Davis to same, 423; Justice Iredell's dissent in *Chisholm's Case*, 2 Dall. 445; *United States* v. *North Carolina*, 136 U. S. 211; cited in *United States* v. *Texas*, 143 U. S. 642, is not controlling as the State consented to be sued. Dicey on Conflict of Laws, 212; see *United States* v. *Guthrie*, 17 How. 284, 303. The States are sovereign within the province of their reserved powers, including the management of their fiscal affairs. By the constitution of North Carolina, Art. 14, sec. 3, "no money shall be drawn from the treasury but in consequence of appropriations made by law;" and the courts cannot direct the State Treasury to pay a claim against the State, however just and unquestioned, where there is no legislative appropriation to pay the same. *Garner* v. *Worth*, 122 N. C. 250; *Railroad* v. *Jenkins, Treasurer*, 68 N. C. 499; *Shaffer* v. *Jenkins, Treasurer*, 72 N. C. 275.

In many of the cases in this court in which attempts have been made to collect debts from States, there have been strong intimations that over and above the objection that States are exempt from suit by the Eleventh Amendment, courts had no process by which they could collect debts from States. *Maryе* v. *Parsons*, 114 U. S. 325; *In re Ayers*, 123 U. S. 443, 491; *Rees* v. *City of Watertown*, 19 Wall. 107; see also *Heine* v. *The Levee Commissioners*, 19 Wall. 655, 661; 8 Rose's Notes on United States Reports, 233; W. H. Burroughs in Virginia Law Journal, March, 1879. The fact that there is property mortgaged to secure the bonds does not relieve the court from being obliged to take charge of the treasury of the State. See *Northwestern M. L. Assn.* v. *Keith* as to Equity Rule 92 as to deficiency judgment. This court

rather than merely adjudge the indebtedness leaving it optional with the defendant State to pay it will decline to take jurisdiction at all. *Kentucky* v. *Dennison*, 24 How. 66; no court sits to determine law *in thesi*. *Marye* v. *Parsons*, 114 U. S. 330; *Broderick* v. *Morton*, 156 N. Y. 136.

If a suit can be brought upon the bonds of a State by another State, no such suit can be brought upon bonds transferred to the State merely because the holder of them cannot collect them.

If for any reason the court can take jurisdiction of a suit against a State for the collection of a debt its compulsive process should be confined to debts due directly to the complaining States upon dealings, contracts, transactions between the States, or at any rate to obligations acquired "in due course of trade," if such an acquisition be possible. 1 Kent's Commentaries, 297, note *d*; Langdell's Treatise on Equity Pleading, 209; and see Fed. Cas. No. 1007.

Jurisdiction over controversies between two or more States was given to the Supreme Court for the purpose of settling disputes—allaying strife—and not for the purpose of fomenting quarrels. What surer method of arousing jealousies, engendering hostilities and retaliations can be conceived than by encouraging such suits between States? Such, at any rate, is the teaching of experience.

A sovereign State cannot be forced into court against her consent; but a cross bill presupposes that the plaintiff is already in court rightfully, and when the State comes into court of her own accord and invokes its aid, she is, of course, bound by all the rules established for the administration of justice between individuals. *P. R. & A. Ry. Co.* v. *So. Car.*, 60 Fed. Rep. 552; *Prioleau* v. *United States*, L. R. 2 Eq. 659; *The Siren*, 7 Wall. 152, and see also for illustrations of these principles, *Brent* v. *Bank of Washington*, 10 Pet. 596; *United States* v. *Bank of Metropolis*, 15 Pet. 377; *The Davis*, 10 Wall. 15; *United States* v. *Ingate*, 48 Fed. Rep. 251; *United States* v. *Flint*, Fed. Cas. No. 15,121; *United States* v. *Wilder*, Fed. Cas. No. 16,694; *United States* v. *Union Nat. Bank*, Fed. Cas. No. 16,597; *United States* v. *Barker*, Fed.

Cas. No. 14,520. Although a government, state or national, is not barred by the statute of limitations, a claim barred by the statute and assigned to the government cannot be sued on, as it has no more validity after than before the assignment. *United States* v. *Buford*, 3 Pet. 12; *United States* v. *N. C. & St. L. R. Co.*, 118 U. S. 125; 1 Cooley's Blackstone, 247, note 6. A contract cannot be assigned if by the assignment a greater obligation is thereby imposed. *Tolehurst* v. *Ass. Port. Cement Mfrs.*, 1901, 2 K. B. 811; 18 Law Quarter. Review, 10; Dicey on Conflict of Laws, 534; *Edwards* v. *Kearsey*, 96 U. S. 595, 600; *Chisholm's Case*, opinion of Jay, Ch. J. 2 Dall. 479; Pollock on Contracts, 294; *Hager* v. *Swayne*, 149 U. S. 242, 248; *Ball* v. *Halsey*, 161 U. S. 72, 80.

The adoption of the Eleventh Amendment and the alarm over the decision in the *Chisholm* case was not so much the apprehension of a loss of dignity in being haled before a court, as the danger of being compelled, by legal process, to pay their debts—the danger of having their complex fiscal affairs taken out of the control of the proper state officers and placed in the hands of this court. *Cohens* v. *Virginia*, 6 Wheat. 246, 406, and see Alexander Hamilton in The Federalist No. 81; Miller on the Constitution, 382, and Davis's notes to same, 652, 653; Judson's Constitutional History of United States, 255. Individuals should not be allowed to enforce compromises for one State by threat of assignment to another State. Taking jurisdiction of this action would result in a vast number of similar claims being made which would not be confined exclusively to public securities but would extend to claims of all kinds. What then becomes of the reserved rights of the States to manage their own domestic affairs? There is scarcely any State which may not be thus called to the bar of this court. Even in Massachusetts claims have been made which the Supreme Court of that State regarded as just, as between man and man, but which it could not enforce against the State for lack of jurisdiction. *Murdock Grate Co.* v. *Commonwealth*, 152 Massachusetts, 28.

There is no absolute necessity for such jurisdiction in this

court; we have lived for more than a century without its exercise; that it does not exist is made probable by the fact that it has not previously been invoked, although the circumstances which gave rise to it have existed from the beginning. The novelty of an action, under such circumstances, is strong evidence that it is groundless. *Mississippi* v. *Johnson*, 4 Wall. 475, 500; *Mogul Case* (1892), A. C. 25. And see article by Carmon F. Randolph, in the number of the Columbia Law Review, May, 1902, "Notes on Suits Between States."

Even if suits can be brought against a State upon bonds so assigned to another State, the present suit cannot be maintained, because it is a suit by the State of South Dakota and an individual representing all individual bondholders of the same class, against the State of North Carolina and another representing all the first mortgage bondholders. 1 Daniel's Chancery Practice, 6th Am. ed. 191, note; as to Judiciary Act of 1789, see *Coal Co.* v. *Blatchford*, 11 Wall. 172; but under the act of 1875, see *Removal Cases*, 100 U. S. 457; 9 Rose's Notes, 850; *Osborne* v. *The Bank*, 9 Wheat. 739, has been overruled on the point that the court would look to the parties on the record and the court will now look beyond to the result of the suit. *In re Ayres*, 123 U. S. 443; *Missouri &c. Ry. Co.* v. *Missouri Road &c. Commrs.*, 183 U. S. 59. The original jurisdiction of this court is limited and should be sparingly exercised. *California* v. *Southern Pacific Ry. Co.*, 157 U. S. 261; *Florida* v. *Georgia*, 17 How. 478, 504.

The Circuit Court has no jurisdiction unless each one of the plaintiffs arranged according to their real interest can maintain a suit against each one of the defendants, arranged according to their real interest in the controversy. *Removal Cases*, 100 U. S. 457; *Strawbridge* v. *Curtiss*, 3 Cranch, 267; *Smith* v. *Lyon*, 133 U. S. 319. In *New Orleans Pacific Railway* v. *Parker*, 143 U. S. 58, if a suit is instituted between competent persons, others having the requisite interest are entitled to intervene, and if they do intervene, and do not have the requisite diversity of citizenship, the jurisdiction of the court is ousted. *Mangles* v. *Donan Brewing Co.*, 53 Fed. Rep. 515; Cook on Stockholders, 3d ed. sec. 827, note 2; *Morris* v. *Gilmer*, 129

U. S. 315; *Tug River C. & S. Co.* v. *Brigel*, 67 Fed. Rep. 625; *Consolidated Water Co.* v. *Babcock*, 76 Fed. Rep. 243, 248; *Board of Trustees* v. *Blair*, 70 Fed. Rep .416.

If this be required merely because the Judiciary Act only confers jurisdiction on the Circuit Court of controversies between the citizens of different States, *a fortiori*, ought it to be so held when the Constitution confers jurisdiction upon this court only of controversies between two or more States and the Eleventh Amendment expressly prohibits suits by individuals against a State?

Nor is it possible to escape the force of this argument by saying that the individuals are not necessary parties to the suit. It would scarcely lie in the mouth of the complainant to say this, because she has elected to bring the suit in the present form and with the present parties, but, if she did, the objection would be futile, because they are necessary parties. *California* v. *Southern Pacific Ry. Co.*, 157 U. S. 229, 257; *Minnesota* v. *Northern Securities Co.*, 184 U. S. 199.

Even if the parties were re-arranged according to their real interest in the controversy, the result of a successful prosecution of this suit will equally be to enable the individual holders of the second mortgage bonds to collect them from the State by suit against her consent, contrary to the provisions of the Eleventh Amendment, which would contravene the spirit of the amendment.

The general rule for the construction of a constitutional provision is so to construe it as to subserve its general purpose, *Legal Tender Cases*, 12 Wall. 531, and that rule has been applied with liberality to the Eleventh Amendment. *Fitts* v. *McGhee*, 172 U. S. 516, 528; dissent of Bradley, J., in *Virginia Coupon Cases*, 114 U. S. 332; *Hans* v. *Louisiana*, 134 U. S. 1. The Constitution prohibits things—not names. *Craig* v. *Missouri*, 4 Pet. 410, 435.

That which cannot be done directly cannot be done indirectly—the immunity of a sovereign from suit is not easily to be destroyed. In the *Parlement Belge*, 5 L. R. P. D. 197, 219, a libel was dismissed against a public ship although the sovereign was not a defendant; and see *Cunningham* v. *M.*

& B. R. R., 109 U. S. 446; *Mighell* v. *Sultan of Johore*, (1894) 1 Q. B. 149, 154; *Jarbolt* v. *Moberly*, 103 U. S. 580, 585; *Ex parte Garland*, 4 Wall. 334, 338.

To sustain this action and give judgment in accordance with the prayer will be to accomplish an unconstitutional result, and that by indirection.

This suit is commenced and prosecuted by, or for the benefit of, individuals. Under *New Hampshire* v. *Louisiana*, 108 U. S. 76, 89, an individual cannot invoke the original jurisdiction of this court in a suit against one State by using the name of another State—a State cannot maintain a suit against another State on behalf of private individuals.

The facts clearly show that the suit was commenced, and is prosecuted, solely for the benefit of the private bondholders, and in the event of recovery they are the sole beneficiaries after deducting, of course, the expenses of the suit, including the fee to South Dakota. The prohibitions of the Eleventh Amendment can not so easily be nullified.

On the merits; the bonds were disposed of contrary to the provisions of the enabling statute, c. 228, Acts North Carolina, 1854, 55, and are, therefore, illegal and uncollectible. See §§ 8, 35, 37.

As to the position of complainant that whether the bonds were illegally issued and sold or not, is immaterial to a holder for value in due course, it must be, of course, through the merit of some antecedent holder, for complainant not only took the bonds after their maturity, but paid nothing for them.

Admitting presumptions in favor of a holder of negotiable paper, the law is that when proof has been given of fraud or illegality in the issue of paper, the burden is cast upon complainant to show that it is a purchaser for value without notice and in due course. *Smith* v. *Sac County*, 11 Wall. 139; *Combs* v. *Hodge*, 21 How. 397; *Collins* v. *Gilvert*, 94 U. S. 753; *Stewart* v. *Lansing*, 104 U. S. 505.

As these bonds were issued and disposed of contrary to the provisions of the enabling statute, they were illegal, and complainant's receiving the bonds as a donation, and after their maturity, casts the burden of proof upon her to show that some

one of her predecessors in title were innocent purchasers for value, and this she has not done.

As the Schafers, who are the only persons whose title complainant rests upon, purchased these state bonds with overdue interest coupons attached and at a small percentage of their face value, they are deprived of the protection given to *bona fide* purchasers for value in due course. *Hulbert* v. *Douglas*, 94 N. C. 122; *Farthing* v. *Dark*, 109 N. C. 291; *Parsons* v. *Jackson*, 99 U. S. 434, 444; 9 Rose's Notes, 737; *Railway Co.* v. *Sprague*, 103 U. S. 756; *London Joint Stock Bank* v. *Simmons*, 1892, A. C. 201, 221. The circumstances were sufficient to put a reasonable person on notice that there was something wrong, and inquiry would have disclosed that they were not issued in accordance with the statute. *Trask* v. *Jacksonville &c. R. R. Co.*, 124 U. S. 515.

If, however, the Schafers were *bona fide* holders for value, as the bonds were not suable in their hands, they ought not to become suable in the hands of a transferee unless that transferee took them for value and without notice of dishonor, even if such controversies are within the jurisdiction of this court. A transferee has no higher or further rights than the transferrer, unless in the exceptional cases under our recording acts and negotiable paper taken for value before maturity and without notice. To permit the State of South Dakota to collect these bonds by suit, whether they were illegally issued or not, will be to add another exception to the rule that a man cannot give what he does not own or possess.

The provisions of the law, Act, 1866, 67, North Carolina, chapter 106, authorizing a mortgage upon the State's stock in the North Carolina Railroad in favor of the holders of the bonds of the class sued on were not complied with, and the mortgage is invalid.

In the indorsement upon the bonds, purporting to give a statutory mortgage upon the State's stock, no stock was designated or described in such way as to be capable of identification, and, therefore, no particular stock has been subjected to the lien of a mortgage. The statute authorized a mortgage in favor of the holders of the bonds, but it has never been exe-

cuted, and the only claim which the holders of the mortgage have against the State is, not a lien upon any particular stock owned by the State, but a cause of action for the breach of contract to give the mortgage. In North Carolina, by whose law the validity of the mortgage is to be determined, a mortgage purporting to be upon a certain number of things, out of a larger number, and in no other wise designated, is invalid as a mortgage. *Waldo* v. *Belcher*, 11 Iredell L. 609; *Blackley* v. *Patrick*, 67 N. C. 40; *Stevenson* v. *Railroad*, 86 N. C. 445; *Holmes* v. *Whitaker*, 119 N. C. 113; Jones on Chattel Mortgages, 56; *Kilgore* v. *New Orleans Gas Co.*, 2 Woods, 144.

The claim on behalf of the mortgage is not stronger in equity than at law, because in order to constitute an equitable mortgage, it is equally necessary to identify the subject-matter. *Halroyd* v. *Marshall*, 10 H. L. 189; *Walker* v. *Brown*, 165 U. S. 654; 19 Enc. of Law, page 14, and authorities. The same rule prevails in actions for the specific performance of a contract. *Lighthouse* v. *Third National Bank*, 162 N. Y. 336. The law is the same, whether the alleged mortgage be statutory or conventional. Jones on Liens, § 106; *Tycross* v. *Dreyfus*, 5 Ch. Div. 605.

If the court has jurisdiction of the cause, and complainant is entitled to recover anything, she is not entitled to recover interest upon overdue coupons. *United States* v. *North Carolina*, 136 U. S. 211.

Mr. Daniel L. Russell, with whom *Mr. Marion Butler* and *Mr. Alfred Russell* were on the brief, for defendant Charles Salter and the second mortgage bondholders.

The first and second mortgage bondholders being interested in the funds must be made parties to the suit, citing cases on complainant's brief and Jones on Mortgages, § 1369; *Wilkins* v. *Frye*, 1 Mer. 244, 262; *Hancock* v. *Hancock*, 22 N. Y. 568; *Carpenter* v. *O'Dougherty*, 58 N. Y. 681; *Rankin* v. *Major*, 9 Iowa 297; *Thayer* v. *Campbell*, 9 Missouri, 280. The second mortgage is *in solido* and not a separate and independent mortgage of ten shares for each bond. See cases cited in complainant's brief. The motives of the donor in making the gift

to the complainant State are not material. See cases cited in complainant's brief. As to the turpitude of repudiation and the obligation of a State to pay its debts, see *Louisiana* v. *Jumel*, 107 U. S. 740; *Murray* v. *Charleston*, 96 U. S. 445.

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

There can be no reasonable doubt of the validity of the bonds and mortgages in controversy. There is no challenge of the statutes by which they were authorized. By those statutes the treasurer was directed, when it became necessary to borrow money for the payment of the subscription, to prepare coupon bonds and advertise in one or more newspapers for sealed proposals, and to accept the terms offered most advantageous to the State, provided that in no event should the bonds be sold for less than their par value. The advertisement was made, no bids were received, but the bonds were delivered to the railroad company as payment for the subscription, dollar for dollar. Upon each bond was placed the statutory pledge or mortgage. It is true no money was paid into the treasury and thence out of the treasury to the railroad company, yet looking at the substance of the transaction (and equity has regard to substance rather than form), the transaction was the same as though the company had been the only bidder, had placed a thousand dollars in the treasury in payment of each bond and received that thousand dollars back from the treasury in payment of the subscription for ten shares of stock. It is true also that there was no formal issue of certificates by the company to the State, but that was a matter of arrangement between the parties to the subscription. The State's right as a stockholder was not abridged by lack of the certificates, and in fact it has been receiving dividends on the stock exactly as though certificates had been issued. The statute also provided that with each several bond a deed of mortgage for an equal amount of stock, signed by the treasurer and countersigned by the comptroller, should constitute a part of the bond and be transferable in like manner with it, "and further, that such mortgage shall have all the force and effect

in law and equity, of registered mortgages without actual registry." While no certificate of stock was to be attached to or go with the bond the statute evidently contemplated that the mortgage endorsed on the bond should have the same force and effect. Hence, when the endorsement was made and the bond issued by the State it was tantamount to a separation and identification of the number of shares named therein. It cannot be that the State having provided this means of giving to each bond the mortgage security of the corresponding shares of stock can now prevent the attaching of the lien on the ground that no shares had been separated and no certificate transferred. It is unnecessary to refer to chap. 98 of the Laws of 1879, for that act was one in the nature of an offer to compromise, although it does contain a recognition of outstanding obligations.

Neither can there be any question respecting the title of South Dakota to these bonds. They are not held by the State as representative of individual owners, as in the case of *New Hampshire* v. *Louisiana*, 108 U. S. 76, for they were given outright and absolutely to the State. It is true that the gift may be considered a rare and unexpected one. Apparently the statute of South Dakota was passed in view of the expected gift, and probably the donor made the gift under a not unreasonable expectation that South Dakota would bring an action against North Carolina to enforce these bonds, and that such action might enure to his benefit as the owner of other like bonds. But the motive with which a gift is made, whether good or bad, does not affect its validity or the question of jurisdiction. This has been often ruled. In *McDonald* v. *Smalley*, 1 Pet. 620, an objection to the jurisdiction on the ground that the title to the property in controversy had been conveyed to the plaintiff in the belief that it would be sustained by the Federal when it would not be by the state court, was overruled, with this observation by Chief Justice Marshall (p. 624):

"This testimony, which is all that was laid before the court, shows, we think, a sale and conveyance to the plaintiff, which was binding on both parties. McDonald could not have main-

tained an action for his debt, nor McArthur a suit for his land. His title to it was extinguished, and the consideration was received. The motives which induced him to make the contract, whether justifiable or censurable, can have no influence on its validity. They were such as had sufficient influence with himself, and he had a right to act upon them. A court cannot enter into them when deciding on its jurisdiction. The conveyance appears to be a real transaction, and the real as well as nominal parties to the suit, are citizens of different States."

See also *Smith* v. *Kernochen*, 7 How. 198; *Barney* v. *Baltimore*, 6 Wall. 280; *Dickerman* v. *Northern Trust Co*, 176 U. S. 181, 190, 191, 192. In this last case Mr. Justice Brown, speaking for the court, said:

"If the law concerned itself with the motives of parties new complications would be introduced into suits which might seriously obscure their real merits. If the debt secured by a mortgage be justly due, it is no defence to a foreclosure that the mortgagee was animated by hostility or other bad motive. *Davis* v. *Flagg*, 35 N. J. Eq. 491; *Dering* v. *Earl of Winchelsea*, 1 Cox Ch. 318; *McMullen* v. *Ritchie*, 64 Fed. Rep. 253, 261; *Toler* v. *East Tenn. &c. Railway*, 67 Fed. Rep. 168. . . . The reports of this court furnish a number of analogous cases. Thus, it is well settled that a mere colorable conveyance of property, for the purpose of vesting title in a non-resident and enabling him to bring suit in a Federal court, will not confer jurisdiction; but if the conveyance appear to be a real transaction, the court will not, in deciding upon the question of jurisdiction, inquire into the motives which actuated the parties in making the conveyance. *McDonald* v. *Smalley*, 1 Pet. 620; *Smith* v. *Kernochen*, 7 How. 198; *Barney* v. *Baltimore*, 6 Wall. 280; *Farmington* v. *Pillsbury*, 114 U. S. 138; *Crawford* v. *Neal*, 144 U. S. 585.

"The law is equally well settled that, if a person take up a *bona fide* residence in another State, he may sue in a Federal court, notwithstanding his purpose was to resort to a forum of which he could not have availed himself if he were a resident of the State in which the court was held. *Cheever* v.

Wilson, 9 Wall. 108, 123; *Briggs* v. *French*, 2 Sumn. 251; *Catlett* v. *Pacific Ins. Co.*, 1 Paine, 594; *Cooper* v. *Galbraith*, 3 Wash. 546; *Johnson* v. *Monell*, Wool. 390."

The title of South Dakota is as perfect as though it had received these bonds directly from North Carolina. We have, therefore, before us the case of a State with an unquestionable title to bonds issued by another State, secured by a mortgage of railroad stock belonging to that State, coming into this court and invoking its jurisdiction to compel payment of those bonds and a subjection of the mortgaged property to the satisfaction of the debt.

Has this court jurisdiction of such a controversy, and to what extent may it grant relief? Obviously that jurisdiction is not affected by the fact that the donor of these bonds could not invoke it. The payee of a foreign bill of exchange may not sue the drawer in the Federal court of a State of which both are citizens, but that does not oust the court of jurisdiction of an action by a subsequent holder if the latter be a citizen of another State. The question of jurisdiction is determined by the status of the present parties, and not by that of prior holders of the thing in controversy. Obviously, too, the subject-matter is one of judicial cognizance. If anything can be considered as justiciable it is a claim for money due on a written promise to pay—and if it be justiciable does it matter how the plaintiff acquires title, providing it be honestly acquired? It would seem strangely inconsistent to take jurisdiction of an action by South Dakota against North Carolina on a promise to pay made by the latter directly to the former, and refuse jurisdiction of an action on a like promise made by the latter to an individual and by him sold or donated to the former.

A preliminary question arises from the fact that representatives of the two classes of bonds are made defendants, and that a part of the relief asked is a sale of the thirty thousand shares of stock of the North Carolina Railroad Company, belonging to the State of North Carolina, in satisfaction and discharge of all the mortgages upon such stock. It is insisted

that these individuals, owners of the bonds, although named as defendants, are in fact occupying an adverse position to that of the State, and that the effect of their presence as parties is a practical nullification of the Eleventh Amendment, in that it is giving to individuals relief by judgment against the State. Apparently one expectation of the donor to South Dakota was that in some way the bonds retained by himself would be placed in judgment and relief obtained against North Carolina in the suit commenced by South Dakota. But we think that these individuals are not necessary parties-defendant, and that no relief should be given to them or to the classes of bondholders they represent. The statute under which the mortgage was executed provided that with each of the bonds a deed of mortgage for a like amount of stock should be executed by the State. There is, therefore, a separate mortgage of ten shares of stock on each one of these bonds, and that mortgage can be fully satisfied by a decree of foreclosure and sale of the ten shares of stock. No one would doubt that, if a certificate of stock was attached as a pledge to a note, the pledge could be satisfied by a sale of the stock without any determination of the rights of the purchaser as between himself and other stockholders. And such was the manifest purpose of this legislation. It contemplated that each bondholder should receive a stock security which he could realize on without the delay and expense of a suit to which all other stockholders and the corporation would be necessary parties. The purchaser at the sale to be authorized by this decree will become vested with the full title of the State to the number of shares of stock stated in the mortgage. He will occupy the same position in relation to the corporate property that other stockholders occupy, and have whatever rights they have. It is not necessary for a full satisfaction of the mortgage on one of these bonds that any other mortgage upon another bond be also foreclosed, or that a decree be entered determining what rights the purchaser will have by virtue of the stock which he obtains at the sale. So far then as these individual defend-

ants are concerned, the suit will be dismissed with costs against South Dakota.

Coming now to the right of South Dakota to maintain this suit against North Carolina, we remark that it is a controversy between two States; that by sec. 2, art. III, of the Constitution this court is given original jurisdiction of "controversies between two or more States." In *Missouri* v. *Illinois and the Sanitary District of Chicago*, 180 U. S. 208, Mr. Justice Shiras, speaking for the court, reviewed at length the history of the incorporation of this provision into the Federal Constitution and the decisions rendered by this court in respect to such jurisdiction, closing with these words (p. 240):

"The cases cited show that such jurisdiction has been exercised in cases involving boundaries and jurisdiction over lands and their inhabitants, and in cases directly affecting the property rights and interests of a State."

The present case is one "directly affecting the property rights and interests of a State."

Although a repetition of this review is unnecessary, two or three matters are worthy of notice. The original draft of the Constitution reported to the convention gave to the Senate jurisdiction of all disputes and controversies "between two or more States, respecting jurisdiction or territory," and to the Supreme Court jurisdiction of "controversies between two or more States, except such as shall regard territory or jurisdiction." A claim for money due being a controversy of a justiciable nature, and one of the most common of controversies, would seem to naturally fall within the scope of the jurisdiction thus intended to be conferred upon the Supreme Court. In the subsequent revision by the convention the power given to the Senate in respect to controversies between the States was stricken out as well as the limitation upon the jurisdiction of this court, leaving to it in the language now found in the Constitution jurisdiction without any limitation of "controversies between two or more States."

The Constitution as it originally stood also gave to this

court jurisdiction of controversies "between a State and citizens of another State." Under that clause *Chisholm* v. *Georgia*, 2 Dall. 419, was decided, in which it was held that a citizen of one State might maintain in this court an action of assumpsit against another State. In consequence of that decision the Eleventh Amendment was adopted, which provides that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State." It will be perceived that this amendment only granted to a State immunity from suit by an individual, and did not affect the jurisdiction over controversies between two or more States. In respect to this it was said by Chief Justice Marshall in *Cohens* v. *Virginia*, 6 Wheat. 264, 406:

"It is a part of our history, that, at the adoption of the Constitution, all the States were greatly indebted; and the apprehension that these debts might be prosecuted in the Federal courts formed a very serious objection to that instrument. Suits were instituted; and the court maintained its jurisdiction. The alarm was general; and, to quiet the apprehensions that were so extensively entertained, this amendment was proposed in Congress, and adopted by the state legislatures. That its motive was not to maintain the sovereignty of a State from the degradation supposed to attend a compulsory appearance before the tribunal of the nation, may be inferred from the terms of the amendment. It does not comprehend controversies between two or more States, or between a State and a foreign State. The jurisdiction of the court still extends to these cases: and in these a State may still be sued. We must ascribe the amendment, then, to some other cause than the dignity of a State. There is no difficulty in finding this cause. Those who were inhibited from commencing a suit against a State, or from prosecuting one which might be commenced before the adoption of the amendment, were persons who might probably be its creditors. There was not much reason to fear that foreign or sister States would

be creditors to any considerable amount, and there was reason to retain the jurisdiction of the court in those cases, because it might be essential to the preservation of peace. The amendment, therefore, extended to suits commenced or prosecuted by individuals, but not to those brought by States."

In the same case, after referring to the two classes of cases, jurisdiction of which was vested in the courts of the Union, he said (p. 378):

"In the second class, the jurisdiction depends entirely on the character of the parties. In this are comprehended 'controversies between two or more States, between a State and citizens of another State,' and 'between a State and foreign States, citizens or subjects.' If these be the parties it is entirely unimportant what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the courts of the Union."

In *Rhode Island* v. *Massachusetts*, 12 Pet. 657, this court sustained its jurisdiction of a suit in equity brought by one State against another to determine a dispute as to boundary, and in the course of the opinion, by Mr. Justice Baldwin, said in respect to the immunity of a sovereign from suit by an individual (p. 720):

"Those States, in their highest sovereign capacity, in the convention of the people thereof, . . . adopted the Constitution, by which they respectively made to the United States a grant of judicial power over controversies between two or more States. By the Constitution, it was ordained that this judicial power, in cases where a State was a party, should be exercised by this court as one of original jurisdiction. The States waived their exemption from judicial power, (6 Wheat. 378, 380,) as sovereigns by original and inherent right, by their own grant of its exercise over themselves in such cases, but which they would not grant to any inferior tribunal. By this grant, this court has acquired jurisdiction over the parties in this cause, by their own consent and delegated authority; as their agent for executing the judicial power of the United States in the cases specified."

And, again, in reference to the extent of the jurisdiction of this court (p. 721):

"That it is a controversy between two States, cannot be denied; and though the Constitution does not, in terms, extend the judicial power to *all* controversies between two or more States, yet, it in terms excludes *none* whatever may be their nature or subject."

In *United States* v. *North Carolina*, 136 U. S. 211, we took jurisdiction of an action brought by the United States against North Carolina to recover interest on bonds, and decided the case upon its merits. It is true there was nothing in the opinion in reference to the matter of jurisdiction, but as said in *United States* v. *Texas*, 143 U. S. 621, 642:

"The cases in this court show that the framers of the Constitution did provide, by that instrument, for the judicial determination of all cases in law and equity between two or more States, including those involving questions of boundary. Did they omit to provide for the judicial determination of controversies arising between the United States and one or more of the States of the Union? This question is in effect answered by *United States* v. *North Carolina*, 136 U. S. 211. That was an action of debt brought in this court by the United States against the State of North Carolina upon certain bonds issued by that State. The State appeared, the case was determined here upon its merits and judgment was rendered for the State. It is true that no question was made as to the jurisdiction of this court, and nothing was therefore said in the opinion upon that subject. But it did not escape the attention of the court, and the judgment would not have been rendered except upon the theory that this court has original jurisdiction of a suit by the United States against a State."

See also *United States* v. *Michigan*, 190 U. S. 379, decided at the last term, in which a bill in equity for an accounting and a recovery of money was sustained. Mr. Justice Peckham, delivering the unanimous opinion of the court, said (pp. 396, 406):

"By its bill the United States invokes the original jurisdiction of this court for the purpose of determining a controversy existing between it and the State of Michigan. This court has jurisdiction of such a controversy, although it is not lit-

erally between two States, the United States being a party on the one side, and a State on the other. This was decided in *United States* v. *Texas*, 143 U. S. 611, 642. . . . There must be judgment overruling the demurrer, but as the defendant may desire to set up facts which it might claim would be a defence to the complainant's bill, we grant leave to the defendant to answer up to the first day of the next term of this court. In case it refuses to plead further, the judgment will be in favor of the United States for an accounting and for the payment of the sum found due thereon."

We are not unmindful of the fact that in *Hans* v. *Louisiana*, 134 U. S. 1, Mr. Justice Bradley, delivering the opinion of the court, expressed his concurrence in the views announced by Mr. Justice Iredell, in the dissenting opinion in *Chisholm* v. *Georgia*, but such expression cannot be considered as a judgment of the court, for the point decided was that, construing the Eleventh Amendment according to its spirit rather than by its letter, a State was relieved from liability to suit at the instance of an individual, whether one of its own citizens or a citizen of a foreign State. Without noticing in detail the other cases referred to by Mr. Justice Shiras in *Missouri* v. *Illinois et al.*, *supra*, it is enough to say that the clear import of the decisions of this court from the beginning to the present time is in favor of its jurisdiction over an action brought by one State against another to enforce a property right. *Chisholm* v. *Georgia* was an action of assumpsit, *United States* v. *North Carolina* an action of debt, *United States* v. *Michigan* a suit for an accounting, and that which was sought in each was a money judgment against the defendant State.

But we are confronted with the contention that there is no power in this court to enforce such a judgment, and such lack of power is conclusive evidence that, notwithstanding the general language of the Constitution, there is an implied exception of actions brought to recover money. The public property held by any municipality, city, county or State is exempt from seizure upon execution because it is held by such corporation, not as a part of its private assets, but as a trustee for public purposes. *Meriwether* v. *Garrett*, 102 U. S. 472, 513.

As a rule no such municipality has any private property subject to be taken upon execution. A levy of taxes is not within the scope of the judicial power except as it commands an inferior municipality to execute the power granted by the legislature.

In *Rees* v. *City of Watertown*, 19 Wall. 107, 116, 117, we said:

"We are of the opinion that this court has not the power to direct a tax to be levied for the payment of these judgments. This power to impose burdens and raise money is the highest attribute of sovereignty, and is exercised, first, to raise money for public purposes only; and, second, by the power of legislative authority only. It is a power that has not been extended to the judiciary. Especially is it beyond the power of the Federal judiciary to assume the place of a State in the exercise of this authority at once so delicate and so important."

See also *Heine* v. *The Levee Commissioners*, 19 Wall. 655, 661; *Meriwether* v. *Garrett*, *supra*.

In this connection reference may be made to *United States* v. *Guthrie*, 17 How. 284, in which an application was made for a mandamus against the Secretary of the Treasury to compel the payment of an official salary, and in which we said (p. 303):

"The only legitimate inquiry for our determination upon the case before us is this: Whether, under the organization of the Federal government or by any known principle of law, there can be asserted a power in the Circuit Court of the United States for the District of Columbia, or in this court, to command the withdrawal of a sum or sums of money from the Treasury of the United States, to be applied in satisfaction of disputed or controverted claims against the United States? This is the question, the very question presented for our determination; and its simple statement would seem to carry with it the most startling considerations—nay, its unavoidable negation, unless this should be prevented by some positive and controlling command; for it would occur, *a priori*, to every mind, that a treasury, not fenced round or shielded by fixed and established modes and rules of administration, but which

could be subjected to any number or description of demands, asserted and sustained through the undefined and undefinable discretion of the courts, would constitute a feeble and inadequate provision for the great and inevitable necessities of the nation. The government under such a *regime*, or, rather, under such an absence of all rule, would, if practicable at all, be administered, not by the great departments ordained by the Constitution and laws, and guided by the modes therein prescribed, but by the uncertain and perhaps contradictory action of the courts, in the enforcement of their views of private interests."

Further, in this connection may be noticed *Gordon* v. *United States*, 117 U. S. 697, in which this court declined to take jurisdiction of an appeal from the Court of Claims, under the statute as it stood at the time of the decision, on the ground that there was not vested by the act of Congress power to enforce its judgment. We quote the following from the opinion, which was the last prepared by Chief Justice Taney (pp. 702, 704):

"The award of execution is a part, and an essential part of every judgment passed by a court exercising judicial power. It is no judgment, in the legal sense of the term, without it. Without such an award the judgment would be inoperative and nugatory, leaving the aggrieved party without a remedy. . . . Indeed, no principle of constitutional law has been more firmly established or constantly adhered to, than the one above stated—that is, that this court has no jurisdiction in any case where it cannot render judgment in the legal sense of the term; and when it depends upon the legislature to carry its opinion into effect or not, at the pleasure of Congress." See also *In re Sanborn*, 148 U. S. 222, and *La Abra Silver Mining Company* v. *United States*, 175 U. S. 423, 456.

We have, then, on the one hand the general language of the Constitution vesting jurisdiction in this court over "controversies between two or more States," the history of that jurisdictional clause in the convention, the cases of *Chisholm* v. *Georgia*, *United States* v. *North Carolina* and *United States* v. *Michigan*, (in which this court sustained jurisdiction over actions

to recover money from a State,) the manifest trend of other decisions, the necessity of some way of ending controversies between States, and the fact that this claim for the payment of money is one justiciable in its nature; on the other, certain expression of individual opinions of justices of this court, the difficulty of enforcing a judgment for money against a State, by reason of its ordinary lack of private property subject to seizure upon execution, and the absolute inability of a court to compel a levy of taxes by the legislature. Notwithstanding the embarrassments which surround the question it is directly presented and may have to be determined before the case is finally concluded, but for the present it is sufficient to state the question with its difficulties.

There is in this case a mortgage of property, and the sale of that property under a foreclosure may satisfy the plaintiff's claim. If that should be the result there would be no necessity for a personal judgment against the State. That the State is a necessary party to the foreclosure of the mortgage was settled by *Christian* v. *Atlantic & North Carolina Railroad Company*, 133 U. S. 233. Equity is satisfied by a decree for a foreclosure and sale of the mortgaged property, leaving the question of a judgment over for any deficiency, to be determined when, if ever, it arises. And surely if, as we have often held, this court has jurisdiction of an action by one State against another to recover a tract of land, there would seem to be no doubt of the jurisdiction of one to enforce the delivery of personal property.

A decree will, therefore, be entered, which, after finding the amount due on the bonds and coupons in suit to be twenty-seven thousand four hundred dollars ($27,400), (no interest being recoverable, *United States* v. *North Carolina*, 136 U. S. 211), and that the same are secured by one hundred shares of the stock of the North Carolina Railroad Company, belonging to the State of North Carolina, shall order that the said State of North Carolina pay said amount with costs of suit to the State of South Dakota on or before the 1st Monday of January, 1905, and that in default of such payment an order of sale be issued to the Marshal of this court, directing him to sell

at public auction all the interest of the State of North Carolina in and to one hundred shares of the capital stock of the North Carolina Railroad Company, such sale to be made at the east front door of the Capitol Building in this city, public notice to be given of such sale by advertisements once a week for six weeks in some daily paper published in the city of Raleigh, North Carolina, and also in some daily paper published in the city of Washington.

And either of the parties to this suit may apply to the court upon the foot of this decree, as occasion may require.

MR. JUSTICE WHITE, with whom concurred MR. CHIEF JUSTICE FULLER, MR. JUSTICE McKENNA and MR. JUSTICE DAY, dissenting.

The decision in this case seems to me to disregard an express and absolute prohibition of the Constitution. The facts are stated in the opinion of the court. As, however, there are some facts deemed by me to be material, which are not referred to, it is proposed to make a summary of the case, and then express the reasons which control me.

In the years 1847 and 1855 the negotiable bonds of the State of North Carolina were issued to aid in the construction of the railway of the North Carolina Railroad Company and were exchanged for the stock of that company. The bonds went into the hands of individuals and the exchanged stock passed into the possession of the State, and was declared to be pledged in the hands of the State to secure the payment of the bonds in question.

In 1855 and 1866 similar aid was given to another railway, the Western North Carolina. Bonds, each for the par value of one thousand dollars, aggregating nearly two and a half millions of dollars, were issued by the State. All the bonds, which were issued after the passage, in 1866, of an act of the legislature, were declared to be secured, as stated in the act, by a mortgage of the stock of the North Carolina Railroad held by the State and already, in its entirety, pledged for the security of all the bonds which had been previously issued

in aid of the North Carolina Railroad. The stock, however, remained in possession of the State, but each of the bonds thereafter issued contained an endorsement that ten shares of stock of the North Carolina Railroad Company in the hands of the State were mortgaged as security for the payment of each of the bonds.

Presumably, as a result of the disastrous consequences of the civil war and the events which followed, the financial affairs of the State of North Carolina in 1879 were profoundly embarrassed. The State had not paid the interest as it accrued on the bonds issued in aid of the North Carolina Railroad. It had in effect paid no interest whatever on the bonds issued in favor of the Western North Carolina Railroad, and, indeed, had defaulted generally in the payment of the interest on its public debt. Statutes were passed by the State providing for an adjustment of its financial affairs, so as to rehabilitate its credit, in order that when the state debt was readjusted the State might, for the benefit of all its people and its creditors, be able to pay the interest on and provide for the principal of the public debt. The adjustment made was accepted by those holding the bonds issued in aid of the North Carolina Railroad and they waived a very large sum of unpaid interest and received new bonds, accompanied with a reiteration of the pledge of all the stock of the North Carolina Railroad owned by the State, which had always been held by the State as security for the payment of all the bonds of that issue. It is to be inferred from the record that the adjustment proposed was generally accepted by the other creditors of the State, and that as a consequence its fiscal affairs were placed upon a sound basis. Be this as it may, certain is it that the adjustment was accepted by the holders of a vast majority of the bonds issued in aid of the Western North Carolina Railroad, and that such holders surrendered their old bonds and took new bonds of the State for twenty-five per cent of the face value of their bonds, these new bonds not purporting to be secured by any mortgage of the stock of the North Carolina Railroad.

In 1901, twenty-two years after the passage of the acts re-

ferred to, and their acceptance as above stated, Simon Schafer and his brother, composing the firm of Schafer & Brothers, bankers and brokers in the city of New York, addressed a petition to the legislature of North Carolina. Therein it was recited that the parties named were the holders, in their own right and as trustees, of nearly two hundred and fifty thousand dollars of the bonds issued in aid of the Western North Carolina Railroad Company, attached to which were unpaid interest coupons for more than thirty years. The petitioners declared that these bonds were substantially all the bonds of the series then outstanding because the holders thereof had not accepted the arrangement of 1879. It was stated that such arrangements had been accepted by the vast majority of others who held such bonds by reason of the financial stress of the State at the time, and because those creditors knew that the stock of the North Carolina Railroad mortgaged to secure the bonds was of no avail for such purpose, since its value at the time of the adjustment was not adequate to pay the bonds issued in aid of the North Carolina Railroad, in favor of which it was first pledged. It was recited that the petitioners had not availed of the adjustment because they preferred waiting a restoration of the credit of the State, and trusted that the stock of the North Carolina Railroad might ultimately prove adequate to pay the bonds as reduced, issued in favor of the North Carolina Railroad, and the small amount of bonds which remained outstanding, as a result of the adjustment. It was declared that this had been accomplished; that in consequence of the reduced amount of the North Carolina Railroad bonds brought about by the adjustment, and the retirement thereby effected of all the bonds of the Western North Carolina Railroad except the small amount held or represented by the petitioners, the stock of the North Carolina Railroad held by the State, if sold, would be adequate to pay both series and leave a balance in favor of the State. Reciting that the petitioners and those they represented were aware that their claims against the State could not be judicially enforced either in the state or Federal courts, the prayer was that an appropriation might be made to pay their bonds in principal

and accumulated interest, or that in default an act be passed authorizing suit in the courts to enforce the mortgage lien asserted to exist on the stock of the North Carolina Railroad. The prayer of this petition was not granted.

Shortly following the failure to act favorably upon the petition just referred to, the act of the legislature of South Dakota, set out in the opinion of the court, was passed. It will be observed that, among other things, it empowered the governor to accept gifts made to the State of bonds or choses in action, and authorized the attorney general of the State, when such gifts were accepted, to bring suit in the name of the State to enforce payment of the same, and for that purpose "to employ counsel to be associated with him in such suits or actions, who, with him, shall fully represent the State, and shall be entitled to reasonable compensation (italics mine) *out of the recoveries and collections in such suits and actions.*" Thereupon Simon Schafer addressed the letter to the Hon. Charles H. Burke, a member of Congress from South Dakota, which is reproduced in full in the opinion of the court. It suffices to say that by that letter ten of the bonds were given to the State of South Dakota, and it was especially mentioned that the gift was made because Schafer was aware that he could not sue the State of North Carolina, whilst the State of South Dakota could do so. The letter also contained the suggestion, presumably as an inducement to an acceptance by the State, that if the ten bonds were enforced by the State of South Dakota, other gifts of similar bonds might be made. The bonds were accepted by the governor of South Dakota, and the attorney general of that State thereupon filed the present bill. The parties defendant were the State of North Carolina, a person sued as representing all the holders of bonds issued in aid of the North Carolina Railroad and a person sued as representative of the holders of the outstanding bonds issued in aid of the Western North Carolina Railroad. The prayer of the bill was in substance for a decree against the State of North Carolina for the amount of the principal of the bonds and for more than thirty years' accrued interest; for an enforcement of the mortgage asserted to exist on the stock of

the North Carolina Railroad Company held by the State; for a decree declaring that the holders of the bonds issued in favor of the North Carolina Railroad Company had lost their prior lien upon the whole stock by reason of their acceptance of the compromise under the act of 1879, and the taking of new bonds by them in pursuance thereof. It was, however, prayed that in the event it should be found that the lien of such bondholders on the stock had not been waived, the stock be ordered sold free from all encumbrances to satisfy the claims of the respective lienholders thereon, and that distribution be made of the proceeds of the stock among them according to priority.

The State answered, challenging the jurisdiction of this court to entertain the bill, and also urging various defences on the merits.

The person joined as representing the bonds issued in aid of the North Carolina Railroad made no appearance. Charles Salter, who was made defendant as representative of the holders of the bonds issued in aid of the Western North Carolina Railroad, answered, substantially admitting all the allegations of the bill, but praying "that plaintiff's bill be dismissed with costs, unless the court shall decree that all the stock subject to the second mortgage be sold for the benefit of all the holders of said second mortgage bonds."

The court now decides that it has jurisdiction, because of the delegation, in the second section of the third article of the Constitution, of judicial power to the United States over "controversies between two or more States," and because of the grant to this court of original jurisdiction over cases in which a State shall be a party. Whilst conceding that if the holders of the bonds issued in aid of the North Carolina Railroad are necessary parties the jurisdiction would be ousted, it is held that such bondholders are not necessary parties, since there may be a sale to enforce complainant's rights of a portion of the stock held by the State of North Carolina, subject to the prior rights therein of the holders of such bonds. The decree which will be entered will, therefore, adjudge the State of North Carolina to be indebted to South Dakota in the

amount of the principal of the ten bonds, with more than thirty years' accrued interest. The decree will direct the sale of the stock in the North Carolina Railroad Company held by the State, subject to the prior pledge in favor of the holders of the bonds of the North Carolina Railroad. The question of a deficiency decree is reserved, in case, as a result of the sale, the debt decreed against the State should not be extinguished.

With this summary of the pleadings, the facts, and the decision of the court in mind, I shall now state the reasons which compel me to dissent, all of which may be embraced in the two following general propositions which I shall examine under separate headings: (A) The absolute want of power in the court to render a decree between the two States on the cause of action sued on; and (B) The want of power to render the decree which is now directed to be entered, because of the absence of essential parties whose presence would oust jurisdiction and the impotency to grant any relief whatever in the absence of such parties.

(A.)

The absolute want of power in the court to render a decree between the two States on the cause of action sued on.

First. The power of this court to award a decree against the State of North Carolina is based on the provision in the second section of the third article of the Constitution, extending the judicial power of the United States over "controversies between two or more States," and to the delegation to this court of original jurisdiction over such controversies. If the provisions in question were the only ones on the subject it might be more difficult to deny that the Federal judicial power embraced this controversy. Those provisions, however, do not stand alone, since they must be considered in connection with the Eleventh Amendment to the Constitution, providing that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign state."

The question which the case involves is not what in a generic sense may be considered a controversy between States, but whether the particular claim here asserted by the State of South Dakota is in any view such a controversy. It is also to be observed that the question is not whether a controversy between States may not rise from a debt originating as the result of a direct transaction between States, but is whether one State can acquire a claim asserted against another State by a citizen of that or of another State or an alien, and as a result sue upon it, and thereby create a controversy between States in a constitutional sense. Indeed, the question is narrower than this, since in this case the alleged debtor State had years before the transfer of the claim in question, while it was yet owned by individuals, declined to recognize the debt, and had refused payment thereof, as the result of a controversy between itself and its alleged creditors.

I take it to be an elementary rule of constitutional construction that no one provision of the Constitution is to be segregated from all the others, and to be considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purposes of the instrument. If, in following this rule, it be found that an asserted construction of any one provision of the Constitution would, if adopted, neutralize a positive prohibition of another provision of that instrument, then it results that such asserted construction is erroneous, since its enforcement would mean, not to give effect to the Constitution, but to destroy a portion thereof. My mind cannot escape the conclusion that if, wherever an individual has a claim, whether in contract or tort, against a State, he may, by transferring it to another State, bring into play the judicial power of the United States to enforce such claim, then the prohibition contained in the Eleventh Amendment is a mere letter, without spirit and without force. This is said because no escape is seen from the conclusion if the application of the prohibition is to depend solely upon the willingness of the creditor of a State, whether citizen or alien, to transfer, and the docility or cupidity of another State in accepting such transfer, that the

provision will have no efficacy whatever. And this becomes doubly cogent when the history of the Eleventh Amendment is considered and the purpose of its adoption is borne in mind.

It is familiar that the amendment was adopted because of the decision of this court in 1793, in *Chisholm* v. *Georgia*, 2 Dall. 419, holding that the grant of judicial power to the United States to determine controversies between a State and a citizen of another State vested authority to determine a controversy wherein a citizen of a State asserted a claim against another State. That the purpose of the amendment was to remove the possibility of the assertion of such a claim is aptly shown by the passage from the opinion of Mr. Chief Justice Marshall in *Cohens* v. *Virginia*, 6 Wheat. 264, as quoted in the opinion of the court in this case, saying (p. 406):

"It is a part of our history, that, at the adoption of the Constitution, all the States were greatly indebted; and the apprehension that these debts might be prosecuted in the Federal courts, formed a very serious objection to that instrument. Suits were instituted; and the court maintained its jurisdiction. The alarm was general; and, to quiet the apprehensions that were so extensively entertained, this amendment was proposed in Congress, and adopted by the state legislatures."

As the purpose of the amendment was to prohibit the enforcement of individual claims against the several States by means of the judicial power of the United States, and as the amendment was subsequent to the grant of judicial power made by the Constitution, the amendment qualified the whole grant of judicial power to the extent necessary to render it impossible by indirection to escape the operation of the avowed purpose which the people of the United States expressed in adopting the amendment. How, as declared by Chief Justice Marshall, could the adoption of the amendment have quieted the apprehensions concerning the right to enforce private claims against the States, if the power was left open after the amendment to do so, if only they were transferred to another State? It is also to be observed that the construction now given causes the judicial power of the United States to embrace

claims not within even the reach of the ruling in *Chisholm* v. *Georgia*, for that case only decided that under the grant of power a citizen of one State might sue another State. But under the rule of construction, now announced, not only claims held by citizens of other States and aliens, but those held by a citizen of the State, become capable of enforcement, if only the holders of such claims, after the State has refused to pay them, choose to sell or make gift thereof to another State found willing to become a party to a plan to evade a constitutional provision inserted for the protection of all the States.

Let me, *arguendo*, grant that a case may be conceived of where one provision of the Constitution can be so construed as to render nugatory another and applicable provision. Even such an impossible doctrine can have no relation to the case in hand. The decisions of this court, rendered since the Eleventh Amendment, have consistently held that that amendment embodied a principle of national public policy, whose enforcement may not be avoided by indirection or subterfuge. Ought this rule of public policy to be disregarded, by endowing every State with the power of speculating upon stale and unenforceable claims of individuals against other States, thus not only doing injustice, but also overthrowing the fiscal independence of every State, and destroying that harmony between them which it was the declared purpose of the Constitution to establish and cement? Such a departure from the provisions of the Eleventh Amendment, and the rule of national public policy which it embodies, may not be sustained by the assumption that it would be unduly curtailing the independence of the several States to deny them the right of enforcing, by the aid of the Federal judicial power, claims against other States acquired from private individuals. For this assumption would amount to this, that any and all of the States only enjoy the essential privilege of being free from coercion as to the claims of individuals, and have the power to manage their financial affairs at the mere pleasure of any of the other States. This is to say, that for the purpose of preserving the rights of the States, those rights must be destroyed.

It is true that the greater number of cases decided by this

court concerning the right to enforce a private claim against a State concerned controversies where suit was brought by citizens of other States or aliens, who were therefore persons expressly within the terms of the Eleventh Amendment. An analysis of those cases, however, will show that they were decided, not upon the mere ground that the person who sued was within the Eleventh Amendment, but upon the broad proposition that, by the effect of that amendment, claims of private individuals could not be enforced against a State, and that in upholding this constitutional limitation the court would look at the real nature of the controversy, irrespective of the parties on the record. If it were found by doing so that in effect the consequence of the granting of the relief would be to enforce by the Federal judicial power the claim of a private individual against a State, such relief would be denied. I content myself with the reference in the margin to the leading cases of this character,[1] and come at once to consider the adjudications of this court rendered in two cases which directly related to the operation of the prohibitions of the Eleventh Amendment on the grant of judicial power to the United States over controversies between States, and to two other cases which directly concerned the effect of the prohibitions of the Eleventh Amendment in suits brought by persons who were within the grant of the judicial power but were not embraced within the category of persons specifically referred to in the Eleventh Amendment. The first two cases referred to are *New Hampshire* v. *Louisiana* and *New York* v. *Louisiana*. The opinion

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[1] *Hollingsworth* v. *Virginia*, (1798) 3 Dall. 378; *Osborn* v. *Bank*, (1824) 9 Wheat. 738, 849; *Briscoe* v. *Bank*, (1837) 11 Pet. 257, 321; *Louisiana* v. *Jumel*, (1883) 107 U. S. 711; *Poindexter* v. *Greenhow*, (1885) 114 U. S. 270, 286; *Marye* v. *Parsons*, (1885) 114 U. S. 325; *Hagood* v. *Southern*, (1886) 117 U. S. 52; *In re Ayers*, (1887) 123 U. S. 443, 504; *Christian* v. *Atlantic & N. C. R. R. Co.*, (1890) 133 U. S. 233, 243; *Louisiana ex rel. N. Y. Guaranty & Indemnity Co.* v. *Steele*, (1890) 134 U. S. 230; *Pennoyer* v. *McConnaughy*, (1891) 140 U. S. 1; *In re Tyler*, (1893) 149 U. S. 164, 190; *Reagan* v. *Farmers' Loan & Trust Co.*, (1894) 154 U. S. 362, 388; *Scott* v. *Donald*, (1897) 165 U. S. 58; *Tindal* v. *Wesley*, (1897) 167 U. S. 204, 219; *Smyth* v. *Ames*, (1898) 169 U. S. 466, 518; *Fitts* v. *McGhee*, (1899) 172 U. S. 516, 524.

of the court in both was delivered by Mr. Chief Justice Waite, and is reported (1883) in 108 U. S. 76. The suits were originally brought in this court. The complainants were, in the one case, the State of New Hampshire, and in the other the State of New York; the principal defendant in both cases being the State of Louisiana. The complainant States asserted the right to enforce certain pecuniary claims against the State of Louisiana, as the holders of the naked legal title to certain coupons and bonds of the State of Louisiana, which, pursuant to legislative authority, by assignment, had been acquired from citizens of the respective States, for the purpose of collection for the benefit of such citizens. The defendant State challenged the jurisdiction of this court over the controversy. To sustain such jurisdiction it was pressed by the complainant that the bonds and coupons were negotiable instruments, of which the assignee States became the legal owners, and that as such they as a matter of law were the real parties in interest, whether the transfer was a complete sale or merely made for the purpose of collection for the benefit of the assignors. The court first considered the grant of judicial power to the United States prior to the adoption of the Eleventh Amendment and held that as such power, when originally conferred, as interpreted in *Chisholm* v. *Georgia*, embraced the right of a citizen of one State to enforce his claims by suit directly against another State, a State could not, as the holder of the legal title, champion for its citizens a right for the prosecution of which a particular remedy had been provided by the Constitution. Coming to generally consider the effect of the Eleventh Amendment as elucidated by the history connected with its adoption, it was decided that as that amendment had expressly taken away the right of a citizen of one State to sue another State, a State could not enforce a right the assertion of which in the courts was prohibited to the citizen himself. Noticing the contention that the grant of judicial power over controversies between States was but a substitute for the surrender to the national government which each State had made, of the power of prosecuting against another State, by force if necessary as a sovereign trustee for its citizens, the claims of such citizens, the

proposition was held not to be sustainable, under the Constitution of the United States. It was decided that the special remedy originally granted to the citizen himself "must be deemed to have been the only remedy the citizen of one State could have under the Constitution against another State for the redress of his grievances, except such as the delinquent State saw fit itself to grant." Having announced this doctrine, it was then, as an inevitable deduction from it decided that, as the Eleventh Amendment had taken away the special remedy originally provided by the Constitution, there was no other remedy whatever left. The opinion of the court concluded as follows (p. 91):

"The evident purpose of the amendment, so promptly proposed and finally adopted, was to prohibit all suits against a State by or for citizens of other States, or aliens, without the consent of the State to be sued and, in our opinion, one State cannot create a controversy with another State, within the meaning of that term as used in the judicial clauses of the Constitution, by assuming the prosecution of debts owing by the other State to its citizens. Such being the case we are satisfied that we are prohibited, both by the letter and the spirit of the Constitution, from entertaining these suits, and the bill in each case is dismissed."

To me it seems that this adjudication is conclusive of the question now here. It in the broadest way determined that the prohibitions of the Eleventh Amendment controlled the grant of judicial power as to controversies between the States so as to exclude the possibility of that grant vesting a State with authority in any form, directly or indirectly, to set at naught the Eleventh Amendment. The case was decided, not upon the particular nature of the title of the bonds and coupons asserted by the States of New Hampshire and New York, since it was conceded that, but for the Constitution, a title such as that propounded would have given rise to an adequate cause of action. The ruling of the court was that, as suits against a State upon the claims of private individuals were absolutely prohibited by the Eleventh Amendment, such character of claim could not be converted into a controversy be-

tween States, and thus be made justiciable, since to do so would destroy the prohibition which the Eleventh Amendment embodied. I do not perceive, if one State may not engender a controversy between States, in the constitutional sense, in respect to claims arising out of dealings between a State and individuals, how it was competent for the State of South Dakota to create such a controversy by the acquisition of a claim of the class whose enforcement it was the purpose of the Eleventh Amendment to effectually prohibit. It is to be observed that in the cases referred to the court did not deny that a sovereign State, in virtue of its existence as such, would not have possessed the inherent power to prosecute against another State the claims of its citizens, and that such a prosecution by it would have constituted a controversy between States in the international significance of those words. But the court held that controversies between States, in the constitutional sense, did not embrace rights of that character, because of the prohibitions of the Eleventh Amendment, which operated upon the whole grant of judicial power, including, of course, such grant as to controversies between States.

The two other cases to which I have referred are *Hans* v. *Louisiana*, (1890) 134 U. S. 1, and *Smith* v. *Reeves*, (1900) 178 U. S. 436. In the first, the opinion of the court was delivered by Mr. Justice Bradley; in the second, by Mr. Justice Harlan. In *Hans* v. *Louisiana*, a suit was brought in the Circuit Court of the United States against the State of Louisiana by a citizen of that State, under the claim that the rights asserted arose under the Constitution and laws of the United States, and therefore were not within the Eleventh Amendment, since that amendment only prohibited suits against a State by a citizen of another State or by aliens. The argument was pressed that as the guarantees of the Constitution were all-abiding, it would be against public policy to deprive a citizen of the protection of the Constitution of the United States by bringing him within the spirit when he was not within the letter of the Eleventh Amendment. The court answered the contention in the broadest possible way. It held that the effect of the Eleventh Amendment was to qualify

to the extent of its prohibitions, the whole grant of judicial power, and, therefore, although a suit by a citizen of a State against a State to enforce assumed constitutional rights, was not within the letter of the amendment, it was within its spirit, and there was no jurisdiction in the Federal courts over such controversy. In summing up its general conclusions the court said (p. 21):

"It is not necessary that we should enter upon an examination of the reason or expediency of the rule which exempts a sovereign State from prosecution in a court of justice at the suit of individuals. This is fully discussed by writers on public law. It is enough for us to declare its existence. The legislative department of a State represents its polity and its will; and is called upon by the highest demands of natural and political law to preserve justice and judgments, and to hold inviolate the public obligations. Any departure from this rule, except for reasons most cogent, (of which the legislature, and not the courts, is the judge,) never fails in the end to incur the odium of the world, and to bring lasting injury upon the State itself. But to deprive the legislature of the power of judging what the honor and safety of the State may require, even at the expense of a temporary failure to discharge the public debts, would be attended with greater evils than such failure can cause."

Smith v. *Reeves* was an action brought in the Circuit Court of the United States by a corporation created under an act of Congress, against the treasurer of the State of California, to obtain redress concerning certain taxes. The defendant challenged the jurisdiction upon the ground that in effect the action was one against a State. This court, concluding that the State of California was the real party in interest, was led to consider whether a Federal court was thereby deprived of jurisdiction. The contention on the part of the plaintiff was that as a Federal corporation had a right to invoke, in virtue of the law of its creation, the jurisdiction of the Federal courts, the case was not controlled by the prohibitions of the Eleventh Amendment forbidding suits against a State by citizens of other States or aliens. The court, speaking through Mr. Jus-

tice Harlan, again adversely disposed of the contention, saying (p. 446):

"If the Constitution be so interpreted it would follow that any corporation created by Congress may sue a State in a Circuit Court of the United States upon any cause of action, whatever its nature, if the value of the matter in dispute is sufficient to give jurisdiction. We cannot approve this interpretation."

After referring to the views expressed by Hamilton, Madison and Marshall, which were commented upon in *Hans* v. *Louisiana*, the court quoted approvingly the following passage from the opinion in *Hans* v. *Louisiana*:

"It seems to us that these views of those great advocates and defenders of the Constitution were most sensible and just; and they apply equally to the present case as to that then under discussion. The letter is appealed to now, as it was then, as a ground for sustaining a suit brought by an individual against a State. The reason against it is as strong in this case as it was in that. It is an attempt to strain the Constitution and the law to a construction never imagined or dreamed of. Can we suppose that, when the Eleventh Amendment was adopted, it was understood to be left open for citizens of a State to sue their own State in the Federal courts, whilst the idea of suits by citizens of other States, or of foreign States, was indignantly repelled? Suppose that Congress, when proposing the Eleventh Amendment, had appended to it a proviso that nothing therein contained should prevent a State from being sued by its own citizens in cases arising under the Constitution or laws of the United States, can we imagine that it would have been adopted by the States? The supposition that it would is almost an absurdity on its face."

The opinion concluded as follows (p. 449):

"It could never have been intended to exclude from Federal judicial power suits arising under the Constitution or laws of the United States when brought against a State by private individuals or state corporations, and at the same time extend such power to suits of like character brought by Federal corporations against a State without its consent."

Here again I am unable to perceive any ground for taking the case in hand out of the rulings made in the cases just reviewed. The letter of the Eleventh Amendment was just as inapplicable to a suit by a citizen of a State against a State to enforce his constitutional rights and to a suit by a Federal corporation, suing in the Federal court by virtue of its creation, as it was to the grant of judicial power over controversies between States. But the prohibition of the Eleventh Amendment was held to apply, because that amendment was again construed as prohibiting the enforcement of claims by private individuals against States through the judicial power of the United States, without reference to the character of the person by whom the claim was asserted. In other words, the decision was that the operation of the Eleventh Amendment was to be determined, not by the formal party complainant on the record, but by the essential character and nature of the claim or right which was asserted. This being the decision, how consistently can the State of South Dakota be held to have power to give effect to a character of claim as to which the Eleventh Amendment declares the judicial power of the United States shall not extend.

Will not the accuracy of what I have just stated, as applied to this case, be demonstrated by putting the question which this court put in *Hans* v. *Louisiana* and approvingly reiterated in *Smith* v. *Reeves*, and giving it the answer which the court gave in those cases, changing, of course, the form of the question to meet the case now here. For this purpose, I repeat the question, placing, however, in brackets the changed mode of expression necessitated by the difference in the character of the parties complainant. "Suppose that Congress, when proposing the Eleventh Amendment, had appended to it a proviso that nothing therein contained should prevent a State from being sued" [upon private claims due to its own citizens or to aliens or citizens of other States, if only such claims were sold or otherwise disposed of long after the debtor State had refused to pay them, so as to thus secure their judicial enforcement] "can we imagine that the Eleventh Amendment would have been adopted by the States? The supposition that it would is almost an absurdity on its face."

Nor do I think the previous decisions of this court, which are relied upon as establishing that the State of South Dakota may maintain this suit, have any such tendency. Of course, it is not by me denied that a dispute as to boundaries between two States is judicially cognizable as a controversy between States, and that such may also be the case where one State asserts property rights against another, provided always that the assertion of the particular right does not violate the prohibitions of the Eleventh Amendment. So, also, in my opinion, *United States* v. *North Carolina*, 136 U. S. 211, and *United States* v. *Texas*, 143 U. S. 621, instead of sustaining the view that the cause of action here asserted can be treated, despite the provisions of the Eleventh Amendment, as a controversy between States, establish the contrary. In *United States* v. *North Carolina*, the United States sued the State of North Carolina concerning the interest on certain bonds. No objection was taken by North Carolina to the jurisdiction of the court, since that State voluntarily assented to a judicial determination of the issue involved. There was, and could have been, therefore, no question of jurisdiction, so far as the State of North Carolina was concerned. The only question of jurisdiction which could have arisen was whether a suit by the United States against a State was within the constitutional grant of judicial power. Although the court in its opinion in *United States* v. *North Carolina* did not refer to the subject of jurisdiction, it must be assumed that it was considered. This is shown by a remark concerning *United States* v. *North Carolina*, made by the court in the course of its opinion in *United States* v. *Texas*, to the following effect:

"It is true that no question was made as to the jurisdiction of this court, and nothing was therefore said in the opinion upon that subject. But it did not escape the attention of the court, and the judgment would not have been rendered except upon the theory that this court has original jurisdiction of a suit by the United States against the State."

Those two cases, therefore, so far as jurisdiction is concerned, simply determined that the grant of judicial power concerning controversies between States, whilst not in letter, embrac-

ing a suit brought by the United States against a State, in spirit and purpose did give jurisdiction of a suit of that character. The effect of these rulings, then, was but to cause a suit by the United States against a State to be within the meaning of controversies between States. In other words, in ascertaining the import of the grant of judicial power as to controversies between States, the court gave force to the spirit and purpose of the Constitution in order to include a suit by the United States against a State within the category of controversies between States. This was simply applying the same rule of construction to the grant of judicial power for the purpose of including the United States, which had been previously applied in *Hans* v. *Louisiana*, in *Smith* v. *Reeves*, and in all the other cases to which I have referred, in order to exclude jurisdiction over controversies, to entertain which would have been a violation of the spirit and purpose of the Eleventh Amendment. When *United States* v. *North Carolina* and *United States* v. *Texas* are considered, it seems to me clear that the decision now made not only is destructive of the inherent rights of the States as protected by the Eleventh Amendment, but also strips the government of the United States of its rights as a sovereign belonging to it under the Constitution. As under the decisions referred to a suit between the United States and a State is within the grant of judicial power over controversies between States, it must follow that a suit by a State against the United States is also of that character. Now, as the ruling is that such a controversy may include the claim of a private individual, if only such claim be transferred to a State, it follows that a suit by a State against the United States on a claim of that character is within the grant of judicial power. Thus it has come to pass that any and every claim against the United States, whatever be its character, is enforceable against the United States if only a State chooses to acquire and prosecute its enforcement. It is no answer to suggest that such claims of private individuals are not justiciable unless the law of the United States has caused them to be so, for if the constitutional grant of judicial power embraces such contro-

versies as is now necessarily held, any restriction by Congress would be repugnant to the Constitution.

My reason does not perceive how the principles which have been stated and the rulings of this court enforcing them are rendered inapplicable by the suggestion that, as the court may not inquire into the motives actuating a particular transfer of right, therefore it is without power to refuse to enforce in behalf of South Dakota the alleged gift. This proceeds upon the assumption that the want of jurisdiction to enforce a private claim against a State depends upon motive. But the absence of such jurisdiction rests upon the constitutional prohibition which addresses itself to the very nature of the cause of action and imposes upon the court the duty to inquire into it. The power of the court when such is the case, even in a case brought in this court by one of the States of the Union to enforce an alleged pecuniary right, is aptly illustrated by *Wisconsin* v. *Pelican Insurance Co.*, 127 U. S. 265. There the State of Wisconsin, having obtained a judgment against the defendant corporation in the courts of Wisconsin, availed of the original jurisdiction of this court to sue the defendant corporation to enforce the judgment. It was held that, as the judgment was for a penalty imposed by the laws of Wisconsin, and as penalties had no extraterritorial operation, the court would look at the origin of the rights upon which the judgment was based, and, doing so, declined to enforce the judgment. See also *Andrews* v. *Andrews*, 188 U. S. 14. If, as the result of merely a general rule of law against the extraterritorial operation of statutory penalties, this court looked beyond the judgment sued on by a State to the cause of action merged in the judgment, and refused relief, the court now must have the power to look into the present cause of action and the origin of the rights asserted by the State of South Dakota. To do otherwise seems to me is but to declare that a general principle of law restricting the extraterritorial enforcement of penal statutes must be held to have more sanctity than the declared will of the people of the United States expressed in the Eleventh Amendment. Indeed, the existence of power in this court to inquire into purpose and motive in suits brought by one

State against another State was directly upheld in *New Hampshire* v. *Louisiana* and *New York* v. *Louisiana*, *supra*. It was not denied in those cases that the bonds sued upon were negotiable, and that if the rules of law controlling in controversies between private individuals were to be applied, the title of each plaintiff State to the bonds it sought recovery upon could not be gainsaid, but should be regarded as absolute. Coming, however, to enforce the provisions of the Eleventh Amendment, the court held that it was its duty to depart from the rule ordinarily applied and to examine into the nature of the asserted rights, and if to give effect thereto would be inconsistent with constitutional provisions, to refuse to lend its aid to the enforcement of the claims.

Second. But putting out of view what seem to be the controlling principles previously stated, let me now look at the controversy from a narrower point of view and consider the rights of the parties by those considerations which would apply to the enforcement of private rights. It is unquestioned on the record that the bonds given to the State of South Dakota and upon which its action is based were past due at the time of the gift, and that for more than twenty years prior to the gift the State of North Carolina had, by her legislation, held herself not bound to pay the same. That these facts were known to the State of South Dakota when it accepted the gift is shown. The makers of the gift could not transfer to the State of South Dakota rights which they had not. In other words, if when the gift was made that which was parted with was not susceptible and had never been susceptible of legal enforcement because not embodying a justiciable obligation against the State of North Carolina, the State of South Dakota could not, by the acceptance of the gift, acquire greater rights than were possessed by the transferrer. I take it to be the elementary rule of public law that, whilst the contracts of a sovereign may engender natural or moral obligations, and are in one sense property, they are yet obligations resting on the promise of the sovereign and possessing no other sanction than the good faith and honor of the sovereign itself. These principles, as applied to the States of

this Union, are the necessary resultant of the adoption of the Eleventh Amendment. It is not necessary to refer to opinions of publicists on the general subject, since this court—as to the States of the Union—has declared the doctrine so fully as to leave it no longer an open question in this forum.

The concluding passages already quoted from the opinion in *Hans* v. *Louisiana*, *supra*, approvingly referred to in *Smith* v. *Reeves*, state the subject in the clearest possible way. Prior to the cases just mentioned, however, this court in numerous decisions had announced the same doctrine. A few of the more important of those cases will now be briefly noticed. In *In re Ayers*, (1887) 123 U. S. 443, the court, speaking, through Mr. Justice Matthews, said (p. 504):

"It cannot be doubted that the 11th Amendment to the Constitution operates to create an important distinction between contracts of a State with individuals and contracts between individual parties. In the case of contracts between individuals, the remedies for their enforcement or breach, in existence at the time they were entered into, are a part of the agreement itself, and constitute a substantial part of its obligation. *Louisiana* v. *New Orleans*, 102 U. S. 203. That obligation, by virtue of the provision of article I, § 10, of the Constitution of the United States, cannot be impaired by any subsequent state legislation. Thus, not only the covenants and conditions of the contract are preserved, but also the substance of the original remedies for its enforcement. It is different with contracts between individuals and a State. In respect to these, by virtue of the 11th Amendment to the Constitution, there being no remedy by a suit against the State, the contract is substantially without sanction, except that which arises out of the honor and good faith of the State itself, and these are not subject to coercion. Although the State may, at the inception of the contract, have consented as one of its conditions to subject itself to suit, it may subsequently withdraw that consent and resume its original immunity, without any violation of the obligation of its contract in the constitutional sense. *Beers* v. *Arkansas*, 20 How. 527; *Railroad Co.* v. *Tennessee*, 101 U. S. 337. The very

object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties. It was thought to be neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons, whether citizens of other States or aliens, or that the course of their public policy and the administration of their public affairs should be subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests. To secure the manifest purposes of the constitutional exemption guaranteed by the 11th Amendment requires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose."

There is another and allied reason which seems to me equally decisive against this claim. As will be observed from the passage already quoted from the opinion of this court in *In re Ayers supra*, it was there affirmatively declared that as the obligation of a State rested but on its conceptions of moral duty, the State itself, under the great responsibilities which attach to it as a sovereign, was the ultimate tribunal to whom the creditor agreed at the very inception of the contract to submit his rights. And that where a sovereign State, in the discharge of the public duty thus resting upon it, declared against the payment of an obligation, such conclusion by the sovereign was a determination by the tribunal which had been impliedly agreed on and was binding upon the creditor, and, as a result of the Eleventh Amendment, not susceptible of review or change by the courts of the United States. Applying this doctrine to this case it is apparent that years before the transfer of the bonds to the State of South Dakota, the State of North Carolina had, through its duly constituted authorities, determined that the holder of the bonds in question had not the right now asserted by the State of South Dakota under the transfer from such

creditor. This after all only serves additionally to demonstrate the fallacy underlying the assumption that the State of South Dakota, because it is a State and may avail of the grant of judicial power over controversies between States, can in doing so escape the prohibition of the Eleventh Amendment, created for the very purpose of protecting the States and preserving their independent control over their own affairs. It seems to me the gross inequality which must arise from disregarding the judgment of the tribunal selected by the creditor is well illustrated by this case. When the facts which I have at the outset stated are recalled, it will be observed that there were about two and a half millions of dollars of outstanding bonds of the same series as those now owned by the State of South Dakota, and that that amount was reduced to about two hundred and fifty thousand dollars of principal, as a consequence of the conclusion of the State of North Carolina concerning the exigencies of its financial situation. It is also certain, when the facts stated in the petition presented to the legislature of North Carolina by the assignor of the State of South Dakota are recalled, that but for this vast reduction of the debt produced by the determination of the State of North Carolina, the alleged security now sought to be realized upon by the State of South Dakota would be of no value. The moral attitude shown by the record then is this, that the State of South Dakota, as the mere beneficiary of the bounty of an individual, seeks to derive all the benefit resulting from the judgment of the State of North Carolina as to its public debt and at the same time desires to repudiate that judgment, and to obtain rights which never would have been within its reach if the judgment of the State of North Carolina had not been exercised. Under these circumstances it to me seems, even if a court of equity was vested with power to disregard the final judgment of the tribunal selected at the time the bonds were issued, such court should not exercise that power in favor of one standing on the record in the position which the State of South Dakota here occupies.

Looking at the question from a yet narrower point of view, the same conclusion seems to me to be impelled. In *United*

States v. *Buford*, (1830) 3 Pet. 11, the question was considered whether a claim acquired by the government of the United States from an individual, which was barred by limitation at the time of its acquisition by the United States, was yet enforceable in the hands of the government. The court decided that, as against the United States, under such circumstances, despite the general exemption of the government from the operation of such statute, the bar of the statute was operative. The court said (p. 30):

"It can require no argument to show, that the transfer of any claim to the United States cannot give to it any greater validity than it possessed in the hands of the assignor."

And this principle was applied by the Court of Exchequer in *King* v. *Morrall*, 6 Price, 24, cited approvingly in *United States* v. *Nashville &c. R. Co.*, 118 U. S. 120. The facts of the case were, in brief, as follows: On a *scire facias* it was sought by the crown to recover from a creditor of a debtor to the crown the amount of a certain bill of exchange. On demurrer to a plea of the statute of limitations it was contended that the right of the crown was not barred by the statute—by a plea which in point of fact admitted the debt. The court held otherwise. Lord Chief Baron Richards observed (p. 28):

"The crown is only entitled to its debtor's right, and cannot create or revive any right in the person of its debtor, if none ever existed, or it has become extinct. In this case, nothing could have been recovered by the debtor of the crown against this defendant if the statute had been pleaded; I therefore consider that it is also a good bar to the suit of the crown, who stands precisely in the same situation as its debtor, and that this is an honest plea which therefore the law allows. If the crown could thus put its debtor in a better situation than he was in before, by such a proceeding as this, the consequence would be monstrous before the passing of the late statute, and the mischief would have been incalculable."

Wood, Baron, said (p. 29):

"In this case, the claim of the crown is only a derivative right, and it must, therefore, stand in the same situation as its principal."

Garrow, Baron, remarked (p. 31):

"By a process, said, by a fiction, to be for the benefit of the crown, it is attempted to revive the debt, and place the creditor in a better situation than the law permits. This is too gross an absurdity; . . . "

These authorities additionally demonstrate that a claim which, when acquired by the State of South Dakota, was without legal sanction, did not by the mere fact of such acquisition become a justiciable, enforceable right. It may be said that there was no statute of limitations in the State of North Carolina barring the claim. But this begs the whole question. It assumes that the State of North Carolina should have indulged in the idle ceremony of passing a special statute of limitations extinguishing, after the lapse of a certain time, a cause of action which had never existed. The proposition is but a further illustration of the misconception which results from holding that the claim of an individual against a State which is not enforceable can be made such by the voluntary act of transferring. The very attribute of sovereignty renders it unnecessary for the sovereign to legislate for its own behalf in the passage of statutes of limitations, insolvent and other like laws, as its will, controlled alone by the duty and sense of responsibility which sovereignty must be presumed to engender, determines the question of liability.

But let me analyze the proposition in order to see what it leads to. What is a statute of limitations? It is but the action of the State in determining that, after the lapse of a specified time, a claim shall not be legally enforceable. In this case, from the very inception of the alleged obligation to the time of the transfer to the State of South Dakota, there was no legal cause of action for the enforcement of the claim under the laws of North Carolina, and by the obligation of the Eleventh Amendment no cause of action on the subject could be asserted to exist in any court of the United States. To hold that there is a right to recover in this case which would not exist if there had been a statute of limitations barring the cause of action, although none had ever arisen, is but to say that the right of the parties is to be determined by words hav-

ing no significance whatever. The fact that the state of North Carolina, in her own courts, was not subject to be coerced as to the claim in question, was in effect a state statute of limitations, since the act of the State in forbidding the arising of a cause of action is certainly in reason the equivalent of an act of that State barring a cause of action in a case where one could exist. It is the non-existence of the cause of action at the time of the transfer, upon which rests the rule preventing a sovereign from recovering on a claim which was barred at the time it acquired it. This is true also of the Eleventh Amendment. As that amendment from the date of the inception of the alleged contract prohibited the assertion of any cause of action concerning the same in the courts of the United States, the amendment was substantially a national statute of limitations. Thus operating, it furnishes an effectual barrier, preventing the State of South Dakota from asserting in the courts of the United States that it had acquired from its transferrer a cause of action which the Constitution of the United States prevented from ever existing so far as the judicial power of the United States was concerned.

Nor does the fact that the State of South Dakota alleges there was a pledge or mortgage of certain stock in the North Carolina Railroad serve at all to take the case out of the control of the provisions of the Eleventh Amendment. It is not pretended that any delivery of stock alleged to have been pledged was ever made to the bondholders; on the contrary, it is conceded that the stock in question has always been in the possession of the State of North Carolina. The right to enforce the alleged pledge must therefore rest upon the power to enforce a private claim against the State of North Carolina and to take from its possession property of which it has ever had the absolute dominion and control. And this view is to my mind concluded by the previous rulings of this court, one of which I shall now particularly notice.

Christian v. *Atlantic & North Carolina Railroad*, (1890) 133 U. S. 233, was a bill in equity to reach dividends on the stock of the railroad company, and apply such dividends to the payment of bonds issued by the State of North Carolina,

and for a sale of stock owned and held by the State. It was contended by the defendants that the proceeding was in substance against the State, and therefore within the prohibitions of the Eleventh Amendment. The correctness of this contention was denied, on the ground that there was a valid contract in favor of the complainant; that by that contract there was a pledge in its favor; and that the object of the suit was not to hold the State of North Carolina or to sue it, but to proceed *in rem* against the stock to enforce the right in and to it resulting from the contract. The court—not at all disputing that if the premise was correct the legal conclusion based on it was well founded—proceeded to test the accuracy of the premise. It found that the stock in question had never been actually delivered to the alleged pledgee, but had always remained in the possession of the agents of the State. Reaching this conclusion, it was held that there was no pledge unless such contract resulted from the declaration of the State that the stock held by it was pledged. Coming to consider that question, the court, speaking through Mr. Justice Bradley, said (p. 242):

"It was no more of a pledge than is made by a farmer when he pledges his growing crop or his stock of cattle for the payment of a debt, without any delivery thereof. He does not use the word in its technical, but in its popular sense. His language may amount to a parol mortgage, if such a mortgage can be created; but that is all. So in this case, the pledge given by the State in a statute may have amounted to a mortgage, but it could amount to nothing more; and if a mortgage, it did not place the mortgagee in possession, but gave him merely a naked right to have the property appropriated and applied to the payment of his debt. But how is that right to be asserted? If the mortgagor be a private person, the mortgagee may cite him into court and have a decree for the foreclosure and sale of the property. The mortgagor, or his assignee, would be a necessary party in such a proceeding. Even when absent, beyond the reach of process, he must still be made a party and at least constructively cited by publication or otherwise. This is established by the authorities before

referred to, and many more might be cited to the same effect. The proceeding is a suit against the party to obtain, by decree of court, the benefit of the mortgage right. But where the mortgagor in possession is a sovereign State, no such proceeding can be maintained. The mortgagee's right against the State may be just as good and valid, in a moral point of view, as if it were against an individual. But the State cannot be brought into court or sued by a private party without its consent. It was at first held by this court that, under the Constitution of the United States, a State might be sued in it by a citizen of another State, or of a foreign State; but it was declared by the 11th Amendment that the judicial power of the United States shall not be construed to extend to such suits. *New Hampshire* v. *Louisiana*, 108 U. S. 76; *Louisiana* v. *Jumel*, 107 U. S. 711; *Parsons* v. *Marye*, 114 U. S. 325; *Hagood* v. *Southern*, 117 U. S. 52; *In re Ayers*, 123 U. S. 443."

Applying the ruling made in the case just cited to the case in hand, it to me clearly results that as possession of the alleged pledged or mortgaged stock was never parted with by the State of North Carolina, the right asserted by the State of South Dakota to enforce the alleged pledge comes directly within the prohibition of the Eleventh Amendment, since in its essence it depends upon the existence in this court of the power to enforce against the State of North Carolina in favor of the State of South Dakota, a mere promise made by North Carolina to a private individual, as to which the State of South Dakota acquired no greater right than was possessed by the individual who made the transfer to it of the bonds in question.

Third. Finally, putting out of view the various considerations which I have previously stated, in my opinion this record discloses a condition of things which ought to prevent a court of equity from exerting its powers to enforce for the benefit of the State of South Dakota the claim which it asserts against the State of North Carolina. From the facts which I have at the outset recited it is undeniable that at the time the gift was made to the State of South Dakota of the bonds in question

they were past due and payment thereof had been more than twenty years prior to the gift refused by the State of North Carolina. The letter evidencing the gift demonstrates that the purpose of the gift to the State of South Dakota, was to enable that State to assert a cause of action against the State of North Carolina which did not exist in favor of the transferrer. It also appears by the act of the legislature of South Dakota, under which this suit was brought, that the State of South Dakota deemed that it might acquire a mere right to litigate, since the act itself in advance provided that the attorney general of the State should prosecute actions in the name of the State to recover on bonds or choses in action which might be transferred to the State, and that it contemplated litigation without cost to itself, since the act empowered the attorney general to employ counsel to prosecute suits, the compensation to be paid *out of the proceeds which might be realized.* This condition of things, in my opinion, although it may not be champertous in the strict sense of that word is in its nature equivalent to a champertous engagement, whose enforcement is contrary to public policy, and one which a court therefore ought not to lend its aid to carry into effect. It has been sometimes said that the doctrine of maintenance and champerty has no application to the sovereign. But this can alone be justified by taking into view the high attributes which pertain to sovereignty. Now if the State of South Dakota may avail of the delegation of judicial power over controversies between States—a power conferred in view of the sovereign dignity of all the States—for the purpose of destroying the sovereignty of another State by subjecting such State to judicial coercion concerning a claim of a private individual, then it seems to me the State of South Dakota should be treated as any other private individual seeking to enforce a private claim, and should have applied to it by a court of equity the principles of morality and justice which control such courts in refusing aid to persons who acquire merely litigious and speculative claims. As said by this court, in the course of its opinion in *Randolph* vs. *Quidnick Co.*, (1890) 135 U. S. 457: "It is a case where equity, true to its ideas of sub-

stantial justice, refuses to be bound by the letter of legal procedure, or to lend its aid to a mere speculative purchase which threatens injury and ruin to a large body of honest creditors, who have trusted for the payment of their debts to the legal validity of proceedings theretofore taken." How aptly these observations apply to the case in hand is shown when it is considered that the holders of more than two million dollars of bonds of the same class as that held by the State of South Dakota, more than twenty years before the transfer to that State, accepted, on the faith of the operation of the Eleventh Amendment, and the circumstances surrounding the State of North Carolina at the time, the adjustment proposed by the act of 1879; and therefore that the claim of South Dakota now urged, in effect, as I have previously stated, seeks to avail of the result brought about by the operation of the Eleventh Amendment, and yet at the same time to deny its efficacy as regards the rights which it claims. It is additionally shown by the inference arising from the record that the whole fiscal system of the State of North Carolina in existence since the adjustment of 1879 has rested upon the action taken by the creditors of the State consequent upon their reliance upon the possession by the State of the attributes of sovereignty which it was the purpose of the Eleventh Amendment to consecrate.

But eliminating all the previous reasoning and considering the case upon the hypothesis that the controversy is one between States, nevertheless I am of opinion that the court is without jurisdiction. And the statement of the reasons which impel me to this conclusion involves an examination of the second proposition which was by me at the outset stated, that is—

(B.)

The want of power to render the decree which is now directed to be entered, because of the absence of essential parties whose presence would oust jurisdiction and the impotency to grant any relief whatever in the absence of such parties.

Even under the view that the general conclusions of the

court as to its authority over the controversy as one between States is well founded, I cannot agree that the holders of the bonds issued in aid of the North Carolina Railroad are not essential parties to this controversy, since the nature of the relief specifically prayed necessitates their presence, and since, without such presence, in my opinion, no decree giving substantial relief to the complainant or doing justice to the principal defendant, can be rendered. If they are such essential parties, it is not questioned that the court is without jurisdiction. *California* v. *Southern Pacific Company*, 157 U. S. 229.

Under the assumption that there was a valid mortgage in favor of the complainant and other holders of the same class of bonds, the bill proceeds upon the theory that it is essential that it be determined what claim or right the holders of the bonds issued in aid of the North Carolina Railroad have upon or in the stock in question. To that end the bill challenged the existence of any right of pledge in favor of such bondholders, upon the theory that, as against the holders of bonds issued in aid of the Western North Carolina Railroad, they had lost their right by accepting the compromise of 1879. It is, however, further asserted in the bill that even if the holders of the bonds issued in aid of the North Carolina Railroad had not, by accepting the compromise of 1879, lost their rights as to the complainant and those similarly situated, yet as the pledge was past due when the adjustment of 1879 was entered into, it was essential, to afford the complainant relief as a junior secured creditor on the stock, that the entire stock be sold free from all encumbrances. And this was also the position taken by the answer filed on behalf of the representative of the outstanding bonds issued in aid of the Western North Carolina Railroad. The bill, then, having been framed upon the theory of the necessity of the specific relief referred to, which could not be afforded without the presence of the other lienholders, the cause, it seems to me, ought not now to be decided upon a wholly different theory, and relief, inconsistent with that specifically prayed for, be awarded to the complainant upon that changed basis.

But, leaving out of view the considerations just stated, it seems to me the decree which it is proposed to enter cannot afford any specific relief to the complainant, without destroying or materially impairing the rights of the prior lienholders, although they are now held not to be essential parties to the controversy. The pledge in favor of the holders of the bonds issued in aid of the North Carolina Railroad was of all the stock and for the benefit of all the bonds. It was therefore indivisible. It cannot be divided without impairing the obligations of the contract in favor of those creditors. Now, whilst each of the ten mortgages which it is in effect held the complainant possesses purported to be of ten shares of stock securing each bond, no particular ten shares were delivered, segregated or identified. As a result no division of the stock held by the State had in fact ever been made, and, therefore, each and every one of the ten shares assumed to be mortgaged to secure each of the bonds were subject to the prior lien on all the stock in favor of all the holders of bonds issued in aid of the North Carolina Railroad. When the attempt is made to enforce the decree in this case what shares will be sold? If any particular shares, then, unless the rights of the prior lienholders are to be rendered divisible, although they are indivisible, the shares sold must continue to be subject to the entire pledge in favor of all the bonds issued in aid of the North Carolina Railroad. To state this situation, it seems to me, is to demonstrate that the decree will afford no substantial relief whatever. The best that can be said, under such circumstances, is that the effect of a sale so made will be merely to foment a law suit. A court of equity, when its aid is invoked to give particular relief, if it finds that it is unable to do it, ought not, whilst denying such relief, to enter a decree which confers no substantial relief, but, on the contrary, can only serve as a fruitful source of future litigation, injurious to the rights of the very party or class of persons in whose favor the decree is rendered. But this is not all, for whilst the decree will, in substance, deprive the complainant of any real benefit from his assumed security, a sale under the decree must also result injuriously to the State

of North Carolina. Its rights, as well as those of the complainant, are entitled to consideration. The possibility of a deficiency decree is now taken into account in the opinion and rights on that subject are reserved. But if the sale which is to be ordered is one which must lead to a prejudicial result, then the effect of the decree is simply to order a sale which can produce at best no more than a nominal sum, and will lay a foundation for a deficiency decree for an amount wholly out of proportion to the actual value of the mortgaged property. It is to my mind no answer to point out that whilst there was no segregation and delivery of the ten shares of stock mortgaged to secure each bond, as such division was provided for, a court of equity will treat that as being done which should have been done. The fallacy of this lies in failing to consider the rights of the prior lienholders and overlooking the fact that their lien was indivisible, and that the segregation provided for in the act of 1866 could not be made without being subordinate to the entire sum of the prior and indivisible right of pledge. When this is borne in mind it results that the rights of those prior lienholders are necessarily clouded or impaired by decreeing that a court of equity will treat that as having been done which ought to have been done; when the very question is, could it have been done efficaciously, consistently with the rights of the prior lienholders? They are, therefore, I submit, essential parties, if it is proposed to give any real relief by the decree of sale which is ordered. If it is not proposed to give that character of relief, then such a decree ought not to be entered, especially when it does not accord with and in reality is inconsistent with the specific relief asked for.

I am authorized to say that the CHIEF JUSTICE, MR. JUSTICE McKENNA and MR. JUSTICE DAY concur in this dissent.

UNITED STATES *v.* CALIFORNIA AND OREGON LAND COMPANY.

CALIFORNIA AND OREGON LAND COMPANY *v.* UNITED STATES.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

Nos. 4, 5. Argued March 14, 17, 1902. Reargued December 9, 10, 1902. Reargued January 5, 6, 7, 1904. Decided February 1, 1904.

A decree rendered upon a bill in equity brought under the Act of March 2, 1889, 25 Stat. 850, to have patents for land declared void as forfeited and to establish the title of the United States to the land, is a bar to a subsequent bill brought against the same defendants to recover the same land on the ground that it was excepted from the original grant as an Indian reservation.

As a general rule, a party asserting a right by suit is barred by a judgment or decree upon the merits as to all *media concludendi* or grounds for asserting the right, known when the suit was brought.

The general rule is, where a bill is dismissed, to dismiss the cross bill also.

THE facts are stated in the opinion of the court.

Mr. Charles W. Russell Special Assistant Attorney General, for the United States.

Mr. John F. Dillon, and *Mr. Aldis B. Browne*, with whom *Mr. Alexander Britton* was on the brief, for the California and Oregon Land Company.

Mr. Justice HOLMES delivered the opinion of the court.

These are cross appeals from a decree of the United States Circuit Court. The bill was brought for the purpose of having certain patents of land issued by the United States declared void. These patents were issued on April 21, 1871, December 8, 1871, and April 2, 1873, to the Oregon Central Military Road Company, under an act of Congress of July 2, 1864, 13 Stat. 355, granting lands to the State of Oregon to aid in the construction of a wagon road, and in pursuance of

a grant of the same lands by the State to the Road Company on October 24, 1864. The California and Oregon Land Company claims through mesne conveyances from the patentee. The ground of the bill, so far as the argument before us is concerned, is that the lands in controversy were within the Klamath Indian Reservation, and therefore were "lands heretofore reserved to the United States" within the proviso reserving such lands in the grant of July 2, 1864. As our decision is upon grounds independent of this question, it is unnecessary to state the legislation and facts upon which that controversy turns.

One of the pleas of the Land Company is that on August 30, 1889, the United States filed an earlier bill in the United States Circuit Court in respect of these same lands, praying, like the present one, that the patents be declared void; that the Land Company pleaded matters showing that the patents were valid, and also that it was a purchaser for valuable consideration without notice; and that on March 29, 1893, a final decree was entered finding the facts to be as alleged by the Land Company, including the allegation that the Land Company was a *bona fide* purchaser for value, and dismissing the bill on that ground. The Land Company also filed a cross bill in the present suit to enjoin the allotments of said lands and the issue of patents for the same to the Indians. The cross bill was demurred to.

The Circuit Court sustained the demurrer, adjudged the plea to be bad, and entered a decree declaring the patents void. We have to deal only with the before-mentioned plea.

The former bill was brought in pursuance of the act of Congress of March 2, 1889, 25 Stat. 850. This act recited that the Oregon legislature had memorialized Congress and had alleged that certain of the wagon roads in the State were not completed within the time required by the grants of the United States, and therefore enacted that suits should be brought in the United States Circuit Court against all claimants of any interest under the grant of 1864, and certain others, "to determine the questions of the seasonable and proper completion of said roads in accordance with the terms of the granting

acts. . . . The legal effect of the several certificates of the Governors of the State of Oregon of the completion of said roads, and the right of resumption of such granted lands by the United States." The court was authorized to render judgment of forfeiture "saving and preserving the rights of all *bona fide* purchasers of either of said grants or of any portion of said grants for a valuable consideration, if any such there be. Said suit or suits shall be tried and adjudicated in like manner and by the same principles and rules of jurisprudence as other suits in equity are therein tried." (The act of March 2, 1896, 29 Stat. 42, also confirmed the title of *bona fide* purchasers.)

By § 2, "The State of Oregon, and any person or corporation claiming any interest under or through the grants aforesaid in the lands to be affected by said suit or suits, and whether made a party thereto or not, may intervene therein by sworn petition to defend his interest therein, as against the United States, or against each other, and affecting the said question of forfeiture, and may, upon such petition for intervention, also put in issue and have adjudicated and determined any other question, whether of law or of fact, which may be in dispute between said intervener and the United States, and affecting the right or title to any part of the lands claimed to have been embraced within the grants. . . . Should the lands embraced within said grants or either of them or any portion thereof, be declared forfeited by the final determination of said suit or suits, the same shall be immediately restored to the public domain and become subject to disposal under the general land laws; and should the final determination of said suit or suits maintain the right of the aforesaid wagon-road grantees or their assigns to the lands embraced in said grants, the Secretary of the Interior shall forthwith adjust said grants in accordance with such determination, and shall cause patents to be issued for the lands inuring to said grantees under said wagon-road grants and which have been heretofore unpatented."

On the general principles of our law it is tolerably plain that the decree in the suit under the foregoing statute, would

be a bar. The parties, the subject matter and the relief sought all were the same. It is said, to be sure, that the United States now is suing in a different character from that in which it brought the former suit. There it sued for itself—here it sues on behalf of the Indians. But that is not true in any sense having legal significance. It would be true of a suit by an executor as compared with a suit by the same person on his own behalf. But that is because in theory of law the executor continues the *persona* of the testator, and therefore is a different person from the natural man who fills the office. This is recognized in *Leggott* v. *Great Northern Ry.*, 1 Q. B. D. 599, 606, cited for the United States. Here the plaintiff is the same person that brought the former bill, whatever the difference of the interest intended to be asserted. See *Werlein* v. *New Orleans*, 177 U. S. 390, 400, 401. The best that can be said, apart from the act just quoted, to distinguish the two suits, is that now the United States puts forward a new ground for its prayer. Formerly it sought to avoid the patents by way of forfeiture. Now it seeks the same conclusion by a different means, that is to say, by evidence that the lands originally were excepted from the grant. But in this, as in the former suit, it seeks to establish its own title to the fee.

It may be the law in Scotland that a judgment is not a bar to a second attempt to reach the same result by a different *medium concludendi*. *Phosphate Sewage Co.* v. *Molleson*, 5 Ct. of Sess. Cas. (4th Ser.) 1125, 1139; although in the same case on appeal Lord Blackburn seemed to doubt the proposition if the facts were known before. *S. C.*, 4 App. Cas. 801, 820. But the whole tendency of our decisions is to require a plaintiff to try his whole cause of action and his whole case at one time. He cannot even split up his claim, *Fetter* v. *Beale*, 1 Salk. 11; *Trask* v. *Hartford & New Haven Railroad*, 2 Allen, 331; Freeman, Judgments, 4th ed. §§ 238, 241; and, *a fortiori*, he cannot divide the grounds of recovery. Unless the statute of 1889 put the former suit upon a peculiar footing, the United States was bound then to bring forward all the grounds it had for declaring the patents void, and when the bill was dismissed was barred as to all by the decree. *Werlein* v. *New Orleans*

177 U. S. 390; *Bienville Water Supply Co.* v. *Mobile*, 186 U. S. 212, 216, 217; *Hoseason* v. *Keegen*, 178 Massachusetts, 247; *Wildman* v. *Wildman*, 70 Connecticut, 700, 710; *Sayers* v. *Auditor General*, 124 Michigan, 259; *Foster* v. *Hinson*, 76 Iowa, 714, 720; *State* v. *Brown*, 64 Maryland, 199; *Boyd* v. *Boyd*, 53 App. Div. N. Y. 152, 159; *Shaffer* v. *Scuddy*, 14 La. Ann. 575; *Henderson* v. *Henderson*, 3 Hare, 100, 115.

The question then is narrowed to whether the statute established a special and peculiar rule of procedure for the cases to be brought under it. No doubt it is true that the ground of recovery that was prominent in the mind of Congress was an alleged forfeiture of the grant, and therefore not unnaturally, in § 2, the result of a forfeiture is stated. But a forfeiture was not the only ground on which the United States might have prevailed. All claimants of any interest were at liberty to intervene and to have any other question affecting the title settled, and if any such other question had been raised and resolved in favor of the United States, of course the same result would have followed. But it cannot be supposed that the United States was not at liberty to raise the same issues which defendants and interveners were given the right to raise. There is no reason for such a discrimination, and its right was admitted at the argument. But if the United States was at liberty to state all its grounds for claiming the land, it was bound to do so on "the same principles and rules of jurisprudence as other suits in equity are therein tried," by which principles and rules, as has been shown, it was expressly enacted that the case should be tried. So far from establishing a special rule, the act shows an intent to settle the title once for all. It was dealing with several grants which might present different cases. It stated in terms that the suits should be brought to determine not merely the question of forfeiture, but "the right of resumption of such granted lands by the United States," § 1, and it provided that if the suits should maintain the right of the wagon-road grantees or their assigns to the lands embraced in said grants, the Secretary of the Interior should adjust the grants in accordance with the determination and issue patents for the lands to which the grantees

were entitled and which had not been patented. See also the language of the act of March 2, 1896, § 1, 29 Stat. 42. It would not be consistent with the good faith of the United States to attribute to it the intent to keep a concealed weapon in reserve in case these suits should fail. On the face of the act it seems to us apparent that these suits were intended to quiet or to end the title of the wagon-road grantees.

As the bill must be dismissed there seems to be no reason why the cross bill should not be dismissed according to the general rule in such cases. *Dows* v. *Chicago*, 11 Wall. 108. It is true that the cross bill is not merely in aid of the defence and that relief has been given upon a cross bill in such a case, notwithstanding the dismissal of the bill. *Holgate* v. *Eaton*, 116 U. S. 33, 42; *Blythe* v. *Hinckley*, 84 Fed. Rep. 228, 236, 237. But apart from any other questions it may be presumed that after this decision no action will be attempted based on a denial of the Land Company's title to the fee.

Decree reversed and case remanded to the Circuit Court with instructions to enter a decree dismissing the bill and cross bill.

MR. CHIEF JUSTICE FULLER, with whom concurred MR. JUSTICE HARLAN and MR. JUSTICE BROWN, dissenting.

It will be assumed that the lands in controversy had been reserved for the Indians prior to the taking effect of the grant, "except so far as it may be necessary to locate the route of said road through the same, in which case the right of way is granted."

The act of 1866 made provision for supplying deficiencies "occasioned by any lands sold or reserved, or to which the rights of preëmption or homestead have attached, or which for any reason were not subject to said grant."

March 2, 1889, Congress directed the Attorney General to cause a suit or suits to be brought against all persons, firms and corporations claiming interests in lands granted to the State of Oregon, by three enumerated acts of Congress, including that under consideration: "To determine the ques-

tions of the seaonable and proper completion of said roads in accordance with the terms of the granting acts, either in whole or in part, the legal effect of the several certificates of the governors of the State of Oregon of the completion of said roads, and the right of resumption of such granted lands by the United States, and to obtain judgments, which the court is hereby authorized to render, declaring forfeited to the United States, all of such lands as are coterminous with the part or parts of either of said wagon roads which were not constructed in accordance with the requirements of the granting acts, and setting aside patents which have issued for any such lands, saving and preserving the rights of all *bona fide* purchasers of either of said grants or of any portion of said grants for a valuable consideration, if any such there be. . . . "

By the second section of the act it was provided that the State or any person or corporation claiming under the grant might intervene and defend his interest therein, and might "also put in issue and have adjudicated and determined any other question, whether of law or of fact, which may be in dispute between said intervener and the United States, and affecting the right or title to any part of the lands claimed to have been embraced within the grants of land by the United States to or for either of said wagon roads. Should the lands embraced within said grants or either of them or any portion thereof, be declared forfeited by the final determination of said suit or suits, the same shall be immediately restored to the public domain and become subject to disposal under the general land laws; and should the final determination of said suit or suits maintain the right of the aforesaid wagon road grantees or their assigns to the land embraced in said grants, the Secretary of the Interior shall forthwith adjust said grants in accordance with such determination," etc.

The act related to three wagon road grants, only one of which was involved in this case. This bill sought a forfeiture of the entire grant for reasons stated, and no other matter was put in issue. The bill covered the lands in the reservation and many thousands of acres besides. It seems to me

clear that Congress did not intend that the United States should ask a forfeiture and at the same time litigate exceptions from the grant. The second section is wholly inconsistent with such a theory. The issue was a single issue and defendants did not seek to have it expanded. The suit was decided in favor of defendants, 148 U. S. 31, and the present bill having been filed in respect of the lands of the Indian reservation it is now contended that the former decree is a bar to its prosecution.

I do not think so. The former case sought a forfeiture of the entire grant. This bill, accepting the conclusion that there could be no forfeiture, simply sought relief as to particular lands which had not been embraced in the grant and did not pass thereby but which had been patented in error. Conceding that Congress may pass title subject to Indian occupancy, it did not do so; but these lands were reserved from the grant, while in terms the right of way through the reservation was granted. Had the decree in the prior case been for the government, this right of way would have been declared forfeited with other lands included in the grant, but as the case turned out the right of way passed while the reservation remained unaffected. The cause of action in this suit is entirely different and governed by entirely different considerations from the cause of action in the prior suit. And I think the decree in the former suit operates as an estoppel only as to the point or question actually litigated and determined.

There is no hardship involved in this view, as, while the United States were shut up to the question of forfeiture, defendants were permitted to raise any questions they chose, and did not see fit to bring any other into the case.

My brothers HARLAN and BROWN concur in this dissent.

THOMAS v. UNITED STATES.

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

No. 43. Argued December 4, 1903.—Decided February 23, 1904.

The words duties, imposts and excises were used comprehensively in the Constitution to cover customs and excise duties imposed on importation, consumption, manufacture and sale of certain commodities, privileges, particular business transactions, vocations and the like. The stamp duty on sales of shares of stock in corporations imposed by the War Revenue Act of 1898, 30 Stat. 448, falls within that category and was not a direct tax.

GEORGE C. THOMAS was indicted for violation of the internal revenue laws of the United States in that, being a broker in the city of New York, he sold certain shares of Atchison preferred stock and omitted the required revenue stamps from the memorandum of sale. He demurred to the indictment on the ground that the act of June 13, 1898, 30 Stat. 448, c. 448, which required the stamps to be affixed, was unconstitutional. The demurrer was overruled, the court, Thomas, J., delivering an opinion. 115 Fed. Rep. 207.

Trial was had, defendant found guilty, and judgment rendered, sentencing him to pay a fine of five hundred dollars.

The case was then brought here on writ of error.

Mr. Frank D. Pavey, with whom *Mr. Walker J. Moore* and *Mr. Charles C. Pavey* were on the brief, for plaintiff in error:

A tax upon property is a direct tax within the meaning of the Constitution and must be apportioned among the States in proportion to the census. *Pollock* v. *Farmers' L. & T. Co.*, 157 U. S. 429, 583; 158 U. S. 601, 637; Const. U. S. Art. I, § 2, subd. 3; Art. I, § 9, subd. 2.

Shares and certificates of stock are property. *Jellenik* v. *Huron Copper Mining Co.*, 82 Fed. Rep. 778; *Allen* v. *Pegram*,

16 Iowa, 163; *Mattingly* v. *Roach*, 84 California, 207; *Sargent* v. *Franklin Ins. Co.*, 8 Pick. 90; *Weaver* v. *Barden*, 49 N. Y. 286; 23 Am. & Eng. Ency. Law, 590; 1 Cook on Corporations, 4th ed. 41.

The right of sale and transfer is an inherent attribute of property. 1 Blackstone's Commentaries, 138; 2 Kent's Commentaries, 317, 320, 326; Bouvier's Law Dictionary—Property; Rutherford's Institutes, p. 20; Puffendorf's Laws of Nature, p. 220; *Wynehamer* v. *People*, 13 N. Y. 396, 397; *Sherman* v. *Elder*, 24 N. Y. 381; *Toledo Bank* v. *Bond*, 1 Ohio St. 662; *Exchange Bank* v. *Hines*, 3 Ohio St. 8; *Tod* v. *Wick*, 36 Ohio St. 385; *Kuhn* v. *Common Council*, 70 Michigan, 537; *Arapahoe County* v. *Printing Co.*, 15 Colo. App. 196; *Commonwealth* v. *Maury*, 82 Virginia, 883; *State* v. *Kreutzberg*, 114 Wisconsin, 534; *In re Marshall*, 102 Fed. Rep. 324.

A tax upon the sale of articles is in substance a tax upon the articles themselves and is invalid if a tax laid in the same manner upon the articles themselves is invalid. *Brown* v. *Maryland*, 12 Wheat. 419, 444; *Welton* v. *Missouri*, 91 U. S. 275, 279; *Cook* v. *Pennsylvania*, 97 U. S. 566, 573; *Almy* v. *California*, 24 How. 174; *Nicol* v. *Ames*, 173 U. S. 509, 521; *Fairbank* v. *United States*, 181 U. S. 293.

A tax upon the sales of shares or certificates of stock is in substance a tax upon the shares or certificates themselves. It is therefore a tax upon property and is a direct tax within the meaning of the Constitution. The war revenue tax upon the sales or shares or certificates of stock is not laid in proportion to the census or enumeration or apportioned among the States according to their numbers and is therefore unconstitutional and void.

Mr. Assistant Attorney General Purdy for the United States:

Where the constitutionality of a law is involved, every possible presumption is in favor of its validity, and this continues until the contrary is shown beyond a reasonable doubt. *Sinking Fund Cases*, 99 U. S. 700, 718; *Powell* v. *Pennsylvania*, 127

U. S. 678, 684, citing, *Fletcher* v. *Peck*, 6 Cranch, 87, 128; *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 625; *Livingston* v. *Darlington*, 101 U. S. 407; *Ogden* v. *Saunders*, 12 Wheat. 213. And see *Nicol* v. *Ames*, 173 U. S. 514.

The Constitution expressly confers upon Congress the taxing power, Art. I, § 8, except as expressed in regard to duties on exports, *Fairbank* v. *United States*, 181 U. S. 293, and except as implied as to means and instrumentalities of government. *Collector* v. *Day*, 11 Wall. 113; all taxes being subject to the rule of uniformity throughout the United States. *Knowlton* v. *Moore*, 178 U. S. 41, 83. As to rule of apportionment, see Art. I, § 9, par. 4, Cons.; *Hylton* v. *United States*, 3 Dall. 171, 177; *Pollock* v. *Farmers' Loan and Trust Co.*, 157 U. S. 429; 158 U. S. 601.

Congress may make all laws which shall be necessary and proper for carrying into execution the foregoing power. The selection of the means rests with Congress. Unless these means are forbidden by the Constitution, the courts will not interfere. *McCulloch* v. *Maryland*, 4 Wheat. 316, 421; *Fong Yue Ting* v. *United States*, 149 U. S. 698, 712; *Interstate C. C.* v. *Brimson*, 154 U. S. 447, 472.

With the two exceptions and under the limitations of the Constitution heretofore pointed out, the taxing power of Congress reaches all kinds and descriptions of property and all rights and privileges incident thereto. *License Tax Cases*, 5 Wall. 462, 471; *Pacific Ins. Co.* v. *Soule*, 7 Wall. 433, 443; *State Tax on Foreign Held Bonds*, 15 Wall. 300, 319; *Knowlton* v. *Moore*, 178 U. S. 41, 59.

In exercising the taxing power Congress may, through classification, select the subjects of taxation, and thus use its discretion in distributing equitably the burdens of government. *Magoun* v. *Illinois Trust and Svgs. Bank*, 170 U. S. 283.

As to the power of Congress, through classification, to select subjects of taxation, the question always is, when a classification is made, whether there is any reasonable ground for it or whether it is only simply arbitrary, based upon no real distinction and entirely unnatural. If the classification be

proper and legal, then there is the requisite uniformity in that respect. *Nicol* v. *Ames*, 173 U. S. 509, 521. And see also *Gulf, Colorado &c. Ry.* v. *Ellis*, 165 U. S. 150; *Barbier* v. *Connolly*, 113 U. S. 31; *Bell's Gap R. R. Co.* v. *Pennsylvania*, 134 U. S. 232, 234; *Home Insurance Co.* v. *New York*, 134 U. S. 594; *Pacific Express Company* v. *Seibert*, 142 U. S. 339; *Railroad Company* v. *Gibbs*, 142 U. S. 386; *Missouri Pacific R. R. Co.* v. *Humes*, 115 U. S. 512; *Missouri Ry. Co.* v. *Mackey*, 127 U. S. 205; *Kentucky Railroad Tax Cases*, 115 U. S. 321; *Missouri* v. *Lewis*, 101 U. S. 22, 30; *Horn Silver Mining Co.* v. *New York*, 143 U. S. 305; *Munn* v. *Illinois*, 94 U. S. 113; *Budd* v. *New York*, 143 U. S. 517; *Soon Hing* v. *Crowley*, 113 U. S. 703; *Wurtz* v. *Hoagland*, 114 U. S. 606; *Watson* v. *Nevin*, 128 U. S. 578; *Minneapolis* v. *Beckwith*, 129 U. S. 26; *C. & N. W. Ry. Co.* v. *McLaughlin*, 119 U. S. 566; *Hayes* v. *Missouri*, 120 U. S. 68; *Dow* v. *Beidelman*, 125 U. S. 680.

The constitutionality of a law making an exaction for purposes of revenue depends upon its operation and effect, and not upon the form it may be made to assume. *License Tax Cases*, 5 Wall. 462.

The absolute and unlimited power to tax is inherent in every sovereignty. In adopting the Constitution, however, the people of the United States delegated to the General Government this power to tax subject to certain exceptions and limitations.

It is apparent from this express grant of power to tax that certain limitations or restrictions were imposed upon the purpose for which taxes could be laid and collected, and which are as follows:

1. To pay the debts of the United States; 2. To provide for the common defence of the United States; and, 3. To provide for the general welfare of the United States. 1 Story on the Constitution, §§ 907, 926; 7 Jefferson's Works, 757; Tucker on the Constitution, 222; Judson on Taxation (1903), § 480.

These limitations as to the purpose for which a tax may be constitutionally laid and collected are so general and far reaching in their nature as to practically amount to no limitation.

Collector v. *Day*, 11 Wall. 113, 127. See also *Lane County* v. *Oregon*, 7 Wall. 71, 77; *Veazie Bank* v. *Fenno*, 8 Wall. 533, 537; *National Bank* v. *Commonwealth*, 9 Wall. 353, 362; *United States* v. *Railway Company*, 17 Wall. 322, 327; *Railway Company* v. *Penniston*, 18 Wall. 5, 36; *California* v. *Central Pacific Ry. Co.*, 127 U. S. 1, 40; *Knowlton* v. *Moore*, 178 U. S. 41, 59.

Whatever may be the precise meaning of the phrase "direct tax" as understood and used by various writers on the subject of political economy, it is only necessary to an intelligent discussion of the validity of the law under consideration to ascertain and determine what is understood by the phrase "direct tax" within the meaning of the Constitution. *Nicol* v. *Ames*, 173 U. S. 509, 515.

The following are the only direct taxes, within the meaning of the Constitution, which have been decided between 1789 and 1896, to be such by the opinions of this court: 1. A capitation or poll tax. The Constitution in express terms regards a capitation or poll tax as a direct tax. 2. A tax on lands (that is, a direct tax on lands such as is ordinarily imposed). *Hylton* v. *United States*, 3 Dallas, 171; *Pacific Insurance Co.* v. *Soule*, 7 Wall. 433; *Veazie Bank* v. *Fenno*, 8 Wall. 533; *National Bank* v. *United States*, 101 U. S. 1; *Scholey* v. *Rew*, 23 Wall. 331; *Railroad Company* v. *Collector*, 100 U. S. 595; *Springer* v. *United States*, 102 U. S. 586; and since 1896: 3. A tax upon all one's personal estate by reason of one's general ownership thereof. 4. A tax on the income of real property. 5. A tax upon the income of personal property. *Pollock* v. *Farmers' Loan and Trust Co.*, 157 U. S. 429; 158 U. S. 601.

The tax here imposed is an indirect tax within every definition of that term contained in the many decisions of this court, and the writings of leading authors on the subject of political economy. For definition of direct and indirect taxes, see *Knowlton* v. *Moore*, 178 U. S. 47; *Income Tax Case*, 157 U. S. 429, 558; Definition of Mr. Edmunds, 157 U. S. 491; of Mr. Justice Brown, 157 U. S. 491; of Chief Justice Fuller, 157 U. S. 558; of Mr. Sedgwick, 157 U. S. 568; of Mr. Albert Gallatin, 157

U. S. 569; of the Justices in the *Hylton Case*, 3 Dall. 171; of Alexander Hamilton, 157 U. S. 572; of Chief Justice Chase, 8 Wall. 546; of Judge Cooley, Const. Lim., 5th ed. 595, *480; of Mr. Justice Miller, Lectures on Constitution, 237; Pomeroy's Const. Law, § 281; 1 Hare's Am. Const. Law, 249; Burroughs on Taxation, 502; Ordonaux's Const. Legislation, 225. See 157 U. S. 624; Black on the Constitution, 162; Mr. Justice Swayne, 102 U. S. 602; Bastable on Public Finance, 249, 256; David A. Wells's Theory and Practice of Taxation.

The tax here imposed is not a direct tax within the meaning of the Constitution, for the reason that it is impossible to apportion it among the several States according to population.

It is a tax in the nature of a duty or excise upon transactions in business activity or forms of commercial dealing. Congress has the power to declare that any person who shall engage in the business or occupation of buying and selling certificates of stock shall pay a tax measured by the price realized. The power to impose privilege and occupation taxes exists independently and concurrently in the state and Federal governments, subject to the constitutional restrictions; in the state governments subject to the exclusive rights conferred on Congress to regulate interstate commerce, and in the Federal government subject to the prohibition of any interference with the internal regulations of the State. *Ward* v. *Maryland*, 12 Wall. 418; *License Tax Cases*, 5 How. 504; *Nathan* v. *Louisiana*, 8 How. 73; *Dobbins* v. *Erie County*, 16 Peters, 435; *Railway Co.* v. *Collector*, 100 U. S. 593, 598.

It is in the nature of a duty or excise upon the contract of sale itself, referring only to the fact that the subject-matter of the sale must be a certificate of stock as the basis or ground for classification. Cases already cited and *Treat* v. *White*, 181 U. S. 264, 268. It is closely analogous to the tax involved in *Hylton* v. *United States*, 3 Dall. 171.

The tax is laid upon the privilege or facility afforded the owner of the stock, under and by virtue of the laws of the State

authorizing the formation of the corporation, to sell and dispose of his property in the form of a certificate of stock.

Taxes of this nature have been uniformly regarded by the legislative and executive departments of the Government since its foundation as indirect within the meaning of the Constitution.

An act of Congress imposing a tax directly upon all shares or certificates of stock in all corporations and associations would be constitutional. *A fortiori,* is a law constitutional which merely taxes the sale, or agreement to sell, such property. *Pacific Insurance Company* v. *Soule,* 7 Wall. 433; *Veazie Bank* v. *Fenno,* 8 Wall. 533, 544, 546; *National Bank* v. *United States,* 101 U. S. 1; *Scholey* v. *Rew,* 23 Wall. 333; *Railroad Company* v. *Collector,* 100 U. S. 595; *Springer* v. *United States,* 102 U. S. 586, 602; *Patten* v. *Brady,* 184 U. S. 608.

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

By the first clause of section eight of article I of the Constitution, Congress is empowered "to lay and collect taxes, duties, imposts and excises," "but all duties, imposts and excises shall be uniform throughout the United States."

This division of taxation into two classes is recognized throughout the Constitution.

By clause three of section two, representatives and direct taxes are required to be apportioned according to the enumeration prescribed, and by clause four of section nine, no capitation or other direct tax can be laid except according to that enumeration.

By clause one of section nine, the migration or importation of persons by the States was not to be prohibited prior to 1808, but a tax or duty could be imposed on such importation, not exceeding ten dollars for each person.

By clause five it is provided: "No tax or duty shall be laid on articles exported from any State."

By clause two of section ten, no State can, "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 clause three the States are forbidden, without the consent of Congress, to "lay any duty of tonnage."

And these two classes, taxes so-called, and "duties, imposts and excises," apparently embrace all forms of taxation contemplated by the Constitution. As was observed in *Pollock* v. *Farmers' Loan and Trust Company*, 157 U. S. 429, 557: "Although there have been from time to time intimations that there might be some tax which was not a direct tax nor included under the words 'duties, imposts and excises,' such a tax for more than one hundred years of national existence has as yet remained undiscovered, notwithstanding the stress of particular circumstances has invited thorough investigation into sources of revenue."

The present case involves a stamp tax on a memorandum or contract of sale of a certificate of stock, which plaintiff in error claims was unlawfully exacted because not falling within the class of duties, imposts and excises, and being, on the contrary, a direct tax on property.

There is no occasion to attempt to confine the words duties, imposts and excises to the limits of precise definition. We think that they were used comprehensively to cover customs and excise duties imposed on importation, consumption, manufacture and sale of certain commodities, privileges, particular business transactions, vocations, occupations and the like.

Taxes of this sort have been repeatedly sustained by this court, and distinguished from direct taxes under the Constitution. As in *Hylton* v. *United States*, 3 Dallas, 171, on the use of carriages; in *Nicol* v. *Ames*, 173 U. S. 509, on sales at exchanges or boards of trade; in *Knowlton* v. *Moore*, 178 U. S. 41, on the transmission of property from the dead to the living; in *Treat* v. *White*, 181 U. S. 264, on agreements to sell shares of stock denominated "calls" by New York stock brokers; in

Patton v. *Brady*, 184 U. S. 608, on tobacco manufactured for consumption.

Brown v. *Maryland*, 12 Wheat. 419, and *Fairbank* v. *United States*, 181 U. S. 283, are not in point. In the one the clause of the Constitution was considered which forbids any State, without the consent of Congress, to "lay any imposts or duties on imports or exports," and in the other, that "no tax or duty shall be laid on articles exported from any State." The distinction between direct and indirect taxes was not involved in either case.

The sale of stocks is a particular business transaction in the exercise of the privilege afforded by the laws in respect to corporations of disposing of property in the form of certificates. The stamp duty is contingent on the happening of the event of sale, and the element of absolute and unavoidable demand is lacking. As such it falls, as stamp taxes ordinarily do, within the second class of the forms of taxation.

Judgment affirmed.

BANKERS MUTUAL CASUALTY COMPANY *v.* MINNEAPOLIS, ST. PAUL AND SAULT SAINTE MARIE RAILWAY COMPANY.

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

No. 141. Argued January 22, 1904.—Decided February 23, 1904.

Although suits may involve the Constitution or laws of the United States, they are not suits arising thereunder where they do not turn on a controversy between the parties in regard to the operation thereof, on the facts. Nor does a case arise under the Constitution or laws of the United States unless it appears from plaintiff's own statement, in the outset, that some title, right, privilege or immunity on which recovery depends will be defeated by one construction of the Constitution or laws of the United States or sustained by the opposite construction.

In an action commenced in the Circuit Court, by a citizen of one State against a railroad company, citizen of another State, for damages for a loss of a registered mail package, where the plaintiff relied on principles of general law applicable to negligence and to the liability of defendant if there was negligence, the fact that the suit involved the relations of the Railroad Company to the government did not put in controversy the construction of any provision of the Constitution or of any law of the United States on which the recovery depended and the judgment of the Circuit Court of Appeals was final and the writ of error is dismissed.

THIS action was originally brought in the Circuit Court of the United States for the District of Minnesota by the German State Bank of Harvey, North Dakota, for which the Bankers Mutual Casualty Company of Iowa was subsequently substituted as plaintiff, against the Minneapolis, St. Paul and Sault Sainte Marie Railway Company of Minnesota. The averments gave jurisdiction on the ground of diversity of citizenship. A demurrer to the original complaint was sustained for reasons stated by Lochren, J. 113 Fed. Rep. 414. Thereupon "an amended and substituted complaint" was filed, and on demurrer judgment was rendered in favor of defendant, and affirmed on error by the Circuit Court of Appeals for the Eighth Circuit. 117 Fed. Rep. 434. This writ or error was then allowed.

The amended complaint was as follows:

"That the Bankers Mutual Casualty Company, during all of the year A. D. 1900, and up to the present time, is and was a corporation, duly organized under the laws of the State of Iowa, and a citizen of said State, with its principal place of business at Des Moines, in said State, engaged in the business of insuring banks against loss from robbery and burglary, including the insurance against loss of packages of money, while in the course of transmission from place to place, while regularly carried in the United States registered mails.

"That defendant, during all of the year A. D. 1900, and up to the present time, is and was a corporation, duly organized under the laws of the State of Minnesota and a citizen of said State, with its principal place of business at Minneapolis, in

said State, engaged in operating a line of railroad situated in the States of Minnesota and North Dakota.

"That the German State Bank, during all of the year A. D. 1900, and up to the present time, is and was a corporation, duly organized under the laws of the State of North Dakota, and a citizen of said State, with its principal place of business at the town of Harvey, in said State, engaged in a general banking business at said town.

"That during the whole year A. D. 1900, and up to the present time, defendant is and was engaged in carrying the United States mails between the terminal and intermediate stations located upon and along its said line of railroad, under and by virtue of the statutes and laws of the United States, and the regulations established by the Post Office Department of the United States government, and in pursuance of a fixing of the compensation to be paid to defendant by the United States government for carrying said mails and the person in charge thereof, based upon the last preceding reweighing of said mails and upon notice in writing, in the usual form, from the Second Assistant Postmaster General of the United States, requiring defendant to carry said mails and the person in charge thereof.

"That said depot, at or near the town of Harvey, was an intermediate station on that part of defendant's said line of railroad within the State of North Dakota, which extends from the station at Hankinson to the station at Portal, and the railroad line between said stations at Hankinson and Portal is designated by and known to the Post Office Department of the United States, as railroad route No. 161,018, being a distance of 344.58 miles, and the compensation fixed by the United States Post Office Department to be paid annually by the United States to defendant during all of the period herein referred to for the carriage of said mails and the person in charge thereof is and was the sum of sixty-four thousand eight hundred and fifteen and 49–100 dollars ($64,815.49), at the rate of $188.10 per mile.

"That this substituted plaintiff is not in possession of the aforesaid notice to defendant, and is unable to attach to this petition said notice or a true copy thereof.

"That during all of the period hereinbefore referred to there was no contract of any kind between defendant and the United States government concerning or providing for the carriage, by defendant, of said mails, or any part thereof, or of the person in charge of said mails, upon or along defendant's said line of railway or any part thereof.

"That on or about the 10th day of November, A. D. 1900, the Metropolitan Bank, a corporation organized under the laws of the State of Minnesota, was engaged in transacting a general banking business in the city of Minneapolis, in said State, and on or about said date said bank deposited in the United States mails, at Minneapolis, in said State, a package containing lawful money of the United States, commonly known and called currency, of the actual cash value of three thousand dollars ($3000.00), in an envelope properly addressed to the German State Bank at Harvey, North Dakota, and prepaid thereon the postage and registration fee, and said package was thereupon duly registered by the postmaster of said post office. That from and after the time of depositing said package in said post office at Minneapolis, said package and its contents was the property of said German State Bank.

"That said registered package was covered by insurance and indemnity against loss while in transit through the United States mails from Minneapolis to said Harvey, under a policy of insurance issued by said Bankers Mutual Casualty Company, the substituted plaintiff, said insurance being for the use and benefit of said German State Bank. That a true copy of said policy is hereto attached as part hereof, and marked Exhibit 'A.'

"That on or about November 10th, A. D. 1900, and while said package was in good safety and prior to the departure of the train carrying said registered package, said Metropolitan Bank deposited in the United States mails, at the post office

in said city of Minneapolis, a letter of advice, properly addressed to said Bankers Mutual Casualty Company at Des Moines, Iowa, with postage thereon prepaid; that said letter of advice notified said Bankers Mutual Casualty Company, of the shipment by said Metropolitan Bank of said sum of three thousand dollars to said German State Bank of Harvey, and upon said mailing of said letter of advice, the contract of insurance and indemnity of said registered package of currency immediately attached thereto and became a valid and complete contract of insurance and indemnity by the said Bankers Mutual Casualty Company, in favor of said German State Bank.

"That in the regular course of transmission of the United States mails between the said city of Minneapolis and the said town of Harvey, said registered package was duly delivered by the post office officials of said city of Minneapolis to the railway mail clerk or other proper postal official, and placed in a railway mail car or other proper car, the property of defendant, then standing upon defendant's said line of railway, and was transported by defendant railway company to defendant's railway depot or station, situated in or near said town of Harvey, North Dakota.

"That prior to the arrival of said registered package at said town of Harvey, the same, together with other registered mail packages and other mail matter, was, by said railway mail clerk in charge of said mails, duly inclosed in a regular United States mail sack or mail pouch, which said mail sack or mail pouch was securely locked or fastened by the official government strap and lock.

"That from and after the time of the depositing of the mail sack containing said currency in defendant's mail car at Minneapolis, Minnesota, for the purpose of transit and transportation for delivery at Harvey, North Dakota, the same was under the exclusive care, custody and control of the postal clerks, regularly employed by the United States government and in charge of the mail in said car; that the mail sacks containing

said registered package, from and after the time of its delivery in said postal car, to the proper postal clerks therein, up to and including the delivery of said mail sack at Harvey, North Dakota, was in the exclusive care, custody and control of the said postal clerks or authorities.

"That upon the arrival of defendant's said train and postal car at said town of Harvey, North Dakota, said railway mail clerk or other postal official, between eleven and twelve o'clock of said night, delivered said mail sack, duly locked, together with said registered package of currency therein contained, to one James Magson, the night station agent, or night operator of defendant at said town of Harvey; that said night station agent, or night operator, was not sworn as an official or employé of the Post Office Department of the United States government, as required by law, but was then and there employed and duly authorized by the defendant to receive and take charge of all mail matter received over defendant's said line of railway, at said town of Harvey, including the mail sack or mail pouch containing said package of currency, and to deposit same in defendant's depot, at Harvey, North Dakota, and did so receive, take charge of and deposit said mail sack or mail pouch.

"That defendant was not sworn as an official or employé of the Post Office Department of the United States government, and had not subscribed or sworn to any oath relating to or concerning the carriage of the United States mails, or the performance of defendant's duties as such carrier of the mails.

"That section 713 of the postal laws and regulations of the United States of the year A. D. 1893, which was in force at the time of the receipt and transmission of said registered package is in words and figures as follows, to wit: 'The railroad company will also be required to take the mails from and deliver them into all intermediate post offices and postal stations located not more than eighty rods from the nearest railroad station at which the company has an agent or other representative employed.'

"That said post office at Harvey was an intermediate post

office, and was located not more than eighty rods from defendant's railroad station, or depot, at or near said town of Harvey.

"That under said postal regulation it was the duty of said defendant to provide a sufficient and safe receptacle or place for the safety and security of said mail, while in its said custody, also to safely care for and guard said mail sack and its contents during the night, also to safely deliver the same to the postmaster or postmistress at the post office in said town of Harvey, North Dakota.

"But neglecting its said duty in the premises, defendant wholly failed and neglected to provide any receptacle or place for the safe or secure keeping of mail, and also failed to place a duly sworn official in charge of said mail sack, and further wholly failed to safely care for or guard said mail sack and its contents, and also wholly failed to safely deliver the same at the post office to the postmaster in said town of Harvey. That by reason of defendant's said negligence, some person, to this plaintiff unknown, in some manner not known to this plaintiff, obtained access to said mail sack and opened the same, and abstracted or took therefrom said registered package, whereby the same was wholly lost to said German State Bank.

"That one George A. Soule was then the road master or foreman employed by said defendant at said town of Harvey, or one of defendant's employés or servants, but was not sworn in as an official or employé of the Post Office Department, as required by law, and was not authorized or employed by defendant to take charge of said mail sack or to perform any duty in relation thereto and had no right of access to said mail sack, or to the mail therein contained, by virtue of his said employment by defendant.

"That said Soule had previously unlawfully obtained and caused to be made, a key to the United States government mail sacks or mail pouches, and personally, or with the aid and assistance of some person or persons, to this plaintiff unknown, did enter one of the rooms contained in the said depot building, where said mail sack or mail pouch had been placed by

defendant's operator or night agent, on the floor or wall of said room, and not in any separate room, closet or other safe receptacle, capable of being securely fastened against any intruder or unauthorized person, by lock and key or otherwise. That said room was not designed for or capable of safely keeping valuable articles of property.

"That said Soule, or other person, had no right of access to said room, or to said mail sack or mail pouch, but through the negligence of defendant and its said night operator or night agent, as set forth in this complaint, did gain entrance to said room and obtain access to said mail sack or mail pouch, and the mail matter therein contained, and did find said mail sack or mail pouch situated or placed as above set forth, so that the same was readily accessible to any person gaining entrance to said room, and did find said mail sack or mail pouch wholly unprotected and unguarded by said night operator or otherwise.

"That said Soule, or other person, by reason of the aforesaid negligence of said defendant and its said night agent or night operator, did obtain access to said mail sack or mail pouch and did unlock the same and abstract and take therefrom the aforesaid registered package, containing said three thousand dollars ($3000) in currency and did unlawfully convert the same to his use and benefit, and the same has never been delivered or returned to said German State Bank or to said Metropolitan Bank of Minneapolis, or to this plaintiff, the Bankers Mutual Casualty Company, or to any one for the benefit of any of them."

[Then followed averments of payment to the German State Bank by the Casualty Company under its policy of insurance; of demand on defendant for repayment, and refusal; of subrogation and assignment; and prayer for judgment.]

Mr. A. U. Quint, with whom *Mr. Horatio F. Dale*, *Mr. William Connor* and *Mr. George W. Bowen* were on the brief, for plaintiff in error:

On the jurisdictional question: The case involved the con-

struction and application of the statutes of the United States relating to mails and of the Postal Regulations especially §§ 713 and 1023, edition of 1893. See *Teal* v. *Felton*, 12 How. (N. Y.) 284. The statutes of the United States impose a duty on defendant to safely care for the mail carried by it.

The case also involves the question of exemption of a railway company, carrying the mail, from liability under the rule of *respondeat superior*, either as a public agent of the United States, or as a private corporation for profit, performing the duty in question, established by the statutes of the United States. The Circuit Court of Appeals and the Circuit Court having each held, in effect, that the railway company was entitled to the exemption in this respect which the law gives to one who is strictly a principal public officer.

This case comes within the exception contained in section 6 of the Circuit Court of Appeals Act of 1891, 1 Supp. U. S. Stats. 904. This case falls within the provision above quoted, as construed by several decisions of this court. *Howard* v. *United States to use of Stewart* (1902), 184 U. S. 676, and cases cited; *Robinson & Co.* v. *Belt*, 187 U. S. 41; *McFaddin* v. *Evans-Snider-Buel Co.*, 185 U. S. 505; *Studebaker* v. *Perry*, 184 U. S. 258; *Marande* v. *Tex. & P. R. Co.*, 184 U. S. 173; *Press Pub. Co.* v. *Monroe*, 164 U. S. 105; *Bolles* v. *Outing Co.*, 175 U. S. 262; *Brady* v. *Daly*, 175 U. S. 148; *Auten* v. *United States National Bank*, 174 U. S. 125; *Sonnentheil* v. *C. M. Brewing Co.*, 172 U. S. 401; *Union P. R. Co.* v. *Harris*, 158 U. S. 326; *N. Pac. R. Co.* v. *Amato*, 144 U. S. 465; *Security Trust Co.* v. *Dent*, 187 U. S. 237.

Mr. Alfred H. Bright for defendant in error:

As to the jurisdictional question: The Circuit Court acquired jurisdiction on the ground of diverse citizenship and the judgment of the Circuit Court of Appeals is final. *Colorado Cen. Mining Co.* v. *Turck*, 150 U. S. 138; *Borgmeyer* v. *Idler*, 159 U. S. 408; *Loeb* v. *Columbia Township*, 179 U. S. 472; *Am.*

Sugar Rfg. Co. v. *New Orleans*, 181 U. S. 277; *Huguley* v. *Galeton Cotton Mills*, 184 U. S. 290.

The sufficiency of this complaint to sustain the claim of jurisdiction on the ground that it shows a suit "arising under the Constitution or laws of the United States" must be tested by rules firmly settled by the decisions of this court. *Gold-Washing Company* v. *Keyes*, 96 U. S. 199, 202; *Am. Sugar Rfg. Co.* v. *New Orleans*, 181 U. S. 277, and cases cited; *Ansbro* v. *United States*, 159 U. S. 695; *McCain* v. *Des Moines*, 174 U. S. 168; *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116, 143; *Starin* v. *New York*, 115 U. S. 248, and cases cited p. 257; *Shreveport* v. *Cole*, 129 U. S. 36; *New Orleans* v. *Benjamin*, 153 U. S. 411, 424; *St. Joseph &c. Ry.* v. *Steele*, 167 U. S. 659; *Hanford* v. *Davies*, 163 U. S. 273, 279; *West. Un. Tel. Co.* v. *Ann Arbor R. R.*, 178 U. S. 239, 243.

Not every suit springing out of facts related to the authority of the United States or to the Constitution or laws thereof, regardless of the nature of that relation, may be said to be a suit arising under the Constitution or laws of the United States. *Metcalf* v. *Watertown*, 128 U. S. 586; *Mail Company* v. *Flanders*, 12 Wall. 130; *Albright* v. *Teas*, 106 U. S. 613; *Hartzell* v. *Tilghmann*, 99 U. S. 547; *Little* v. *Hall*, 18 How. 165; *Blackburn* v. *Portland Mining Co.*, 175 U. S. 571; *Shoshone Mining Co.* v. *Rutter*, 177 U. S. 505; *Bausman* v. *Dixon*, 173 U. S. 113; *Pope* v. *Railway Co.*, 173 U. S 573; *McKenna* v. *Simpson*, 129 U. S. 506; *Provident Savings Soc.* v. *Ford*, 114 U. S. 635; *Price* v. *Railway Co.*, 113 U. S. 218.

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

If the jurisdiction of the Circuit Court depended entirely on diversity of citizenship, the judgment of the Circuit Court of Appeals was made final by the act of March 3, 1891, and this writ of error must be dismissed. But it is contended that jurisdiction also rested on the ground that the case arose under

the Constitution or laws of the United States, and that must be tested by the settled rule that a suit does not so arise unless it really and substantially involves a dispute or controversy as to the effect or construction of the Constitution or some law or treaty of the United States, upon the determination of which the result depends, and which appears on the record by plaintiff's own statement of his case in legal and logical form, such as is required in good pleading. *Tennessee* v. *Union & Planters Bank*, 152 U. S. 454; *Arbuckle* v. *Blackburn*, 191 U. S. 405; *Defiance Water Company* v. *Defiance*, 191 U. S. 184; *Gold-Washing &c. Company* v. *Keyes*, 96 U. S. 199; *Starin* v. *New York*, 115 U. S. 248.

The amended complaint alleged that defendant was engaged in carrying the mails by virtue of the laws and postal regulations of the United States; that a registered package of currency was deposited in the mails, delivered to the mail clerk on the proper mail car belonging to defendant, duly inclosed with other mail matter in a securely locked mail sack, and transported by defendant to its station at Harvey; that the mail clerk between eleven and twelve o'clock at night delivered the mail sack duly locked and containing the registered package of currency to the night station agent of defendant at the town of Harvey, who was duly authorized by defendant to receive and take charge of all mail matter received there on defendant's railway, neither defendant nor the station agent having taken the oath as officials or employés of the Post Office Department; and it was then averred:

"That section 713 of the postal laws and regulations of the United States of the year A. D. 1893, which was in force at the time of the receipt and transmission of said registered package, is in words and figures as follows, to wit: 'The railroad company will also be required to take the mails from and deliver them into all intermediate post offices and postal stations located not more than 80 rods from the nearest railroad station at which the company has an agent or other representative employed.'

"That said post office at Harvey was an intermediate post office and was located not more than 80 rods from defendant's railroad station, or depot, at or near said town of Harvey.

"That under said postal regulation it was the duty of said defendant to provide a sufficient and safe receptacle or place for the safety and security of said mail, while in its said custody; also to safely care for and guard said mail sack and its contents during the night; also to safely deliver the same to the postmaster or postmistress at the post office in said town of Harvey, North Dakota.

"But neglecting its said duty in the premises, defendant wholly failed and neglected to provide any receptacle or place for the safe or secure keeping of mail, and also failed to place a duly sworn official in charge of said mail sack, and further wholly failed to safely care for or guard said mail sack and its contents, and also wholly failed to safely deliver the same at the post office to the postmaster in said town of Harvey."

And further, that defendant's roadmaster entered the depot, unlocked the mail bag with a key he had unlawfully caused to be made, abstracted the package of currency and converted its contents; that the room where the mail bag was placed was "not designed or capable of safely keeping valuable articles or property," and that it was through the negligence of defendant and its station agent that the man gained entrance to the room and obtained access to the mail bag.

It will be perceived that plaintiff relied on principles of general law applicable to negligence, and to the liability of defendant if there were negligence, and nowhere asserted a right which might be defeated or sustained by one or another construction of the Constitution or of any law of the United States. The complaint did indeed deny that there was any contract between defendant and the government, but that was merely a conclusion of law, inconsistent with the statutes, and with the facts alleged. And whether the duty counted on was imposed by law, or arose from contract, the question remained whether defendant was a public agent of the United

States and the consequences of that relation, and the construction of no provision of the Constitution or of any law of the United States on which the recovery depended was put in controversy.

In other words, no definite issue in respect of a right claimed under the Constitution or any law of the United States was deducible from plaintiff's statement of its case, and if the postal regulations could, under circumstances, be regarded as laws of the United States creating a right which might be denied or secured according to one construction or another, it did not appear that the construction of the extract from section 713 of those regulations was in any way in dispute or could have been. And the averments of the complaint cannot be helped out by resort to the other pleadings or to judicial knowledge. *Mountain View &c. Company* v. *McFadden*, 180 U. S. 533; *Arkansas* v. *Kansas and Texas Coal Company*, 183 U. S. 185.

The Constitution empowers Congress to establish post offices and post roads, and Congress has passed laws accordingly, pursuant to which defendant was carrying the mails. But the alleged cause of action was not referable to those laws or put on the ground that defendant was an officer or public agent of the United States. That was matter of defence and could not be and was not resorted to by plaintiff to obtain jurisdiction. *Tennessee* v. *Union & Planters Bank*, 152 U. S. 454.

A writ of error to the judgment of a state court stands on different ground. Such was *Teal* v. *Felton*, 12 How. 284, in which the postmaster relied on an act of Congress in defence, and the writ was properly granted under the twenty-fifth section of the judiciary act.

Cases against United States officers as such, or on bonds given under acts of Congress, or involving interference with Federal process, or the due faith and credit to be accorded judgments, are not in point; nor does the case fall within the ruling that a corporation created by Congress has a right to invoke the jurisdiction of the Federal courts in respect to any litigation it may have except as specially restricted. The

doctrine of *Pacific Railroad Removal Cases*, 115 U. S. 1, cannot be extended so as to embrace cases like the present. *Shoshone Mining Company* v. *Rutter*, 177 U. S. 505, 509.

On the other hand, such cases as *Provident Savings Society* v. *Ford*, 114 U. S. 635; *Metcalf* v. *Watertown*, 128 U. S. 586; *Colorado Central Mining Company* v. *Turck*, 150 U. S. 138; *St. Joseph &c. R. R. Co.* v. *Steele*, 167 U. S. 659; *Pratt* v. *Paris Gas Light &c. Company*, 168 U. S. 255; *Western Union Telegraph Company* v. *Ann Arbor Railroad Company*, 178 U. S. 239; *Gableman* v. *Peoria &c. Railway Company*, 179 U. S. 335, show that suits though involving the Constitution or laws of the United States are not suits arising under the Constitution or laws where they do not turn on a controversy between the parties in regard to the operation of the Constitution or laws, on the facts.

In *Price* v. *Pennsylvania Railroad Company*, 113 U. S. 218, which was a writ of error to the Supreme Court of Pennsylvania, the question arose whether a railway mail clerk was a passenger within a certain statute of Pennsylvania, and Mr. Justice Miller, delivering the opinion, said:

"The plaintiff argues here, and insisted throughout the progress of the case in the state courts, that by reason of certain laws of the United States as applied to the facts found in the verdict of the jury, the decedent was a passenger, and the Supreme Court erred in holding otherwise. These laws are thus cited in the brief of plaintiff's counsel.

"'Act of March 3, 1865, § 8, 13 Stat. 506, provides that 'For the purpose of assorting and distributing letters and other matter in railway post offices, the Postmaster General may, from time to time, appoint clerks who shall be paid out of the appropriation for mail transportation.'

"'§ 4000 Rev. Stat. requires that 'Every railway company carrying the mail shall carry on any train which may run over its road, and without extra charge therefor, all mailable matter directed to be carried thereon, with the person in charge of the same.'

"We do not think these provisions either aid or govern the construction of the proviso in the Pennsylvania statute.

"The person thus to be carried with the mail matter, without extra charge, is no more a passenger because he is in charge of the mail, nor because no other compensation is made for his transportation, than if he had no such charge, nor does the fact that he is in the employment of the United States, and that defendant is bound by contract with the government to carry him, affect the question. It would be just the same if the company had contracted with any other person who had charge of freight on the train to carry him without additional compensation. The statutes of the United States which authorize this employment and direct this service do not, therefore, make the person so engaged a passenger, or deprive him of that character, in construing the Pennsylvania statute. Nor does it give to persons so employed any *right* as against the railroad company, which would not belong to any other person in a similar employment, by others than the United States.

"We are, therefore, of opinion that no question of Federal authority was involved in the judgment of the Supreme Court of Pennsylvania, and the writ of error is accordingly dismissed."

Although that case was a writ of error to a state court it was held, in effect, that it was too obvious for controversy that the acts of Congress referred to did not give the mail clerk any particular right as against the railroad company in respect of negligence and therefore this court declined to entertain the writ.

We repeat that the rule is settled that a case does not arise under the Constitution or laws of the United States unless it appears from plaintiff's own statement, in the outset, that some title, right, privilege or immunity on which recovery depends will be defeated by one construction of the Constitution or laws of the United States, or sustained by the opposite construction. *Gold-Washing &c. Company* v. *Keyes*, 96 U. S.

199; *Starin* v. *New York*, 115 U. S. 248; *New Orleans* v. *Benjamin*, 153 U. S. 411; *Blackburn* v. *Portland Gold Mining Company*, 175 U. S. 571; *Shoshone Mining Company* v. *Rutter*, 177 U. S. 505.

Tested by this rule, the jurisdiction of the Circuit Court depended entirely on diversity of citizenship and not in any degree on grounds making the case one arising under the Constitution, laws or treaties of the United States.

Writ of error dismissed.

MR. JUSTICE WHITE dissented.

BRUNSWICK TERMINAL COMPANY *v.* NATIONAL BANK OF BALTIMORE.

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

No. 88. Argued December 9, 10, 1903.—Decided February 23, 1904.

The additional liability of the shareholders of corporations depends on the terms of the statute creating it, and as such a statute is in derogation of the common law it cannot be extended beyond the words used.

Where the charter of a state bank provides for additional liability of the shareholders as sureties to the creditors of the bank for all contracts and debts to the extent of their stock therein, at the par value thereof, at the time the debt was created, a shareholder is not liable for a debt created after he has actually parted with his stock and the transfer has been regularly entered on the books of the bank.

Where the decisions of the highest court of a State show that it regarded the construction and application of a statute as open for review if another case arose, its prior determinations of the questions do not necessarily have to be adopted and applied by the Federal courts in cases where the cause of action arose prior to any of the adjudications by the state court.

Section 1496 of the Georgia Code of 1882, requiring shareholders of banks to publish notice of transfer in order to exempt themselves from

liability, does not apply to shareholders who have transferred their stock prior to the inception of the debts at the time of the failure of the institution.

THIS was a bill filed January 14, 1898, in the Circuit Court of the United States for the District of Maryland by the Brunswick Terminal Company and others, creditors of the Brunswick State Bank, chartered by the State of Georgia, which failed and was declared insolvent in May, 1893, to enforce, in behalf of its creditors, against the National Bank of Baltimore, a statutory liability equal to the par value of certain shares of stock in the State Bank at one time standing in the name of the Baltimore Bank.

The case was first heard on demurrer to a plea of the Maryland statute of limitations. The demurrer was overruled, the defence sustained, and the bill dismissed. 88 Fed. Rep. 607. On appeal to the Circuit Court of Appeals for the Fourth Circuit, the decree was reversed and the cause remanded for further proceedings. 99 Fed. Rep. 635.

The cause was then heard on the pleadings, and an agreed statement of facts, the parties reserving the right to refer to any pertinent laws or statutes of Georgia, as follows:

"That the Brunswick State Bank was a corporation chartered, organized and existing under the laws of the State of Georgia, and was engaged in the general banking business in that State; that on or about the 30th day of May, 1893, William M. Wiggins and others, alleging themselves to be creditors of said Brunswick State Bank, filed their petition in the Superior Court of Glynn County, Georgia, against said bank, alleging that it was insolvent, and praying for the appointment of a receiver to take possession of its assets, and administer them, and on the 29th day of June following the court decreed that the bank was insolvent and appointed a permanent receiver for the purposes stated; that the State of Georgia and Glynn County were, under the laws of Georgia, preferred creditors, and the assets obtained by the receiver as the assets of the bank were exhausted by the payment of these preferred claims

and the costs of litigation, and nothing was left for the payment of other creditors of the bank; that the following persons are creditors of the said Brunswick State Bank in the amounts stated in connection with their names, and were originally parties plaintiff in said cause, or having become such subsequently, that is to say: [Here follow lists of creditors.]

"That the defendant is a national bank, chartered, organized and conducting a business of a bank at the city of Baltimore, in the State of Maryland, under the provisions of the statutes of the United States in relation to national banks and their operation.

"That in the month of August, 1890, the defendant discounted for one Lloyd a promissory note drawn by him and F. E. Cunningham for the sum of ten thousand dollars ($10,000.00), endorsed by the copartnership firm of Lloyd & Adams, and by W. A. Cunningham, and received, together with the note, as the collateral security for its payment, one hundred and ten (110) shares of the capital stock of said Brunswick State Bank of the par value of one hundred dollars ($100.00) per share; that, in order to protect itself as pledgee, the defendant caused this stock to be transferred into its own name on the books of the Brunswick State Bank, on or about the 25th day of August, 1890; that the said note was paid to the defendant at the time of its maturity, and the defendant being under obligation to return the stock, the pledge being at an end and the pledgor entitled to its return, retransferred the stock on the books of said Brunswick State Bank by direction of the pledgor, and the said transfer was fully completed on the books of the said bank on or before the 20th day of October, 1890, but no notice by publication of the fact of said retransfer was given by the defendant; that the defendant never had or claimed any interest in said stock, save under the pledge aforesaid, but never notified the Brunswick State Bank, its stockholders or creditors, that it held said stock otherwise than as the absolute owner thereof.

"That the indebtedness of said Brunswick State Bank to

all of the plaintiffs in this cause accrued after the said 20th day of October, 1890, from transactions with said bank commenced after that date, and the plaintiffs had no knowledge in fact that the name of the defendant had appeared upon the books of said Brunswick State Bank as a stockholder.

"It is agreed that the court may draw inferences from any of the foregoing facts to the same extent as if the facts had been proven by means of witnesses."

The Circuit Court rendered a decree dismissing the bill. 112 Fed. Rep. 812.

An appeal to the Circuit Court of Appeals was taken and that court certified to this court certain questions concerning which it desired instructions for the proper decision of the case. After full argument on the merits this court required the whole record and cause to be sent up for consideration.

Mr. Henry W. Williams and *Mr. C. P. Goodyear*, with whom *Mr. W. E. Kay*, *Mr. H. Winslow Williams* and *Mr. William S. Thomas* were on the brief, for appellants.

Mr. William L. Marbury, and *Mr. Frank Gosnell*, with whom *Mr. Allan McLane* was on the brief, for appellee.

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

The Baltimore Bank was a national bank, and was not authorized to permanently invest any portion of its capital in the stock of other corporations, nor did it attempt to do so in this instance. The shares of stock of the Brunswick Bank were merely accepted as collateral to a note discounted by the Baltimore Bank. They stood, it is true, for a few weeks in the name of the Baltimore Bank on the registry of the Brunswick Bank, but they were then retransferred to the pledgor as appeared on the registry, the note having been paid. Complainants became creditors long after the transaction, and were chargeable with notice so far as the Baltimore Bank was con-

cerned. But notwithstanding the latter bank only held the shares as collateral and had returned the pledge in due course on the payment of the loan, the contention is that the bank is under a statutory liability to these subsequent creditors, to the full amount of the shares it had temporarily held as security.

This additional liability of a stockholder depends on the terms of the statute creating it, and as it is in derogation of the common law the statute cannot be extended beyond the words used.

As to stockholders of the Brunswick Bank, such a liability was imposed by the ninth section of the charter, granted in 1889, which provided "that said corporation shall be responsible to its creditors to the extent of its property and assets, and the stockholders, in addition thereto, shall be individually liable equally and ratably, and not one for another, as sureties to the creditors of such corporation, for all contracts and debts of said corporation, to the extent of the amount of their stock therein, at the par value thereof, respectively, at the time the debt was created in addition to the amount invested in such shares."

Tested by the language of this section, the Baltimore Bank was never under liability to these creditors. For if this national bank could have been regarded as the owner of these shares from August 25 to October 20, 1890, notwithstanding the actual facts and the limitations on its powers, it was not such stockholder, in fact or in appearance, at the time complainants' debts were created. It acquired the stock as pledgee, August 25, 1890, and the note to which it was collateral having been paid, retransferred it October 20, 1890, the retransfer being regularly entered on the books of the bank. It was after this that the transactions commenced from which the indebtedness to complainants arose, and no element of estoppel was involved.

Nevertheless complainants contend that the Baltimore Bank remained liable as a stockholder because it did not give notice of the retransfer under section 1496 of the Georgia Code of 1882, reading as follows:

"When a stockholder in any bank or other corporation is individually liable under the charter, and shall transfer his stock, he shall be exempt from such liability, unless he receives a written notice from a creditor within six months after such transfer, of his intention to hold him liable; *provided*, he shall give notice once a month, for six months, of such transfer, immediately thereafter, in two newspapers in or nearest the place where such institution shall keep its principal office."

This section was obviously not intended to impose a liability but to exempt from an existing liability. If any debt had been created from August 25 to October 20, and perhaps as to any debt outstanding on August 25, the Baltimore Bank, treating it as a stockholder from August 25 to October 20, might have been held liable because it did not give the statutory notice, but no such case is presented. On the face of this record it is immaterial whether there were any creditors during the six months after the retransfer to give or to receive notice or whether there was any indebtedness incurred prior to August 25, or during the period from August 25 to October 20, 1890.

We concur in the views of the Circuit Court, as thus expressed by Morris, J.:

"As by the charter of the Brunswick State Bank a stockholder was only liable as surety to creditors to the extent of his stock in the bank at the time the debt was created, and as the defendant at the time the debts of the plaintiffs were created had no stock in the bank, and was therefore under no liability, it does not appear that section 1496 of the Georgia code could have any application to this defendant. This section is applicable to a stockholder who, being individually liable to a creditor or creditors, shall then transfer his stock. The stockholders in the Brunswick State Bank were only liable for debts created while they held their stock, and, as applied to them, this section means that a stockholder who has become individually liable to a creditor by holding stock at the time the creditor's debts were created shall be exempt

from such liability, provided he publishes a notice that he has transferred his stock, unless within six months after the transfer the creditor gives him notice that he intends to hold him liable. This would seem to be the plain meaning and intention of the statute.

"As section 1496 enables a stockholder, who, by the charter, is already under liability to a creditor, to escape that liability by transferring his stock, unless the creditor gives him notice within six months after the transfer, it is sensible and understandable why notice of the transfer should be given; but, as to persons who as yet had no dealings with the bank out of which debts could be created, to require notice to them would not be sensible, and would be a mere arbitrary penalty, without reason,—a thing which is not to be imputed to the legislature if the section is capable of a more reasonable interpretation. If no notice of transfer by advertisement is given by the stockholder, then no notice within six months need be given by the creditor, and both stand upon the right given by the charter, unaffected by section 1496 of the code."

But it is said that the highest judicial tribunal of Georgia has decided otherwise, and that the Circuit Court and this court are bound to accept its interpretation of these statutory provisions. Without discussing the exceptions to that rule the inquiry in the first instance is as to what has been actually decided by the Supreme Court of Georgia in respect of the construction and application of those provisions in circumstances such as exist in this case. We are referred to the cases of *Brobston* v. *Downing*, *Brobston* v. *Chatham Bank*, 95 Georgia, 505, decided May Term, 1894; and *Chatham Bank* v. *Brobston*, 99 Georgia, 801, decided December Term, 1895, which involved the charter of the Brunswick State Bank.

The court delivered no opinion in *Brobston* v. *Downing*, and *Chatham Bank*, but the first headnote by Bleckley, C. J., was in these words: "With or without a clause in the charter restricting the personal statutory liability of stockholders to the

amount of stock at its par value at the time the debt in question was created, the liability exists and continues for any debt incurred by the corporation at any time until the stockholder who claims to be exempt by reason of having sold and transferred his stock before the debt was created has given notice of such sale conformably to section 1496 of the code. Lumpkin, J., concurring *dubitante.*"

This does not in terms refer to stock which has been held as collateral and retransferred on payment of the loan.

In the second case there was no opinion of the court, but the following headnotes appear:

"1. The decisions of this court in the cases of *Brobston* v. *Downing*, and *vice versa*, and *Brobston* v. *Chatham Bank*, 95 Ga. 505, upon a review thereof, are affirmed.

"2. Where the charter of a bank imposes on all of its stockholders personal liability to its creditors, such liability attaches as well to those who acquire a complete legal title to stock of the bank by having the same transferred to them as collateral security for debts due by the transferers, as to those who purchase such stock outright.

"3. Under the charter of the Brunswick State Bank, and the general rules of law applicable thereto, a stockholder is individually liable for his *pro rata* part of the corporation debts created before he acquired his shares of stock by transfer, as well as for a like part of those created during his ownership of the shares.

"4. A stockholder in that bank is also liable to the same extent upon debts of the corporation created after he transferred his shares, unless he gave notice of the transfer, as prescribed in section 1496 of the code."

These were followed by four other headnotes, which need not be set forth.

Of the three members of the court, Mr. Justice Lumpkin and Gober, J., filed an explanatory opinion, in which, after giving the ninth section of the Brunswick Bank charter, and section 1496 of the Code of 1882, they stated:

"In the case of *Brobston & Co. et al.* v. *Downing*, and *Same* v. *The Chatham Bank*, 95 Georgia, 505, this court in effect decided that a stockholder in this bank was individually liable for his *pro rata* part of the debts of the corporation created before he became a stockholder, as well as for a like proportion of the indebtedness incurred by it while he held his stock. This decision controls the present cases. Upon a review of it, duly allowed, Chief Justice Simmons and Justice Lumpkin are of the opinion that it should be affirmed; and Judge Gober, being thus bound by it, of necessity concurs in the judgments now rendered. He is nevertheless of the opinion that in dealing with the cases reported in 95 Georgia, *supra*, the court, in so far as it held that a stockholder of this bank could be made liable for any debt created by it before he actually became a stockholder, misconstrued that portion of the bank's charter which is quoted above. If free to do so, he would hold that, under the language just referred to, the individual liability of a stockholder of this corporation is limited to such debts only as were contracted during the time he was an owner of stock and up to the date when, relatively to such liability, he legally severed his connection with the corporation. We all agree that any such owner, although he may have transferred his stock, would still be bound, under the above cited section of the code, for whatever liability the charter fixed upon him, unless he gave the notice provided for by that section.

"In 1894, an act was passed by the general assembly which materially modifies the law bearing upon this subject, in that it dispenses with any necessity for a stockholder, upon transferring his stock, to publish notice of the fact in order to be discharged from liability. That act declares that 'whenever a stockholder in any bank or other corporation is individually liable under the charter, and shall transfer his stock, he shall be exempt from such liability by such transfer, unless such bank or other corporation shall fail within six months from the date of such transfer.' Act of 1894, p. 76; Civil Code,

§ 1888.[1] In view of the radical change thus made in the law, the difference of opinion which exists between the majority and the minority of the court as constituted for the hearing of the cases now in hand is, apparently, of but little practical importance, save as affecting the result of the present litigation. If another case should arise the decision of which would depend upon the question as to which we disagree, the whole matter would still be open to review by a bench of six justices. Accordingly, we have agreed among ourselves to let the present decision stand upon the headnotes as announced, with the foregoing explanation of our reasons for not entering upon a discussion as to what should be the proper construction of the bank charter now under consideration."

As the reference was to the increase of the number of justices from three to six, which followed soon after, we think this explanation indicated that it was contemplated that "the whole matter would be open for review," before the new bench, if another case arose. The power to reëxamine would exist, and these remarks were evidently intended to suggest that in the circumstances it might be properly exercised. And this, although the point of disagreement was confined to the question whether liability attached in respect of indebtedness created

[1] Sections I, II and VI of the act of 1894 are as follows:

SEC. I. *Be it enacted by the General Assembly of the State of Georgia, etc.*, That from and after the passage of this Act, whenever a stockholder in any bank or other corporation is individually liable under the charter, and shall transfer his stock, he shall be exempt from such liability by such transfer, unless such bank or other corporation shall fail within six months from the date of such transfer.

SEC. II. *Be it further enacted*, That the stockholders in whose name the capital stock stands upon the books of such bank or other corporation at the date of its failure shall be primarily liable to respond upon such individual liability; but upon proof made that any of said shareholders at the date of the failure are insolvent, recourse may be had against the person or persons from whom such insolvent shareholder received his stock, if within a period of six months prior to the date of the failure of such bank or other corporation.

SEC. VI. *Be it further enacted*, That all laws and parts of laws in conflict with this law be, and the same are, hereby repealed.

before the particular stockholders sought to be charged became such.

We conclude, therefore, that the questions before us have not been so definitely determined by the state court as to entitle such determination to be adopted and applied in this case. And this conclusion is confirmed by other considerations. The foregoing decisions were rendered in 1894 and 1895, and the Baltimore Bank was not a party to the litigation and was never within the jurisdiction of the Georgia courts. The transaction with this bank occurred in 1890, and fully terminated October 20 of that year.

When it took the collateral shares in its own name, it seems to us that it had the right to assume that it ran no risk of incurring liability by virtue of the terms of the charter of the Brunswick Bank for indebtedness created after, in the ordinary course of business, it ceased to hold the stock, and that it could not reasonably have supposed that section 1496 of the code of Georgia was intended arbitrarily to make all, who might have held the stock of the Brunswick Bank from time to time, liable for every transaction during twenty years (the period of limitations), after they had ceased to be stockholders.

There had been no such ruling in respect of the statutory liability imposed by the charter of the Brunswick Bank on its stockholders, when the loan was made and paid, and the cases cited from the Georgia reports prior to 1894, all of which we have carefully examined, dealt with different provisions and involved different considerations.

The charter of the Brunswick Bank was granted in 1889, at which time section 1496 had been in force for many years, and its application could only extend to the liability imposed by the charter, namely, liability for indebtedness created while the relation of stockholder existed. The words "at the time the debt was created," must be held to have been providently inserted as words of limitation, and cannot be rejected, nor rendered inefficacious by the prior law, which only applied to the actual situation, and did not control it nor purport to do so.

The question is not whether all stockholders remained such if notice were not published, but whether the liability as stockholders, as to subsequent transactions, continued in spite of the termination of that relation, and that question is answered by the explicit terms of the ninth section of the charter.

Decree affirmed.

SPRECKELS SUGAR REFINING COMPANY *v.* McCLAIN.

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

No. 103. Argued December 3, 1903.—Decided February 23, 1904.

1. Subdivision 4, section 629, Rev. Stat., was not superseded by the Judiciary Act of 1887, 8, and under it a Circuit Court may take cognizance of a suit arising under an act providing for internal revenue without regard to the citizenship of the parties.
2. Where the constitutionality of an act of Congress is not drawn in question, a case involving simply the construction of the act is not embraced by the fifth section of the Judiciary Act of 1891.
3. A suit against a collector to recover sums paid under protest as taxes imposed by the War Revenue Act of 1898, 30 Stat. 448, is, within the meaning of the Judiciary Act of 1891, to be deemed one arising under both the Constitution and the laws of the United States, if relief be sought upon the ground that the taxing law is unconstitutional, and if constitutional that its provisions, properly construed, do not authorize the collection of the tax in question.
4. A case "arising . . . under the revenue laws" section 6, Judiciary Act of 1891, and involving the construction of a law providing for internal revenue, but which, from the outset, from the plaintiff's showing involves the application or construction of the Constitution, or in which is drawn in question the constitutionality of an act of Congress, may be carried by the plaintiff, as of right, the requisite amount being involved, from the Circuit Court of Appeals to this court for final determination.
5. The tax imposed by section 27 of the War Revenue Act of 1898, upon the gross annual receipts, in excess of $250,000 of any corporation or company carrying on or doing the business of refining sugar, is an excise, and not a direct tax to be apportioned among the States according to numbers. In estimating the gross annual receipts of the company for purposes of that tax, receipts derived from the use of wharves used by it in connection

with its business should be included, but the receipts by way of interest received on its bank deposits or dividends from stock held by it in other companies should be excluded.

THE plaintiff in error, who was the plaintiff below, is a sugar refining company, incorporated under the statutes of Pennsylvania for the purpose "of refining sugar, which will involve the buying of the raw material therefor, and selling the manufactured products, and of doing whatever else should be incidental to the said business of refining."

The defendant is the Collector of Internal Revenue for the First District of that Commonwealth.

The plaintiff seeks by two separate actions to recover certain sums, paid by it under protest to the defendant as Collector, and which it is alleged were unlawfully exacted by that officer under the twenty-seventh section of the act of June 13, 1898, entitled "An act to provide ways and means to meet war expenditures, and for other purposes;" by which act a tax was imposed upon the gross annual receipts, in excess of a named sum, of every person, firm, corporation or company carrying on or doing the business of refining sugar—the amount of the tax to be determined by the returns of business required by the statute. 30 Stat. 448, 464, c. 448.

By agreement of the parties, the issues in the two causes were consolidated and tried as one cause.

It is conceded that before bringing the actions the plaintiff did all that was required in order to maintain a suit against the Collector, and that the payments made by it to that officer were not voluntary.

The record contains a summary of the returns made by the plaintiff covering its entire gross receipts from June 14, 1898, to August 1, 1900, under these heads: Period covered by return; Indebtedness due before June 14, 1898; Amounts received from interest, rent and wharfage, and stevedoring; Sugar sold since June 14, 1898; Gross receipts; Amount of tax paid; and Dates of payment."

The plaintiff contended that for the purposes of the tax in

question certain things were included, as being part of its gross annual receipts arising from business, which could not properly have been so included, and that no tax could legally have been exacted on account of them. The Government insisted that no taxes had been exacted which the law did not require to be paid.

In its statement of demand the plaintiff alleges that no part of its receipts from other sources than the business of refining sugar was taxable under the provisions of the act; that no tax upon receipts was payable or collectible before the end of the year from the date of the passage of the act; that the administration of the act makes arbitrary, unjust and illegal discrimination, founded on a pretended difference between the business of manufacturing and of refining sugar, between the plaintiff and other persons, firms, corporations and companies carrying on and doing the business of refining sugar; and that all the provisions of the act subjecting the plaintiff to pay the tax in question were in violation of the Constitution of the United States and void.

That statement also shows that upon appeal to the Commissioner of Internal Revenue, it urged the following reasons why the sums it had paid should be refunded: That the act, so far as it assumed to subject corporations or companies carrying on or doing business of refining sugar to pay a special excise tax, was unconstitutional and void; that the tax was a direct tax, which had not been apportioned among the several States as required by the Constitution, was not uniform throughout the United States, and was invalid; that the plaintiff was and at all times had been engaged in the business of manufacturing and not in that of refining sugar; that it refines sugar only incidentally in the process of manufacture, and is, therefore, not liable for the payment of the tax; that by the provisions of the act the tax was payable annually at the end of each year and the collection thereof monthly or for periods less than a year and prior to the expiration of the year was illegal, unauthorized and void; and that the tax was assessed upon and

collected from gross receipts that included receipts outside of those coming from the business of refining sugar; that such gross receipts included receipts from sales of sugar made prior to the passage of the act, from interest on loans and indebtedness, from dividends upon stock owned by the plaintiff in other sugar refining companies, from wharfage collected by it upon wharves owned by it, and from receipts from other sources.

One of the contentions of the plaintiff was that apart from its constitutionality, the act of 1898, properly construed, did not embrace the claims here in dispute, and therefore did not authorize the defendant to demand and collect the taxes here in question.

The cause was determined in the Circuit Court upon an agreed special verdict of a jury. Some of the positions taken by the plaintiff were sustained while others were overruled. Judgment was rendered in favor of the plaintiff for $1056.82, the aggregate of the sums paid (with interest thereon) by way of tax upon receipts on business done before the passage of the act, and for stevedoring. 109 Fed. Rep. 76. The plaintiff prosecuted a writ of error to the Circuit Court of Appeals, which sustained the judgment, except in one particular, namely, in requiring the plaintiff to pay the tax in question otherwise than annually. 113 Fed. Rep. 244. And the case is here upon writ of error sued out by the plaintiff.

It may be stated that both courts below formally sustained the constitutionality of the act of 1898, remitting that question to this court for full consideration and determination.

Mr. John G. Johnson for plaintiff in error:

It is necessary that the constitutional question which has thus been practically relegated by the Circuit Court and by the Circuit Court of Appeals, to this court, for actual decision, shall be by it determined. In dealing with this question, it must consider the whole subject-matter of controversy. *Am. Sugar Ref'g Co.* v. *New Orleans*, 181 U. S. 277; *Huguley Mfg. Co.* v. *Galeton Mills*, 184 U. S. 290; *Carey Mfg. Co.* v. *Acme Co.*, 187

U. S. 427; *Robinson* v. *Caldwell*, 165 U. S. 359; *United States* v. *Am. Bell Tel. Co.*, 159 U. S. 548, 553.

Section 27 of the War Revenue Act of 1898 imposes no tax upon receipts by sugar refining companies from wharfage paid to them for the use of wharves belonging to them. It amounts to a direct tax on rentals. The wharves were used for business other than sugar refining. The business of building wharves for accommodation of vessels with power to demand wharfage therefor was distinct from the sugar business and plaintiff in error should not be obliged to pay a percentage on wharfage received by it when all other wharf owners were exempt.

If the act meant what the department said, it was unconstitutional, as imposing an "excise" duty upon one class of refineries, and exacting no such duty from another. The plaintiff was made to pay the tax, whilst its competitors, who refined sugar made from the juice of domestic beets and cane, were allowed to escape, thereby producing unjust and illegal discrimination between persons in similar circumstances material to their rights. *Yick Wo* v. *Hopkins*, 118 U. S. 356.

Section 27 imposes no tax upon receipts by sugar refining companies of interest paid to them upon their deposits in bank and of dividends from investments in shares and other securities. As to what an excise tax is, see Century Dictionary, and authorities cited; Bouvier, citing 1 Black. Com., 318; Story on the Const. § 950; Cooley on Taxation, 4, and see as to non-taxable elements of business, *People ex rel. &c.* v. *Roberts*, 154 N. Y. 1; *People* v. *Albany Ins. Co.*, 92 N. Y. 458; *Bailey* v. *R. R. Co.*, 106 U. S. 109. To tax such dividends would be double taxation. Cooley on Taxation (2d ed.), ch. VI, p. 225; *Merchant's Ins. Co.* v. *McCartney*, 1 Lowell, 447; *S. C.*, 17 Fed. Cas. 46.

Section 27 of the War Revenue Act is unconstitutional, because it imposes a direct tax not in accordance with constitutional requirements.

Congress may levy an excise tax upon business, in the shape of a license tax, or of a requirement of the payment of a desig-

nated amount, because of the privilege of doing business. As long as the tax is not imposed upon the *rem*, but is required to be paid as a condition, or in consideration, of a business or privilege, it is an excise tax. Congress, however, cannot label a direct tax an "excise tax," if the assessment is really upon the *rem*.

The tax under section 27 is a direct tax. *Pollock* v. *F. L. & Trust Co.*, 157 U. S. 429; *S. C.*, 158 U. S. 601, 629, 634. See also *Cook* v. *Pennsylvania*, 97 U. S. 566; *Pacific Ins. Co.* v. *Soule*, 7 Wall. 445; *Nicol* v. *Ames*, 173 U. S. 509.

Mr. Solicitor General Hoyt for defendant in error:

The court has no jurisdiction of this case, and the writ of error must be dismissed. If the Circuit Court of Appeals had jurisdiction, that court, having passed upon the entire case without certifying the constitutional question, and no petition for certiorari having been submitted, more than a year having elapsed, the case is not properly here. *Robinson* v. *Caldwell*, 165 U. S. 359. If the Circuit Court of Appeals did not have jurisdiction, the writ of error must nevertheless be dismissed. The jurisdiction of the Circuit Court rested solely on the ground that the suit arose under the Constitution or laws of the United States. As the constitutional question appeared on the face of the first pleading in the case, the appellate jurisdiction of this court, under section 5 of the Circuit Court of Appeals Act, was exclusive. *American Sugar Refining Co.* v. *New Orleans*, 181 U. S. 281; *Huguley Mfg. Co.* v. *Galeton Cotton Mills*, 184 U. S. 290. The writ of error having been sued out to review, not the judgment of the Circuit Court, but the judgment of the Circuit Court of Appeals, this court has no jurisdiction under section 5 of the Circuit Court of Appeals Act. There are no separate grounds of jurisdiction in this case because of a constitutional question and of a question arising under a revenue law; the case is one which clearly arose solely under the "Constitution or laws of the United States." The judgment of the Circuit Court of Appeals was not final, and for that reason not re-

viewable here. See *Keystone Iron Co.* v. *Martin*, 132 U. S. 91; *Bostwick* v. *Brinkerhoff*, 106 U. S. 3.

It is asserted that the tax is not justly laid upon the plaintiff because it manufactures rather than refines sugar. But under the facts plainly existing in the sugar trade and shown here, the manufacturing is only another name for refining, and the latter process is "incident" to manufacture only in the sense that the greater includes the less. As to the matter of interest, wharfage and rent, the property from which these items of income were derived was all part of the capital embarked in the business of sugar refining. The company's charter was given to enable it to refine sugar, and this purpose involves the purchase of raw material, the sale of manufactured products and the doing everything else incidental to the business. The reasoning of the courts below is conclusive on these points. The situation as to interest on deposits and dividends from investments is precisely the same.

The point about double taxation is untenable. Duplicate taxation is not open to legal objection when it is plainly intended or when it naturally and unavoidably results from the law. Cooley on Taxation, 222, 223; *The Delaware R. R. Tax*, 18 Wall. 206; *Sturges* v. *Carter*, 114 U. S. 511; *New Orleans* v. *Houston*, 119 U. S. 265; *Patton* v. *Brady*, 184 U. S. 608. The act contains nothing to avoid the effect of double taxation, and if it has really supervened, which is very doubtful, any such collateral result operating equally on all who are similarly placed is natural, is reasonably to be contemplated in such a law, is not unjust, and, as in many other tax laws, is unavoidable.

The tax is an excise and plainly indirect. The definitions and the opposing argument in *Patton* v. *Brady*, 184 U. S. 608, show that a tax upon manufacture or the process of manufacture is an excise and indirect. In considering the nature of the tax as an excise, it makes no difference how the manufacturing activities are measured in the imposition of the tax. This is a tax upon the process of production, and in the last

analysis is also a tax on consumption. In either aspect it is indirect. It is plain that the incidence shifts.

The question here is purely constitutional and legal and is eminently practical. The economic test should not rule. But even the economists would regard as indirect this particular variety of tax upon the gains of a calling, because it rests upon the energies of manufacture and not upon professional receipts or the gains of personal industry. It is evident from the opinion of the court in the *Income Tax Cases*, 157 U. S. 429, 579; 158 U. S. 601, 711, that notwithstanding the abstract economic doctrine, the court regards taxes on all business gains, professional earnings, salaries, etc., as excises and indirect taxes. Here we have a case which lies outside both the economic and the judicial classification of direct taxes.

The *Income Tax Cases* state the net result of all the decisions holding that certain taxes are direct taxes and therefore must be apportioned, and admit to that category, besides the poll tax specified by the Constitution, only taxes on land, on the income of land, on personal property in general, and on the income of personal property.

The authorities which may be invoked to support the argument that a tax on an incident or function of property is a direct tax upon the property itself simply show that the States cannot, directly or indirectly, burden the exercise by Congress of the powers committed to it by the Constitution, nor may Congress burden the agencies or instrumentalities employed by the States in the exercise of their powers. That doctrine does not in the least affect this case.

There can be no valid doubt of the right of Congress to select this subject for taxation; and there can be no doubt that in laying this excise Congress observed the rule of uniformity as held to mean a geographical uniformity.

The Government contentions may be summarized as follows: That under its charter and in fact, plaintiff is refining sugar, involving related purposes which the charter defines; that the tax on interest, wharfage and rent, which are natu-

rally and fairly incidental to the business of sugar refining, was justly laid; that the tax is distinctly an excise and indirect, and, so considered, it is uniform; that it cannot be viewed as direct under the decisions of this court or under any authorities, judicial or economic, (*a*) because it does not fall upon persons or property or incomes, except in the most remote and indirect sense; (*b*) because it falls upon a calling or occupation or the gains therefrom; (*c*) because it really operates upon the *operation* of an industry, the *exercise* of a right, the *use* of property, upon the business energies or activities; (*d*) because the incidence of the tax can be, and is, shifted and passed on, and, while immediately paid by the refiner, is ultimately paid by the consumer.

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

We are met at the threshold of this case with a question of jurisdiction raised by the Government, which contends that under the existing statutes the judgment of the Circuit Court of Appeals cannot be reviewed by this court, at the instance of the plaintiff, as of right.

By the fifth section of the Judiciary Act of March 3, 1891, appeals or writs of error may be taken from the District Courts or from the existing Circuit Courts direct to this court in certain specified cases, among which is "any case that involves the construction or application of the Constitution of the United States," and "any case in which the constitutionality of any law of the United States . . . is drawn in question." § 5.

By the sixth section of the same act it is provided that the Circuit Courts of Appeals "shall exercise appellate jurisdiction to review by appeal or by writ of error [the] final decision in the District Court and the existing Circuit Courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law, and the judgments or de-

crees of the Circuit Courts of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different States; also, in all cases arising under the patent laws, under the revenue laws, and under the criminal laws, and in admiralty cases, excepting that in every such subject within its appellate jurisdiction the Circuit Court of Appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision. And thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the Circuit Courts of Appeals in such case, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal.

"And excepting also that in any such case as is hereinbefore made final in the Circuit Court of Appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.

"In all cases not hereinbefore, in this section, made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs." 26 Stat. 826, c. 517.

This suit was cognizable by the Circuit Court under the Judiciary Act of 1887–8, as one arising under both the Constitution and the laws of the United States. 25 Stat. 433, c. 866. It arose under the Constitution, because the plaintiff's cause of action, as disclosed in its Statement of Demand, has its sanction in that instrument, if it be true, as alleged, that

the act of 1898, under which the defendant proceeded, when collecting the taxes in question, is repugnant to the Constitution. And it arose under the laws of the United States because it arose under a statute providing for internal revenue. By section 629, subdivision 4, of the Revised Statutes, the Circuit Courts, without regard to the citizenship of the parties, may take original cognizance of suits arising under a law of that character. That provision has not been superseded by the Judiciary Act of 1887–8. See also Rev. Stat. §§ 3220, 3226.

Was the judgment of the Circuit Court subject to review only by this court, or was it permissible for the plaintiff to take it to the Circuit Court of Appeals? If the case, as made by the plaintiff's Statement, had involved no other question than the constitutional validity of the act of 1898, or the construction or application of the Constitution of the United States, this court alone would have had jurisdiction to review the judgment of the Circuit Court. *Huguley Mfg. Co.* v. *Galeton Cotton Mills*, 184 U. S. 290, 295. But the case distinctly presented other questions which involved simply the construction of the act; and those questions were disposed of by the Circuit Court at the same time it determined the question of the constitutionality of the act. If the case had depended entirely on the *construction* of the act of Congress—its constitutionality not being drawn in question—it would not have been one of those described in the fifth section of the act of 1891, and, consequently, could not have come here directly from the Circuit Court. As, then, the case, made by the plaintiff, involved a question other than those relating to the constitutionality of the act and to the application and construction of the Constitution, the Circuit Court of Appeals had jurisdiction to review the judgment of the Circuit Court, although if the plaintiff had elected to bring it here directly, this court would have had jurisdiction to determine all the questions arising upon the record. The plaintiff was entitled to bring it here directly from the Circuit Court, or, at its election, to go to the Circuit Court of Appeals for a review of the whole case. Of course,

the plaintiff, having elected to go to the Circuit Court of Appeals for a review of the judgment, could not thereafter, if unsuccessful in that court upon the merits, prosecute a writ of error directly from the Circuit Court to this court. *Robinson* v. *Caldwell*, 165 U. S. 359; *Loeb* v. *Columbia Township Trustees*, 179 U. S. 472; *Ayers* v. *Polsdorfer*, 187 U. S. 585.

It remains to inquire whether the judgment of the Circuit Court of Appeals was so far final, within the meaning of the sixth section of the act of 1891, that it could not be reviewed here as of right upon writ of error. Can the judgment of that court in this case be reëxamined here in any way except upon writ of certiorari granted by this court? The Government insists that it cannot, because the case—to use the words of the sixth section of the act of 1891—is one "arising . . . under the revenue laws." So far as we now remember, this precise point has not heretofore arisen for our determination. Looking at the purpose and scope of the act of 1891, we are of opinion that the position of the Government on this point cannot be sustained. It rests upon an interpretation of the act that is too technical and narrow. The meaning of the words "arising . . . under the revenue laws," in the sixth section, is satisfied if they are held as embracing a case strictly arising under laws providing for internal revenues and which does not, by reason of any question in it, belong also to the class mentioned in the fifth section of that act. We do not think that the words quoted necessarily embrace a case carried to the Circuit Court of Appeals, which, although arising under the revenue laws, and involving a *construction* of those laws, depends for a full determination of the rights of the parties upon the construction or application of the Constitution, or upon the constitutionality of an act of Congress. We lean to that interpretation of the act which enables the defeated party in such a case in the Circuit Court of Appeals to have, as of right, upon writ of error to that court, a reëxamination here of the judgment (the requisite amount being involved) if the correctness of the judgment depends in whole or in part upon

the application or construction of the Constitution, or upon the constitutionality of any act of Congress drawn in question.

What we have said is in harmony with our former decisions, although the precise point here was not involved in any of them. In *American Sugar Company* v. *New Orleans*, 181 U. S. 277, 280, 281, it was said: "It was held in *Loeb* v. *Columbia Township Trustees*, 179 U. S. 472, where the jurisdiction of the Circuit Court rested on diverse citizenship, but the state statute involved was claimed in defence to be in contravention of the Constitution of the United States, that a writ of error could be taken directly from this court to revise the judgment of the Circuit Court, although it was also ruled that the plaintiff might have carried the case to the Circuit Court of Appeals, and that if a final judgment were rendered by that court against him, he could not thereafter have invoked the jurisdiction of this court directly on another writ of error to review the judgment of the Circuit Court. . . . If plaintiff, by proper pleading, places the jurisdiction of the Circuit Court on diverse citizenship, and *also on grounds independent of that*, a question expressly reserved in *Colorado Central Mining Company* v. *Turck*, 150 U. S. 138, and the case is taken to the Court of Appeals, propositions as to the latter grounds may be certified, or, if that course is not pursued and the case goes to judgment, (and the power to certify assumes the power to decide,) an appeal or writ of error would lie under the last clause of section six, because the jurisdiction would not depend solely on diverse citizenship. *Union Pacific Railway Company* v. *Harris*, 158 U. S. 326." In *Huguley Manufacturing Company* v. *Galeton Cotton Mills*, 184 U. S. 290, 295, it was said: "If after the jurisdiction of the Circuit Court attaches on the ground of diversity of citizenship, issues are raised, the decision of which brings the case within either of the classes set forth in section five, then the case may be brought directly to this court; although it may be carried to the Circuit Court of Appeals, in which event the final judgment of that court could not be brought here as of right. *Loeb* v. *Columbia Trustees*,

179 U. S. 472. If the jurisdiction of the Circuit Court rests solely on the ground that the suit arises under the Constitution, laws or treaties of the United States, then the jurisdiction of this court is exclusive, but if it is placed on diverse citizenship, and *also on grounds independent of that*, then if carried to the Court of Appeals, the decision of that court would not be made final, and appeal or writ of error would lie. *American Sugar Company* v. *New Orleans*, 181 U. S. 277. . . . The ground on which the jurisdiction of the Circuit Court was invoked was solely diversity of citizenship, and the record does not show anything to the contrary, so that the decree of the Circuit Court of Appeals cannot be regarded otherwise than as made final by the statute."

Now, as the judgment of the Circuit Court of Appeals may be brought to this court, as of right, where the jurisdiction of the Circuit Court rested upon the diversity of citizenship, and also upon grounds that would bring the case within section five of the act of 1891, it must be held that the judgment of the Circuit Court of Appeals is not final, within the meaning of the sixth section, in a case which, although arising under a law providing for internal revenue and involving the construction of that law, is yet a case also involving, from the outset, from the plaintiff's showing, the construction or application of the Constitution or the constitutionality of an act of Congress.

For the reasons stated we hold that the plaintiff was entitled, of right, to a writ of error for the review by this court of the judgment of the Circuit Court of Appeals.

Coming now to the merits of the case, we first notice the contention of the plaintiff that the twenty-seventh section of the act of 1898 imposes a direct tax in violation of the constitutional provision relating to the apportionment of taxes of that kind among the several States.

The above section of the act of 1898 is as follows: "Sec. 27. That every person, firm, corporation, or company carrying on or doing the business of refining petroleum, or refining sugar, or owning or controlling any pipe line for transporting oil or

other products, whose gross annual receipts exceed two hundred and fifty thousand dollars, shall be subject to pay annually a special excise tax equivalent to one-quarter of one per centum on the gross amount of all receipts of such persons, firms, corporations, and companies in their respective business in excess of said sum of two hundred and fifty thousand dollars.

"And a true and accurate return of the amount of gross receipts as aforesaid shall be made and rendered monthly by each of such associations, corporations, companies, or persons to the collector of the district in which any such association, corporation or company may be located, or in which such person has his place of business. Such return shall be verified under oath by the person making the same, or, in case of corporations, by the president or chief officer thereof. Any person or officer failing or refusing to make return as aforesaid, or who shall make a false or fraudulent return, shall be liable to a penalty of not less than one thousand dollars and not exceeding ten thousand dollars for each failure or refusal to make return as aforesaid and for each and every false or fraudulent return."

The contention of the Government is that the tax is not a direct tax, but only an excise imposed by Congress under its power to lay and collect excises which shall be uniform throughout the United States. Art. I, § 8. Clearly the tax is not imposed upon gross annual receipts as property, but only in respect of the carrying on or doing the business of refining sugar. It cannot be otherwise regarded because of the fact that the amount of the tax is measured by the amount of the gross annual receipts. The tax is defined in the act as "a special excise tax," and, therefore, it must be assumed, for what it is worth, that Congress had no purpose to exceed its powers under the Constitution, but only to exercise the authority granted to it of laying and collecting excises.

This general question has been considered in so many cases heretofore decided that we do not deem it necessary to consider it anew upon principle. It was held in *Pacific Insurance Co.* v. *Soule*, 7 Wall. 433, that the income tax imposed by the

internal revenue act of June 30, 1864, amended July 13, 1866, 13 Stat. 223, 14 Stat. 98, on the amounts insured, renewed and continued by insurance companies, on the gross amount of premiums received, on dividends, undistributed sums and income, was not a direct tax, but an excise duty or tax within the meaning of the Constitution; in *Veazie Bank* v. *Fenno*, 8 Wall. 533, that the statute then before the court, which required national banking associations, state banks or state banking associations to pay a tax of ten per centum on the amount of state bank notes paid out by them, after a named date, did not in the sense of the Constitution impose a direct tax, but was to be classed under the head of duties, which were to be sustained upon the principles announced in *Pacific Insurance Co.* v. *Soule*, above cited; in *Scholey* v. *Rew*, 23 Wall. 331, that the tax imposed on every devolution of title to real estate was not a direct tax but an impost or excise, and was, therefore, constitutional; in *Nicol* v. *Ames*, 173 U. S. 509, that the tax imposed (30 Stat. 448) upon each sale or agreement to sell any products or merchandise at an exchange, or board of trade, or other similar place, either for present or future delivery, was not in the constitutional sense a direct tax upon the business itself, but in effect "a duty or excise law upon the privilege, opportunity or facility offered at boards of trade or exchanges for the transaction of the business mentioned in the act," which was "separate and apart from the business itself;" in *Knowlton* v. *Moore*, 178 U. S. 41, 81, that an inheritance or succession tax was not a direct tax on property, as ordinarily understood, but an excise levied on the transmission or receipt of property occasioned by death; and, in *Patton* v. *Brady*, 184 U. S. 608, that the tax imposed by the act of June 13, 1898, upon tobacco, however prepared, manufactured and sold, for consumption or sale, was not a direct tax, but an excise tax which Congress could impose; that it was not "a tax upon property as such but upon certain kinds of property, having reference to their origin and intended use."

In view of these and other decided cases, we cannot hold that

the tax imposed on the plaintiff expressly with reference to its "carrying on or doing the business of . . . refining sugar," and which was to be measured by its gross annual receipts in excess of a named sum, is other than is described in the act of Congress, a special excise tax, and not a direct one to be apportioned among the States according to their respective numbers. This conclusion is inevitable from the judgments in prior cases, in which the court has dealt with the distinctions, often very difficult to be expressed in words, between taxes that are direct and those which are to be regarded simply as excises. The grounds upon which those judgments were rested need not be restated or reëxamined. It would subserve no useful purpose to do so. It must suffice now to say that they clearly negative the idea that the tax here involved is a direct one, to be apportioned among the States according to numbers.

It is said that if regard be had to the decision in the *Income Tax Cases*, a different conclusion from that just stated must be reached. On the contrary, the precise question here was not intended to be decided in those cases. For, in the opinion on the rehearing of the *Income Tax Cases* the Chief Justice said: "We have considered the act only in respect of the tax on income derived from real estate, and from invested personal property, and have not commented on so much of it as bears on gains or profits from business, privileges or employments, in view of the instances in which taxation on business, privileges or employments has assumed the guise of an excise tax and been sustained as such." 158 U. S. 601.

The question of the constitutionality of the act having been disposed of, we turn our attention to the questions involving its construction merely.

As already stated, the judgment of the Circuit Court determined certain questions for the plaintiff. But as the Government did not prosecute a writ of error to the Circuit Court of Appeals those questions cannot be examined here, and we can only consider such points, on the merits of the case, as are raised by the plaintiff's assignments of error.

It was in proof that the plaintiff owned three wharves on the Delaware River, at which vessels landed, and for the use of which those vessels paid wharfage according to the rates prescribed by a general tariff. A large part, nearly all, of the sugar refined by the plaintiff was brought into the port of Philadelphia by vessels which came to those wharves, and such vessels paid wharfage according to that tariff. Many vessels brought raw sugar which the Refining Company had purchased abroad. The wharves were built by the plaintiff for the purpose of transacting any business that it might have or for which it saw fit to use them. And nearly all the business done at that time at the wharves was the unloading of sugar consigned to the plaintiff. The exceptions were too few to be regarded as material. Upon its receipts from such wharfage, the plaintiff had been compelled to pay a tax. Was it required by the act to pay a tax upon receipts of profits from that source? In other words, were the receipts from wharfage properly included in plaintiff's gross annual receipts upon which the amount of the prescribed tax was to be computed?

On this question the Circuit Court said: "Scarcely any vessels lie at those wharves except the vessels that bring raw sugar to the plaintiff, and the wharves are used for the convenience and greater profit of the corporate enterprise. The money paid by the vessels for wharfage is, I think, a receipt for the business." The view of the Circuit Court of Appeals was thus expressed: "The use which the plaintiff really made of its wharves was in 'carrying on or doing the business of . . . refining sugar.' They were part of the plant of that business, and, as it was actually conducted, they were an essential condition of it. Consequently their receipts were its receipts, and as such they were properly comprised in the assessment. *Adams Express Company* v. *Ohio State Auditor*, 165 U. S. 194."

This question is not wholly free from difficulty. But we think the better reason is with the ruling in the Circuit Court and in the Circuit Court of Appeals, to the effect that the

wharves, in every substantial sense, constituted a part of the plaintiff's "plant" and, if not absolutely necessary, were of great value, in the prosecution of its business; and that receipts derived by plaintiff from the use of the wharves by vessels—particularly because, with rare exceptions, the vessels using them brought to the plaintiff the raw sugar which it refined—were receipts in its business of refining sugar. The primary use of the wharves was in connection with and in the prosecution of that business. The importation of raw sugar from abroad was not, in any proper sense, a separate business, but an essential part of the plaintiff's general business of refining sugar. The wharves were part of the instrumentalities and conveniences employed by plaintiff for the successful management and conduct of its business of refining sugar. Without the wharves the gross amount of receipts and profits from such business would probably have been less than they were in fact. If the receipts from the use of the wharves were reasonably to be deemed receipts in the plaintiff's business of refining sugar, as we think they were, then they were properly treated as a part of its gross annual receipts, upon which, in excess of the sum of $250,000, the tax in question was rightly imposed.

The remaining assignment of error relates to the including in the plaintiff's gross annual receipts of interest paid to it upon deposits in bank and dividends received by it upon shares of stock in other companies. Upon this point Judge McPherson, holding the Circuit Court, said: "This interest, I think, was properly included by the Collector in determining the annual value of the business. It was corporate property, presumably used for corporation purposes, and was as much engaged in the business of refining as the capital invested in machinery or raw materials." Judge Dallas, with whom concurred Judge Acheson, delivering the judgment of the Circuit Court of Appeals, said: "The interest received by the plaintiff upon its corporate funds, either deposited in bank or invested in income producing securities, was also rightly included. The special

verdict states that it was 'interest upon its investments of moneys and property as explained by the testimony of Mr. Ball,' and it appears from that testimony that the only business of the plaintiff was sugar refining, and that this interest was received by it upon investments or deposits of such part of the capital of that business as at the time being was not in active use therein. Mr. Ball, it is true, also testified that it did not have anything to do with sugar refining, but the question for our decision is, not whether this interest was derived from the refining of sugar, which of course it was not, but whether or not it was received in the *business* of sugar refining, and upon this very different question the facts found are conclusive. The funds of the corporation, however any portion of them may have been temporarily applied or held, were all embarked in the sugar refining business, and to it, therefore, all receipts which those funds produced necessarily belonged. Any diminution of them would certainly have been its loss, and it seems to be equally clear that their augmentation, however occasioned, must have been its gain. Except in connection with and as incidental to that business, the plaintiff was neither an investor nor a depositor, and therefore, by becoming either the one or the other, it did not engage in an additional and separate business." Judge Gray, dissenting, said: "Keeping in mind the well settled rule, that the citizen is exempt from taxation, unless the same is imposed by clear and unequivocal language, and that where the construction of a tax is doubtful, the doubt is to be resolved in favor of those upon whom the tax is sought to be laid, I cannot assent to the affirmance of the judgment of the court below in this respect. I do not think that the income derived from such investment of funds is in any proper sense a receipt in the business of sugar refining. The very term 'gross receipts' in 'the business,' would seem to exclude all such receipts as the interest upon investments here referred to."

We are of opinion that upon the point last stated there was error. The gross annual receipts, upon which, in excess of a

certain amount, the tax was imposed, were, under the statute, only receipts in the business of refining sugar, not receipts from independent sources. But, clearly, neither interest paid to the plaintiff on its deposits in bank, nor dividends received by it from investments in the stocks of other companies, were receipts in the business of refining sugar. The moneys deposited by the plaintiff in bank were, we assume, on this record, the profits it had earned in the business in which it was engaged. Profits did not necessarily remain in the business; and whether they would be divided among stockholders or be used in the further prosecution of the business was for the plaintiff to determine. They could have been used for purposes wholly distinct from the business of refining sugar. We are of opinion that the receipts by the plaintiff of interest on its bank deposits had no necessary relation to the business of refining sugar, but rested wholly upon some agreement or understanding between the bank and the depositor, which had no direct connection with that business. And the same thing may be said of plaintiff's investment of its moneys in the stocks of other companies. In the absence of any showing to the contrary, it must be assumed that the declaration or the receipt of dividends on such stocks was wholly apart from the particular business in which the holder of the stock was engaged.

We hold that in the matter of interest received by the plaintiff on deposits in bank, as well as in the matter of dividends received by it on stocks in other companies, the judgments of both the Circuit Court and the Circuit Court of Appeals were erroneous.

The judgment of each court is reversed and the cause is remanded for such further proceedings as may be necessary for the correction of the errors hereinbefore specified, and as may be in conformity with this opinion.

It is so ordered.

THE CHIEF JUSTICE: Mr. Justice BROWN and myself are of opinion that the judgment of the Circuit Court of Appeals in

this case was made final in that court by the Judiciary Act of March 3, 1891, and that, therefore, the writ of error should be dismissed.

CORNELL *v.* COYNE.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 113. Argued January 18, 19, 1904.—Decided February 23, 1904.

The prohibition in the Constitution against taxes or duties on exports attaches to exports as such and does not relieve articles manufactured for export from the prior ordinary burdens of taxation which rest upon all property similarly situated.

In construing a statute the title is referred to only in cases of doubt and ambiguity; and where doubt exists as to the meaning of a statute in regard to a privilege claimed from the government thereunder it should be resolved in favor of the government.

The fact that a quantity of "filled cheese" was manufactured expressly for export does not exempt it from the tax imposed by the act of June 6, 1896, 29 Stat. 253, and the reference in that act to the provisions of existing laws governing the engraving, issue, etc., of stamps relating to tobacco and snuff, and making them applicable to stamps used for taxes on filled cheese as far as possible, does not relate to stamps issued without cost for tobacco and snuff manufactured for export.

On June 6, 1896, Congress passed an act, 29 Stat. 253, entitled "An act defining cheese, and also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of 'filled cheese.'" Section 2 defines "filled cheese." Section 3 directs that "manufacturers of filled cheese shall pay four hundred dollars for each and every factory per annum." Section 6 provides for the stamping and branding of the wooden packages in which manufacturers are required to pack filled cheese, and that "all sales or consignments made by manufacturers of filled cheese to wholesale dealers in filled cheese

or to exporters of filled cheese shall be in original stamped packages." Section 9 and 11 are as follows:

"SEC. 9. That upon all filled cheese which shall be manufactured there shall be assessed and collected a tax of one cent per pound, to be paid by the manufacturer thereof; and any fractional part of a pound in a package shall be taxed as a pound. The tax levied by this section shall be represented by coupon stamps; and the provisions of existing laws governing the engraving, issue, sale, accountability, effacement and destruction of stamps relating to tobacco and snuff, as far as applicable, are hereby made to apply to stamps provided for by this section."

"SEC. 11. That all filled cheese as herein defined imported from foreign countries shall, in addition to any import duty imposed on the same, pay an internal revenue tax of eight cents per pound, such tax to be represented by coupon stamps; and such imported filled cheese and the packages containing the same shall be stamped, marked and branded, as in the case of filled cheese manufactured in the United States."

Plaintiffs in error were manufacturers of filled cheese, entered into contracts for its manufacture and export, and under such contracts manufactured and exported 1,580,479 pounds of filled cheese. They were required by the defendant in error, as collector, to purchase and affix stamps to the exported packages of filled cheese. They protested against such required purchase, and applied to the Commissioner of Internal Revenue, as authorized by section 3226, Rev. Stat., for a return of the various sums so paid, but their application was rejected. Thereupon they commenced this action in the Circuit Court of the United States for the Northern District of Illinois. In the declaration they alleged "that the requirements of the said defendant, whereby the plaintiffs were compelled in the manner aforesaid, to purchase and use the said revenue stamps, were wholly unauthorized and unwarranted by law; and that section 9, of the act of Congress aforesaid, and said act itself in that the same failed to contain provisions whereby filled cheese

manufactured for export trade and exported and sold in foreign markets wholly without the United States, might be exported and sold free from the levy of any duty or tax thereon; or provision whereby the same might be freed from the force and effect of said act, are repugnant to said section 9, article I, of the Constitution of the United States, and that this suit, therefore, involves the construction or application of the Constitution of the United States."

A demurrer to the declaration was sustained. They elected to stand by the declaration. Judgment was entered in favor of the defendant, and thereupon this writ of error was sued out.

Mr. William E. Mason and *Mr. Charles W. Greenfield,* with whom *Mr. Lewis F. Mason* and *Mr. Charles E. Kremer* were on the brief, for plaintiffs in error:

The levy and collection of the tax was unwarranted by law. It was forbidden by the Constitution, which provides that no tax or duty shall be laid on articles exported from any State. Art. I, Const., is devoted to the legislative branch of the government; § 8 enumerates the powers of Congress; § 9 the limitations and restrictions thereon; par. 5, § 9, provides that "no tax or duty shall be laid on articles exported from any State." "Exported" is a perfect participle, and this clause should be construed to mean that no tax or duty shall be laid on any articles which are exported from any State. Century Dictionary, verb "export" and word "participle."

Provisions of the Constitution must receive a reasonable interpretation. Story on Const. § 419. And such reasonable interpretation should be given as well to limitations upon the power of Congress as to grants of power. *Fairbank* v. *United States,* 181 U. S. 283.

The same word should not necessarily be construed in the same sense wherever it occurs in the same instrument. Story on Const. § 454. This provision was to prevent discrimination by Congress between the States, and prohibits any taxation by

Congress upon articles which are "exported." *Pace* v. *Burgess*, 92 U. S. 372; *Fairbank* v. *United States*, 181 U. S. 283; Story on Const. § 1014.

Cases involving the question of interstate commerce such as *Coe* v. *Errol*, 116 U. S. 517, and kindred cases, have no application. There is a distinction between the terms "tax" and "duty" as used in this clause. The latter is a charge fixed by reason of exportation or importation, while the former applies to any charge which may be laid upon persons or property for the support of the government. Story on Const. § 952; *Pacific Ins. Co.* v. *Soule*, 7 Wall. 433; *Hylton* v. *United States*, 3 Dall. 171; *Savings & Loan Assn.* v. *Topeka*, 21 Wall. 655; *Dooley* v. *United States*, 183 U. S. 151.

It is a fair conclusion from the facts set up in the declaration that the intended export of the filled cheese therein mentioned was the immediate cause of the levy and collection of the tax involved in this case.

This provision of the Constitution is self-executing. *Groves* v. *Slaughter*, 15 Pet. 449; *Davis* v. *Burke*, 179 U. S. 399; *Dill* v. *Ellicott*, 7 Fed. Cas. 691; *Ill. Cent. Ry. Co.* v. *Ihlenberg*, 75 Fed. Rep. 873; *Law* v. *People*, 87 Illinois, 385, 392; *Wash. Home* v. *City*, 157 Illinois, 414, 426; *Fuller* v. *Chicago*, 89 Illinois, 282, approved by this court in *Buchanan* v. *Litchfield*, 102 U. S. 278. The same principle was upheld in *Board of Lake Co. Comrs.* v. *Rollins*, 103 U. S. 662; *Dixon County* v. *Field*, 111 U. S. 83; *Doon Township* v. *Cummins*, 142 U. S. 370.

This provision of the Constitution and the act of June 6, 1896, like statutes *in pari materia* must be construed together, and taken together they constitute the law governing the powers and duties of the revenue officers of the government. Cooley on Const. Lim. p. 3; Story on Const. § 374; *Cooper Mfg. Co.* v. *Ferguson*, 113 U. S. 727; *Billingsley* v. *State*, 14 Maryland, 369, 376.

Statutes *in pari materia* are construed together. *United States* v. *Freeman*, 3 How. 556, 564; *Doe ex dem. Patterson* v. *Winn*, 11 Wheat. 380, 386; *Atkins* v. *Fiber, etc. Co.*, 18 Wall.

301; *Ryan* v. *Carter*, 93 U. S. 84; *The Sloop Elizabeth*, 1 Paine C. C. R. 11; *S. C.*, 8 Fed. Cas. 468; Potter's Dwarris on Statutes, p. 189 and note; Smith's Commentaries, Statutory and Constitutional Construction, p. 751.

Revenue laws are liberally construed, *Cliquot* v. *United States*, 3 Wall. 114; *Smythe* v. *Fiske*, 23 Wall. 374, against as well as in favor of the government. *United States* v. *Stowell*, 133 U. S. 1.

Courts, in construing a statute, will restrain its operation within narrower limits than its words import if satisfied that the liberal meaning of its language would extend to cases which a legislature never designed to include in it. *Lessee of Brewer* v. *Blougher*, 14 Pet. 178, 198; *Oates* v. *National Bank*, 100 U. S. 239, 244; *United States* v. *Am. Bell Tel. Co.*, 159 U. S. 548; *McKee* v. *United States*, 164 U. S. 287; *Woolridge* v. *McKenny*, 8 Fed. Rep. 650, 659.

Where there are two acts or provisions, one special and particular, the other general, if the general standing alone would include the same matter and thus conflict with the special, the special provision must be taken as an exception. *Rodgers* v. *United States*, 185 U. S. 83; *Crane* v. *Reeder*, 22 Michigan, 322, 334; *Ex parte Crow Dog*, 109 U. S. 556, 570; Black on Interpretation of Laws, 116; Sedgwick on Const. of Stat. and Const. Law, 98.

A law requiring two repugnant and incompatible things is incapable of receiving a literal construction, and must sustain some change of language to be rendered intelligible in order to arrive at the intention of the legislature. *Huidekoper's Lessee* v. *Douglass*, 3 Cranch, 1, 66.

Additional words of qualification may be added to a general provision. *Rodgers* v. *United States*, 185 U. S. 83.

Courts avoid constructions which make a law unconstitutional. *United States* v. *Coombs*, 12 Pet. 72; *United States* v. *Cent. Pac. Ry. Co.*, 118 U. S. 241; *Hooper* v. *People*, 155 U. S. 657; *Grenada Co.* v. *Brown*, 112 U. S. 261; *Parsons* v. *Bedford*, 3 Pet. 433, 449.

Courts also avoid a construction which makes a law ridiculous or absurd. *Holy Trinity Church, etc.* v. *United States,* 143 U. S. 457; *United States* v. *Hogg,* 112 Fed. Rep. 909; 50 C. C. A. 608.

The court, in construing a doubtful statute, will consider the title of the act. *United States* v. *Fisher,* 2 Cranch, 358, 387; *United States* v. *Palmer,* 3 Wheat. 610, 631; *Smythe* v. *Fiske,* 23 Wall. 374; *Holy Trinity Church* v. *United States,* 143 U. S. 457; *Hadden* v. *Collector,* 5 Wall. 107; *United States* v. *Trans. Mo., etc., Assn.,* 166 U. S. 290; *Price* v. *Forrest,* 173 U. S. 410; *Coosaw Mining Co.* v. *State of South Carolina,* 144 U. S. 550. Also the act as a whole, including all its provisions. *United States* v. *Fisher,* 2 Cranch, 358, 386; *United States* v. *Stowell,* 133 U. S. 1.

It was the duty of the Commissioner of Internal Revenue to make regulations whereby filled cheese could be exported without payment of the tax. Section 18, Act of June 6, 1896, provides that the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall make all needful regulations for the carrying into effect the provisions of the said act. 29 Stat. 253; 2 U. S. Comp. Stat. 2236.

The regulation of the commissioner requiring a manufacturer to affix the proper tax-paid stamp on the withdrawal of a package was unauthorized. The commissioner or Secretary of the Treasury cannot make regulations which will defeat the law. *Campbell* v. *United States,* 107 U. S. 410; *United States* v. *100 Barrels of Whiskey,* 95 U. S. 571; *Morrill* v. *Jones,* 106 U. S. 467.

If the collector, under the strict letter of the act of June 6, 1896, was required to levy and collect the tax in question, then said act is unconstitutional. *Pace* v. *Burgess,* 92 U. S. 372; *Fairbank* v. *United States,* 181 U. S. 283; *Dooley* v. *United States,* 183 U. S. 151; *Marbury* v. *Madeson,* 1 Cranch, 178.

The construction placed by Congress upon this clause of the Constitution, by inserting in all prior and subsequent internal revenue acts a provision for exportation without payment of

the tax, should have great weight in determining the constitutionality of the act. *Stuart* v. *Laird*, 1 Cranch, 299; *Barrow-Giles Lith. Co.* v. *Sarony*, 111 U. S. 53; *The Laura*, 114 U. S. 411; *United States* v. *Filbrick*, 120 U. S. 52, 59; *United States* v. *Hill*, 120 U. S. 169, 182; *Robertson* v. *Downing*, 127 U. S. 607, 613; *Schell* v. *Fauche*, 138 U. S. 562, 572.

Mr. Assistant Attorney General McReynolds for defendant in error:

It was not the purpose of the act of June 6, 1896, to exempt from the tax imposed thereby, filled cheese exported from any State, and § 3385, Rev. Stat., providing for free stamps for tobacco and snuff to be exported has no applicability to the engraving, issue, etc., of stamps. It cannot be construed to apply to revenue stamps designated by the act of 1896, and especially cannot exempt from tax the very article which, without exception, said act subjects thereto.

The title and preamble of an act are no part of it and cannot enlarge or confer powers or control the words of the same unless they are doubtful or ambiguous. *Yazoo & Miss. Val. R. R. Co.* v. *Thomas*, 132 U. S. 174, 188; *Price* v. *Forrest*, 173 U. S. 410, 427.

There is no doubt or ambiguity about the imposition of a tax upon all filled cheese manufactured in the United States by the act in question, and although its title may indicate a purpose to regulate exportation of filled cheese, there is, in fact, nothing in its body attempting to carry out any such purpose. The principles laid down by this court in *Turpin* v. *Burgess*, 117 U. S. 504, are decisive of the present controversy. And see earlier opinions by Mr. Justice Bradley in *Pace* v. *Burgess*, 92 U. S. 372; *Brown* v. *Houston*, 114 U. S. 622; *Coe* v. *Errol*, 116 U. S. 517; also Miller's Lectures on Const. 593, citing these cases. Early revenue laws taxed manufactured articles, although intended for export. March 3, 1791, 1 Stat. 199, c. 15, §§ 15, 51; December 21, 1814, 3 Stat. 152, c. 15.

Mere intention or contract to export goods does not con-

stitute them articles of commerce and make laying a tax upon them contrary to the provisions of the Federal Constitution.

For definitions of "export," see Webster's Inter. Dictionary; *United States* v. *Steamboat Forrester*, Fed. Cas. No. 15,132; *Muller* v. *Baldwin*, L. R. 9 Q. B. 457, 1874. For proceedings in constitutional convention on this provision of the Constitution, see Elliot's Debates, vol. 5, 432, 433, 454, 455, 487; see also as to state legislation prior to 1787, Mercer's Abridgement, Public Acts, Virginia, in force 1758; 32 Car. II, c. 2; Laws of Virginia, 3 Henning's Stat. at L. 356, ch. XXIX; 2 Stat. South Carolina, 1682, 1716, 64; Bacon's Laws of Maryland, 1704, ch. 27.

Chief Justice Marshall said: "The States are forbidden to lay a duty on exports, and the United States are forbidden to lay a tax or duty on articles exported from any State. There is some diversity in language, but none is perceivable in the act which is prohibited."

The terms "exports" and "articles exported," in construing constitutional provisions, have been constantly used by this court as interchangeable and as meaning the same thing. It is now well settled that the words "imports" and "exports," when they appear in the Constitution, apply only to articles brought from, or sent to, foreign countries, and are used solely in reference to foreign commerce. *Brown* v. *Maryland*, 12 Wheat. 419, 444; *Woodruff* v. *Parham*, 8 Wall. 131; *License Cases*, 5 Wall. 462, 471; *Coe* v. *Errol*, 116 U. S. 517; *Dooley* v. *United States*, 183 U. S. 154; *Fairbank* v. *United States*, 181 U. S. 283; Story on Constitution, § 1014.

This court has decided that the uniformity of excises contemplated by the Constitution refers to a geographical uniformity and that the purpose was that such exactions should operate generally throughout the United States, that is, to be laid to the same amount on the same articles in each State. *Knowlton* v. *Moore*, 178 U. S. 41, 96, 106.

Nothing produced in any State can become an article of interstate commerce until committed to a common carrier

for transportation out of the State, or until it has started on its ultimate passage to another State. The same rule—except as to destination only—must determine the moment when an article of foreign commerce becomes such. *Gibbons* v. *Ogden*, 9 Wheat. 1, 202; *Turner* v. *Maryland*, 107 U. S. 38, 50.

The fact that an article is manufactured for export does not make it an article of commerce. There is a clear distinction between manufacture and commerce. *Kidd* v. *Pearson*, 128 U. S. 1, 20; *County of Mobile* v. *Kimball*, 102 U. S. 691, 702; *United States* v. *E. C. Knight Co.*, 156 U. S. 1.

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

The contention is that inasmuch as this filled cheese was manufactured under contract for export, and was in fact exported, the tax of one cent per pound prescribed by section 9 was prohibited by the fifth paragraph of section 9, article I, of the Constitution, which reads: "No tax or duty shall be laid on articles exported from any State."

But this means that no burden shall be placed on exportation, and does not require that any bounty be given therefor. Congress has power to encourage exportation by remitting taxes on goods manufactured at home as it has power to encourage manufactures by duties on imports, yet the Constitution does not compel it to do either the one or the other. This power of encouraging is illustrated by section 11 of this act, which requires all imported filled cheese to pay, in addition to import duties, an internal revenue tax of eight cents a pound—eight times as much as that manufactured at home. To remit on articles exported the tax which is cast upon other like articles consumed at home, while perhaps not technically a bounty on exportation, has some of the elements thereof. By this act all filled cheese is subject to a manufacturing tax of one cent a pound. To remit that tax in favor of filled cheese exported may encourage the manufacturer to seek a foreign rather than

a home market, but if the full tax on all filled cheese manufactured is required for the support of the government the remission of part necessitates revenue from some other source. Doubtless the remission is given in hope of widening the market and increasing the production, but that is only a possibility of the future, while the loss in the revenue is a fact of the present. Subjecting filled cheese manufactured for the purpose of export to the same tax as all other filled cheese is casting no tax or duty on articles exported, but is only a tax or duty on the manufacturing of articles in order to prepare them for export. While that which is asked in this case is the return of a manufacturing tax there is nothing in the constitutional provision to distinguish between manufacturing and other taxes, and if the plaintiff's contention be sustained as to a manufacturing tax it would follow that the government was bound to refund all prior taxes imposed on articles exported. A farmer may raise cattle with the purpose of exportation, and in fact export them. Can it be that he is entitled to a return of all property taxes which have been cast upon those cattle? The true construction of the constitutional provision is that no burden by way of tax or duty can be cast upon the exportation of articles, and does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated. The exemption attaches to the export and not to the article before its exportation. Such has been the ruling of this court. In *Turpin* v. *Burgess*, 117 U. S. 504, 506, where the question was as to an export stamp tax on tobacco, Mr. Justice Bradley, speaking for the court, said:

"The constitutional prohibition against taxing exports is substantially the same when directed to the United States as when directed to a State. In the one case the words are, 'No tax or duty shall be laid on articles exported from any State.' Art. I, sec. 9, par. 5. In the other they are, 'No State shall, without the consent of Congress, lay any imposts or duties on imports or exports.' Art. I, sec. 10, par. 2. The prohibition

in both cases has reference to the imposition of duties on goods by reason or because of their exportation or intended exportation, or whilst they are being exported. That would be laying a tax or duty on exports, or on articles exported, within the meaning of the Constitution. But a general tax, laid on all property alike, and not levied on goods in course of exportation, nor because of their intended exportation, is not within the constitutional prohibition."

See also *Brown* v. *Houston*, 114 U. S. 622; *Coe* v. *Errol*, 116 U. S. 517.

Justice Miller, in his lectures on the Constitution (p. 592) says:

"The Congress of the United States, during the late civil war, imposed a tax upon cotton and tobacco, which tax was not limited to those products when in the process of transportation, but was assessed on all the cotton and tobacco in the country. It was argued that because the larger part of these products was exported out of the country and sold to foreign nations, and because their production was limited to a particular part of the country, the tax was forbidden by the corresponding clause of the Constitution prohibiting Congress from levying a tax on exports. Although the question came at that time to the Supreme Court of the United States, it was not then decided, because of a division of opinion in that court. The recent cases, however, of *Coe* v. *Errol*, 116 U. S. 517, and *Turpin* v. *Burgess*, 117 U. S. 504, seem to decide that the objection was not valid, and hold that only such property as is in the actual process of exportation, and which has begun its voyage or its preparation for the voyage, can be said to be an export."

Some light is thrown on this question by the cases of *Kidd* v. *Pearson*, 128 U. S. 1, and *United States* v. *E. C. Knight Company*, 156 U. S. 1. In the former a manufacturer of intoxicating liquors in Iowa claimed to be beyond the reach of the prohibitory law of the State on the ground that he manufactured only for exportation, and therefore as Congress had

exclusive control over interstate commerce it had like control over the manufacture for interstate commerce. But this court, in an elaborate opinion by Mr. Justice Lamar, unanimously held against the contention, and decided that commerce did not commence until manufacture was finished, and that therefore the State was not prevented from exercising exclusive control over the manufacture. In the latter case the question was whether a monopoly of the business of manufacturing sugar within a State was a restraint of interstate commerce, and therefore within the purview of the act of Congress to protect trade and commerce against unlawful restraints and monopolies, 26 Stat. 209, and it was held that it did not, Chief Justice Fuller announcing the opinion of the court, saying (pp. 12 and 13):

"Commerce succeeds to manufacture, and is not a part of it. . . . The fact that an article is manufactured for export to another State does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the State and belongs to commerce."

There is nothing in the case of *Fairbank* v. *United States*, 181 U. S. 283, inconsistent with these views. There the question was as to the validity of a stamp tax on a foreign bill of lading, and it was held that it was a tax directly on the exportation. As said in the opinion with reference to the constitutional provision (p. 292): "The purpose of the restriction is that exportation, all exportation, shall be free from national burden." It is unnecessary to refer to the earlier legislation of Congress which, as shown by counsel for the government in his brief, has been in harmony with this construction. From what we have said it is clear that there is no constitutional objection to the imposition of the same manufacturing tax on filled cheese manufactured for export and, in fact, exported, as upon other filled cheese.

Although the only charge in the declaration and the only matter complained of in the assignments of error is the uncon-

stitutionality of the act, and especially of section 9 thereof, in failing to contain provisions for the exportation of filled cheese free from the levy of any tax or duty, counsel have in this court made a further contention that if the act be constitutional, it is because, properly construed, it does provide for exportation free from tax or duty. The argument is that the title of the act names as one of its purposes to regulate "exportation;" that while in the act there is no express provision for exportation, section 9, in reciting that "the provisions of existing laws governing the engraving, issue, sale, accountability, effacement and destruction of stamps relating to tobacco and snuff, as far as applicable, are hereby made to apply to stamps provided for by this section," is to be construed as incorporating all provisions respecting stamps "relating to tobacco and snuff," including those for stamps on exports, which are issued free of charge.

Assuming, without deciding, that we may rightfully reverse the judgment of the Circuit Court for a failure to consider a question which was not presented, and that we may treat the declaration as amended so as to present this question, we are of opinion that the contention as to the construction of the act cannot be sustained. The title of an act is referred to only in cases of doubt or ambiguity.

"The title is no part of an act and cannot enlarge or confer powers, or control the words of the act unless they are doubtful or ambiguous. *United States* v. *Fisher*, 2 Cranch, 358, 386; *Yazoo & Mississippi Railroad* v. *Thomas*, 132 U. S. 174, 188. The ambiguity must be in the context and not in the title to render the latter of any avail." *United States* v. *Oregon &c. Railroad*, 164 U. S. 526, 541. See also *Price* v. *Forrest*, 173 U. S. 410, 427, and cases cited.

There is no doubt or ambiguity in the act. Section 9 explicitly declares "that upon all filled cheese which shall be manufactured there shall be assessed and collected a tax of one cent per pound, to be paid by the manufacturer thereof." And while the section contains a reference to existing laws

governing the engraving, issue, etc., of stamps relating to tobacco and snuff, that clause is a part of the sentence which provides that the tax levied by this section shall be represented by coupon stamps, and the existing laws governing the engraving, issue, etc., of stamps are in terms "hereby made to apply to stamps provided for by this section" as far as applicable. In other words, the provisions of existing laws concerning the engraving, issue, etc., of stamps are made applicable only to stamps representing taxes. There is neither directly nor indirectly any reference to stamps issued without cost to cover an exportation free from tax or duty. While in section 3 there is special reference by number to various sections of the Revised Statutes concerning special taxes, and they are made to extend so far as applicable to the taxes authorized by this act, there is nowhere any mention of section 3385, Rev. Stat., which provides for relieving exported manufactured tobacco and snuff from the manufacturing tax. Further, in section 6 it is directed that all sales to exporters of filled cheese shall be in original stamped packages, and this direction is in the same sentence with that providing for sales to wholesale dealers. Clearly there is nothing in the body of the act exempting exported filled cheese from the ordinary manufacturing tax on other filled cheese. But if there were a doubt as to the meaning of the statute that doubt should be resolved in favor of the government. Whoever claims a privilege from the government should point to a statute which clearly indicates the purpose to grant the privilege.

"But if there be any doubt as to the proper construction of this statute, (and we think there is none,) then that construction must be adopted which is most advantageous to the interests of the government. The statute being a grant of a privilege, must be construed most strongly in favor of the grantor. *Gildart* v. *Gladstone*, 12 East, 668, 675; *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 544; *Dubuque & Pacific Railroad* v. *Litchfield*, 23 How. 66; *The Binghamton Bridge*, 3 Wall. 51, 75; *Rice* v. *Railroad Co.*, 1 Black, 358, 380; *Leaven-*

worth, Lawrence & Galveston Railroad v. *United States*, 92 U. S. 733; *Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659." *Hannibal &c. Railroad Co.* v. *Packet Co.*, 125 U. S. 260, 271.

Why Congress should grant an exemption from manufacturing tax in the case of exported tobacco and not in the case of exported filled cheese, is not for us to determine. Doubtless the reasons which prompted such difference were satisfactory. It is enough that no exemption has been made in favor of the latter.

The judgment of the Circuit Court was right, and it is

Affirmed.

MR. JUSTICE BROWN did not hear the argument and took no part in the decision of this case.

MR. JUSTICE HARLAN, with whom MR. CHIEF JUSTICE FULLER concurred, dissenting.

As this case went off upon demurrer by the Government to the declaration its material allegations must be taken as true. The case cannot properly be dealt with upon any other basis.

The declaration shows that the plaintiffs in error, who were plaintiffs below, were engaged in the business of manufacturing what is known in commercial circles as filled cheese; and that in execution of certain contracts made with foreign customers the plaintiffs manufactured large quantities of filled cheese, and shipped it by instalments, directly from their factory in Illinois to Liverpool and London. It alleged that "each quantity or instalment of filled cheese manufactured, exported and delivered by the plaintiffs under said contracts was forwarded by the plaintiffs *as soon as the same was ready for shipment from their factory* in said district, and *prior to the shipment thereof* the plaintiffs applied to the defendant as such collector for permission to ship and forward the same without purchasing, and attaching to said filled cheese or to the said packages containing the said filled cheese the revenue stamps required by an alleged

act of Congress, approved June 6, A. D. 1896, with reference to internal revenue; but notwithstanding the fact that such filled cheese was *manufactured for export*, and was *about to be delivered by the plaintiffs for export and shipment to a foreign market* . . . the defendant did at various times during said period, and on the dates of shipment of said filled cheese, by force, duress, exact," etc.

Upon the occasion of each of the shipments the internal revenue collector exacted and collected (against the protest of the plaintiffs) a tax upon the cheese of one cent per pound, the collector insisting that such a tax was imposed by the act of Congress of June 6, 1896, entitled "An act defining cheese, and also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of 'filled cheese.'" 29 Stat. 253, c. 337.

The first question to be considered is whether Congress intended by that act to impose a tax of one cent per pound upon filled cheese manufactured for exportation, and which, it is admitted, was in fact exported immediately after being so manufactured. Such is the case before the court for consideration.

The ninth section of the act of 1896, under which the collection proceeded, provides that "upon all filled cheese which shall be manufactured there shall be assessed and collected a tax of one cent per pound, to be paid by the manufacturer thereof; and any fractional part of a pound in a package shall be taxed as a pound. The tax levied by this section shall be represented by coupon stamps; and the provisions of existing laws governing the engraving, *issue*, *sale*, accountability, effacement and destruction of stamps relating to tobacco and snuff, as far as applicable, are hereby made to apply to stamps provided for by this section." § 9.

Observe that the section refers to "existing laws" relating, among other things, to the *issue* and *sale* of stamps for tobacco and snuff. That reference, I submit, embraced section 3385 of the Revised Statutes, Title, Internal Revenue, which provides

"Manufactured tobacco, snuff, and cigars *intended for immediate exportation,* may, after being properly inspected, marked, and branded, be removed from the manufactory in bond *without having affixed thereto the stamps indicating the payment of the tax thereon.* The removal of such tobacco, snuff, and cigars from the manufactory shall be made under such regulations, and after making such entries and executing and filing, with the collector of the district from which the removal is to be made, such bonds and bills of lading, and giving such other additional security as may be prescribed by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury. There shall be affixed to each package of tobacco, snuff, and cigars *intended for immediate export,* before it is removed from the manufactory, *an engraved stamp, indicative of such intention.* Such stamp shall be provided and furnished to the several collectors as in the case of other stamps, and be charged to them and accounted for in the same manner; and for the expense attending the providing and affixing thereof, ten cents for each package so stamped shall be paid to the collector on making the entry for such transportation. When the manufacturer has made the proper entries, filed the bonds, and otherwise complied with all the requirements of the law and regulations as herein provided, the collector shall issue to him a permit for the removal, accurately describing the tobacco, snuff, and cigars to be shipped, the number and kind of packages, the number of pounds, the amount of tax, the marks and brands, the State and collection-district from which the same are shipped, the number of the manufactory and the manufacturer's name, *the port* from which the said tobacco, snuff, and cigars are *to be exported,* the route or routes over which the same are to be sent to the port of shipment, and the name of the vessel or line by which they are to be conveyed *to the foreign port.* The bonds required to be given for the *exportation* of the tobacco, snuff, and cigars shall be canceled upon the presentation of the proper certificates that said tobacco, snuff, and cigars have been landed *at any port without*

the jurisdiction of the United States, or upon satisfactory proof that after shipment the same were lost at sea."

It requires no argument to prove that, under that section, manufactured tobacco and snuff "intended for immediate exportation" could be exported without payment of any tax and without having affixed thereto any stamp other than "an engraved stamp indicative of such intention." The effect of the reference in the last clause of the ninth section of the act of 1896, to "existing laws governing the engraving, *issue, sale,* accountability, effacement and destruction of stamps relating to tobacco and snuff" was, I think, to incorporate into that act section 3385 of the Revised Statutes, so far as it could be made applicable to filled cheese, and to allow filled cheese *intended for immediate exportation* to be removed from the manufactory without payment of any tax, having affixed to it no other stamp than one engraved *and indicating the intention to export.* In that view, which seems to me incontestable, the purpose of Congress was to put manufactured filled cheese, intended for immediate exportation, upon the same footing as manufactured tobacco and snuff intended for immediate exportation and to permit its exportation without payment of any tax. Certainly section 3385 was one of the existing laws at the date of the passage of the act of 1896, and if applied to that act the result, I submit, must be as just stated. This question is within such narrow compass that it cannot be elucidated by extended discussion; and if the bare reading of the above statutes, all together, does not bring the mind to the conclusion indicated by me, argument to that end would be unavailing.

So I leave that question and come to the proposition that if the act of 1896 is to be construed as imposing a tax upon the plaintiffs' cheese, when about to be exported, then it is in conflict with the Constitution.

The eighth section of Article II of the Constitution enumerates certain powers which Congress may exercise, while the ninth section specifies certain things that Congress may not

do. The express words of that instrument are that "no tax or duty shall be laid on articles exported from any State." Manifestly, so far as any prohibitory action by Congress is concerned, the object of that provision was to open the markets of the world to the products and manufactures of the several States, freed from any tax or burden whatever imposed by the United States. This court said in *Fairbank* v. *United States*, 181 U. S. 283, 292, that the "purpose of the restriction [on the power of Congress] is that exportation, *all* exportation, shall be free from national burden."

I do not contend that the owner of an article about to be exported could rightfully ship it to a foreign country, without paying such tax as had legally *attached* in favor of the Government *prior to the date on which the owner formed the purpose to export.* An existing property tax upon manufactured articles which had become a part of the general mass of property and was held in the possession of the owner for purposes of sale or use in this country, could not be defeated by reason of the fact that the owner—*subsequent to manufacture, and after a substantial interval of time*—formed the intention to export it. But that is not this case, although the court seems to treat it as if it were one of that kind. The Government admitted by its demurrer to the declaration that the filled cheese in question was manufactured for exportation; that upon the completion of the manufacture the plaintiff as soon as it was ready for shipment from their factory set about to export it; and that it was ready to be delivered for such exportation, when the collector took the position that before it could be removed from his district and exported, the tax of one cent per pound, imposed by the ninth section of the act of 1896 "upon all filled cheese which shall be manufactured," must be paid. It is, in effect, admitted of record that the plaintiffs never had any other purpose than to export the cheese, as soon as manufactured, in fulfilment of contracts previously made with foreign customers, and that they promptly prepared it for exportation. There was no appreciable interval of time between

the commencement of manufacture, and the preparation for exportation, when it could be reasonably said that the cheese had become a part of the general mass of property in the locality of its manufacture for purposes of sale, delivery, or consumption in this country. So that the question arises whether it is consistent with the constitutional injunction, "no tax or duty shall be laid on articles exported from any State," that, *at the instant* when an article admittedly manufactured for exportation is being prepared in good faith for exportation, not for sale or consumption here, a national tax be laid on such article *as property*. If that question be answered in the affirmative, then the purpose of the constitutional restriction, that "all exportation shall be free from national burden," may be defeated; for if, in such circumstances as are disclosed in this case, Congress can impose a tax of one cent per pound on filled cheese, manufactured and intended for immediate exportation, and about to be exported, it can impose such taxes on articles manufactured in this country and intended for immediate exportation as will make it impossible for manufacturers to secure, or will deter them from attempting to secure, contracts with foreign consumers or buyers. The result would be that Congress, in time of peace, and by means of taxation, could bring about a condition of utter occlusion between the manufacturers of this country and the markets of other countries. Indeed, the several States could bring about that result by taxation; for if an article manufactured for exportation and which was prepared for exportation as soon as manufacture was completed, is not an *export* from the moment such preparation was begun, then a State may impose a tax upon it as *property* and compel the payment thereof before the article is removed from its limits for exportation. I do not think that the framers of the Constitution contemplated such a condition as possible.

In support of the views expressed in it the opinion reproduces the following observations by Mr. Justice Miller in one of his lectures on Constitutional Law p. (592): "The Congress

of the United States, during the late civil war, imposed a tax upon cotton and tobacco, which tax was not limited to those products when in the process of transportation, but was assessed on all the cotton and tobacco in the country. It was argued that because the larger part of these products was exported out of the country and sold to foreign nations, and because their production was limited to a particular part of the country, the tax was forbidden by the corresponding clause of the Constitution prohibiting Congress from levying a tax on exports. Although the question came at that time to the Supreme Court of the United States, it was not then decided, because of a division of opinion in that court. The recent cases, however, of *Coe* v. *Errol*, 116 U. S. 517, and *Turpin* v. *Burgess*, 117 U. S. 504, seem to decide that the objection was not valid, and hold that only such property as is in the actual process of exportation, and which has begun its voyage or *its preparation for the voyage*, can be said to be an export."

I submit that these observations do not justify the conclusion announced by the court; for, the eminent jurist who made them says that property is to be deemed an export from the time it is in the actual process of exportation and "its preparation for the voyage" has begun. That is, in substance, the precise principle for which I am contending. Whilst the cheese was in the process of being manufactured, it was not of course a subject of taxation under the statute. It became manufactured filled cheese only when manufacture was completed. But, as soon as it was manufactured and prepared for shipment, and when it was about to be started on its journey to Europe, the collector exacted from the plaintiffs the property tax imposed by the act of 1896. In my judgment, within the meaning of the Constitution, and in every just sense, the cheese was in the actual process of exportation, and became an export from the moment when, *immediately after* the completion of manufacture, without loss of time, the plaintiffs, in good faith, prepared it for shipment in fulfillment of their contracts with foreign customers. In the *Fairbank* case the court held that

a mere stamp tax on a bill of lading taken at the time articles were shipped from a State to a foreign country was a tax on the articles themselves as exports, and was forbidden by the constitutional provision that no tax or duty shall be laid on articles exported from any State. It is now held that a tax on articles admittedly manufactured only for exportation and not for sale or consumption in this country, and which are exported as soon as they can be made ready for shipment, after the completion of manufacture, in execution of contracts entered into prior to the commencement of manufacture, is a tax on the articles themselves *as property* and not on them as exports. In short, the effect of the present decision is to say that, if Congress so wills, articles manufactured in this country, although manufactured only for exportation, and not for sale or consumption here, cannot be exported to other countries, except subject to such tax as Congress may choose to impose on the manufactured articles as property. Thus, despite the express prohibition of all taxes or duties upon articles exported from the States, Congress is recognized as having the same power over exports from the several States as it has exercised over imports from foreign countries. I do not think it has such power.

The views I have expressed are not in conflict with the judgment in *Turpin* v. *Burgess*, 117 U. S. 504, cited in the opinion of the court. That was not a case of a property tax upon a manufactured article intended for exportation, but a mere stamp tax imposed by the internal revenue law upon manufactured tobacco, and placed upon the tobacco in order to indicate the purpose to export it. The only issue was as to the validity of the statute imposing that stamp tax. There was nothing to show any purpose to export the goods immediately upon the completion of manufacture. The goods remained in the factory, and the court said that they "might never be exported," and "whether they would be or not would depend altogether on the will of the manufacturer." There was no showing of preparation for exportation as soon as such

preparation could begin after manufacture. In the present case, as we have seen, it is admitted that the filled cheese was manufactured for exportation and was being prepared, immediately after manufacture, for exportation. The tax here was, in effect, collected while the cheese was being made ready for exportation, and therefore, to use the words of *Turpin* v. *Burgess*, whilst it "was being exported."

For the reasons stated, I am constrained to dissent from the opinion and judgment of the court.

I am authorized to say that the CHIEF JUSTICE concurs in this opinion.

NORTHERN PACIFIC RAILWAY COMPANY *v.* ADAMS.

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

No. 143. Argued January 25, 26, 1904.—Decided February 23, 1904.

When a railroad company gives gratuitously, and a passenger accepts, a pass, the former waives its rights as a common carrier to exact compensation; and, if the pass contains a condition to that effect, the latter assumes the risks of ordinary negligence of the company's employés; the arrangement is one which the parties may make and no public policy is violated thereby. And if the passenger is injured or killed while riding on such a pass gratuitously given, which he has accepted with knowledge of the conditions therein, the company is not liable therefor either to him or to his heirs, in the absence of wilful or wanton negligence.

A railroad company is not under two measures of liability—one to the passenger and the other to his heirs. The latter claim under him and can recover only in case he could have recovered had he been injured only and not killed.

A statute of Idaho reads as follows:

"When the death of a person, not being a minor, is caused

by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death; or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just." Revised Statutes of Idaho, § 4100.

Jay H. Adams resided in Spokane, Washington. He was a lawyer and the attorney of several railway companies, though not in the employ of petitioner. He was a frequent traveler on petitioner's and other railways. On November 13, 1898, he with a friend started on one of petitioner's trains from Hope, Idaho, to Spokane. The train consisted of an engine and eight cars, those behind the express car being in the following order: smoking car, day coach, tourist sleeper, dining car, Pullman sleeper. All were vestibuled except the tourist sleeper immediately in front of the dining car. It had open platforms, as an ordinary passenger coach. Shortly after leaving Hope, Mr. Adams, then in the smoking car, went back to the dining car for cigars. To reach the dining car he passed through the day coach and the tourist sleeper. After buying cigars he left the dining car and went forward. This was the last seen of him alive. His body was found the next day opposite a curve in the railroad track about six miles west of Hope. There was no direct testimony as to how he got off the train, whether by an accidental stumble, or by being thrown therefrom through the lurching of the train which was going at a high rate of speed. The road from Hope to the place where the body was found is in Idaho. He was riding on a free pass, containing these provisions:

"CONDITIONS.

"This free ticket is not transferable, and, if presented by another person than the individual named thereon, or if any alteration, addition or erasure is made upon it, it is forfeited, and the conductor will take it up and collect full fare.

"The person accepting this free ticket agrees that the Northern Pacific Railway Company shall not be liable, under any circumstances, whether of negligence of agents or otherwise, for any injury to the person, or for any loss or damage to the property, of the passenger using the same.

"I accept the above conditions.

"JAY H. ADAMS.

"This pass will not be honored unless signed in ink by the person for whom issued."

This action was brought by the plaintiffs, the widow and son of the deceased, in the Circuit Court of the United States for the District of Washington. Verdict and judgment were in their favor for $14,000, which were sustained by the Court of Appeals for the Ninth Circuit, 54 C. C. A. 196; 116 Fed. Rep. 324, and thereupon the case was brought here on a writ of certiorari. 187 U. S. 643.

Mr. Charles W. Bunn for petitioner:

The verdict as to negligence rests on the most flimsy foundation, and the want of vestibules on the platforms of the tourist sleeping car was improperly submitted to the jury as a ground of liability. *Sansom* v. *Southern Railway*, 50 C. C. A. 53. There was no sufficient evidence that the real cause of death was either the lurching of the train or the want of a vestibule.

The jury were told they should *presume* Mr. Adams was crossing the platform with due care; and they were also allowed to *presume* that a lurch of the train threw him off. The verdict therefore rests not only on *presumption*, but on *two* presumptions, which in point of fact are not consistent with each other. *Reidhead* v. *Skagit County*, 73 Pac. Rep. 118; Wills on Circumstantial Evidence, 274; *Asbach* v. *Railway Co.*, 74 Iowa, 250; *Carruthers* v. *Railway Co.*, 55 Kansas, 600; *Wheelan* v. *Railway Co.*, 85 Iowa, 167; *Ruppest* v. *Railroad Co.*, 154 N. Y. 90.

The jury must not be left to mere conjecture, and a bare possibility that the damage was caused in consequence of the

negligence and unskillfulness of the defendant, is not sufficient. *Searles* v. *Railway Co.*, 101 N. Y. 661, affirmed in *Grant* v. *Railway Co.*, 133 N. Y. 659.

Where the evidence is equally consistent with either view—the existence or non-existence of negligence—it is not competent for the judge to leave the matter to the jury. The party who affirms negligence has failed to establish it. This is a rule which never ought to be lost sight of. *Cotton* v. *Wood*, 8 C. B. (N. S.) 568; Thompson on Negligence, § 364; *Baulec* v. *Railroad Co.*, 59 N. Y. 356; *Hayes* v. *Railway Co.*, 97 N. Y. 259; *Railroad Co.* v. *Schertle*, 97 Pa. St. 450; *Wieland* v. *D. & H. Canal Co.*, 167 N. Y. 19; *Wiwirowski* v. *Railway Co.*, 124 N. Y. 420; *Cordell* v. *Railway Co.*, 75 N. Y. 330; *Tyndale* v. *Railroad Co.*, 156 Massachusetts, 503.

Conjecture cannot be allowed to supersede proof, and a jury will not be permitted to conjecture how an accident occurred. *Borden* v. *Railroad Co.*, 131 N. Y. 671; *Railroad Co.* v. *State*, 73 Maryland, 74; *Quincy, etc.*, v. *Kitts*, 42 Michigan, 34; *Steffen* v. *Railway Co.*, 46 Wisconsin, 259; *Sorenson, Admr.*, v. *Paper Co.*, 56 Wisconsin, 338; *Manning* v. *Railway Co.*, 105 Michigan, 260; *Finkelston* v. *Railway Co.*, 94 Wisconsin, 270; *Ellison* v. *Receiver, &c.*, 49 Minnesota, 240; *Orth* v. *Railroad Co.*, 47 Minnesota, 384; *Hewitt* v. *Railroad Co.*, 67 Michigan, 61.

Deceased was riding on a pass issued as a gratuity and not for a valuable consideration.

The contract on the pass was valid by the laws of Washington, where it was entered into. *Muldoon* v. *Seattle City Ry. Co.*, 7 Washington, 528; *S. C.*, 10 Washington, 311.

In the Federal courts, however, the question is one of general law. *Liverpool &c. Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 442; *Lake Shore Ry.* v. *Prentice*, 147 U. S. 101; *Hartford Ins. Co.* v. *Railway Co.*, 175 U. S. 91.

Defendants in error can only recover in case deceased could have recovered damages in an action for injuries in case death had not ensued. *Munro* v. *Dredging Co.*, 84 California, 515,

527; *Klepsch* v. *Donald*, 4 Washington, 436, 444; *The Stella*, L. R. Pro. Div. 1900, 161.

Contributory negligence has been held a good defence even under statutes like the one in question not containing the express condition of Lord Campbell's act. *Quinn* v. *N. Y., N. H. & H. R. R. Co.*, 56 Connecticut, 44; *Lane, Adm'r*, v. *Cent. Iowa R. R. Co.*, 69 Iowa, 443; cases cited in note to § 66, Tiffany on Death by Wrongful Act. *Munro* v. *Dredging Co.*, 84 California, 515; *Chesapeake & Ohio R. R.* v. *Dixon*, 179 U. S. 131, are not in point.

As to the statement that a man cannot barter away his own life or freedom, it is a glittering generality. See *Balt. & Ohio R. R. Co.* v. *Voigt*, 176 U. S. 498.

The great weight of authority sustains the proposition that one who accepts a purely gratuitous pass can bind himself by contract to relieve the carrier from liability for personal injury. *Duncan* v. *Maine Central R. R. Co.*, 113 Fed. Rep. 508, 514; *Quimby* v. *Boston & Maine Railroad*, 150 Massachusetts, 365; *Griswold* v. *New York, etc., Railroad*, 53 Connecticut, 371; *Muldoon* v. *Seattle City Ry., supra; Gulf, Colorado & Santa Fé Ry.* v. *McGown*, 65 Texas, 640; *Rogers* v. *Kennebec, etc., Co.*, 86 Maine, 261; *Kinney* v. *Central R. R. Co.*, 34 N. J. L. 513, and the recent case of *Payne* v. *Terre Haute & Indianapolis Ry. Co.*, 157 Indiana, 616; *Roering and Wife* v. *Chesapeake Beach Ry. Co.*, Court of Appeals, District of Columbia, upon the present calendar of this court. See also article 57, Central Law Journal, p. 83.

Mr. Reese H. Voorhees, with whom *Mr. C. S. Voorhees* was on the brief, for defendants in error:

The contract on the back of the transportation alleged to have been used by the deceased at the time of his death, which purports to release the petitioner from all liability for injury to the person of the deceased, caused by the negligence of the petitioner, is void as against the plaintiffs, because they were not parties to such contract, and over *their* right of action

for loss to *them*, deceased could exercise no control, because the contract does not exempt the carrier from liability for death, and because the contract is void as against public policy.

Plaintiffs have an independent right of action for the losses to them occasioned by petitioner's negligence, which right of action the deceased could neither enjoy nor in any wise control.

The negligence of the petitioner, and the death of deceased occurred in Idaho. See Rev. Stat. Idaho, § 4100. As to right to maintain action under similar statute, see § 4828, Ballinger's Ann. Code and Stat. Washington.

These two statutes are for the exclusive benefit of the heirs, and are not for the benefit of the estate of the deceased. *Munro* v. *Dredging, etc., Co.*, 84 California, 515; *Noble* v. *Seattle*, 19 Washington, 133.

Lord Campbell's act, and the many acts inspired by it create and grant to other persons than the deceased or his estate, an independent right to recover for the losses sustained by such other persons through the negligence of a party causing death, such right of action being separate and distinct from any right of action which the deceased had, or could have enjoyed had he survived. *Blake* v. *Midland Ry. Co.*, 18 Q. B. 93; *S. C.*, 10 Eng. L. & Eq. 443; *Reed* v. *Great Nor. Ry. Co.*, L. R. 3 Q. B. 555; *Leggott* v. *Great Nor. R. Co.*, L. R. 1 Q. B. 599; *Robinson* v. *Can. Pac. R. Co.*, H. L. 1892; *Brown* v. *Chicago & N. W. R. Co.*, 44 L. R. A. (Wis.) 579; *Ches. & Ohio R. Co.* v. *Dixon*, 179 U. S. 131; *Martin* v. *Baltimore & Ohio Railroad*, 151 U. S. 673; *Hurlbert* v. *Topeka*, 34 Fed. Rep. 510; *The Oregon*, 73 Fed. Rep. 846; *Pym* v. *Railroad Co.*, 4 Best & S. 396; *Mo. Pac. Ry. Co.* v. *Bennett's Estate*, 47 Pac. Rep. 183; *Perkins* v. *N. Y. Central R. R. Co.*, 24 N. Y. 200; *Lincoln* v. *S. & S. Railroad Co.*, 23 Wend. 425; *Whitford* v. *P. M. R. R. Co.*, 23 N. Y. 467; *Adams* v. *Nor. Pac. Ry. Co.*, 95 Fed. Rep. 938; *Davis* v. *St. Louis, I. M. & S. Ry. Co.* (Ark.), 7 L. R. A. 283; *Jeffersonville Ry. Co.* v. *Swain*, 26 Indiana, 484; *Littlewood* v. *Mayor, etc.*, 89 N. Y. 27; *Western & A. R. Co.* v. *Bass*, 104 Georgia, 392; *S. C.*, 30 S. E. Rep. 874; *Vicksburg & M. R. Co.* v. *Phillips*, 64

Mississippi, 693; *S. C.*, 2 So. Rep. 537; *Hurst* v. *Detroit City Ry. Co.*, 84 Michigan, 539; *S. C.*, 48 N. W. Rep. 44; *Needham* v. *Grand Trunk Ry. Co.*, 38 Vermont, 294; *Bowes* v. *Boston*, 155 Massachusetts, 344; *S. C.*, 15 L. R. A. 365; *Commonwealth* v. *Met. R. R. Co.*, 107 Massachusetts, 236; *Donahue* v. *Drexler*, 82 Kentucky, 157; 56 Am. Rep. 886; *Fink* v. *Garman*, 40 Pa. St. 95; *The Onoko* (C. C. A.), 107 Fed. Rep. 984; *Roche* v. *Imperial Mining Co.*, 7 Fed. Rep. 703; *Re Mayo*, 54 L. R. A. 665; *Louisville &c. R. R. Co.* v. *Clarke*, 152 U. S. 240. As to effect of releases by the deceased, see *Sheriock* v. *Alling*, 44 Indiana, 197; *Hecht* v. *O. & M. Ry. Co.*, 32 N. E. Rep. (Ind.) 302; *Price* v. *Richmond & D. R. Co.*, 33 So. Car. 556; *S. C.*, 12 S. E. Rep. 413; *Hill* v. *Penna. R. R. Co.*, 178 Pennsylvania, 223; *S. C.*, 35 L. R. A. 196; *Lubrano* v. *Atlantic Mills*, 34 L. R. A. 797; Tiffany Death by Wrongful Act, 300, 329; *Doyle* v. *Fitchburg*, 162 Massachusetts, 66; *S. C.*, 25 L. R. A. 157; *Southern Bell Tel. &c. Co.* v. *Cassin*, 111 Georgia, 577; *S. C.*, 50 L .R. A. 694; *L. & N. Co.* v. *McIlwain*, 98 Kentucky, 700, distinguished, and see *Western & A. R. Co.* v. *Bass*, 104 Georgia, 392, and *Leg* v. *Britton*, 64 Vermont, 652; *Davis* v. *St. Louis, I. M. &c. Ry. Co.*, 7 L. R. A. (Ark.) 283.

There is a radical difference between injuries to the person and death. See cases cited *supra*, especially *Hurlbert* v. *City of Topeka*, 34 Fed. Rep. 510; *Missouri P. Ry. Co.* v. *Bennett's Est.*, 47 Pac. Rep. 183; *Needham* v. *Grand Trunk Ry. Co.*, 38 Vermont, 292; *Bowes* v. *Boston*, 155 Massachusetts, 344; *S. C.*, 15 L. R. A. 157.

The contract must be strictly construed and the exemption from liability for injuries cannot be extended to liability for killing. *Hinkle* v. *Southern Ry. Co.* (N. C.), 78 Am. St. Rep. 685; *Compania De Navigacion La Flecha* v. *Brauer*, 168 U. S. 119; *Clark* v. *Geer*, 86 Fed. Rep. 448.

Where two constructions are possible one of which leads to essentially evil results and the other is more consonant with reason and justice, the latter will be adopted. *Coughlan* v. *Stetson*, 19 Fed. Rep. 727; *Woodward* v. *Payne*, 16 California,

445; *Noonan* v. *Bradley*, 9 Wall. 394; *N. J. Steam Nav. Co.* v. *Merchants Bank*, 6 How. 383; *Mich. Cent. R. R. Co.* v. *Min. Springs Mfg. Co.*, 16 Wall. 318.

Even if the ticket showed that he was carried free, nevertheless the deceased was a passenger and entitled to the same degree of care as other passengers and as if he had paid his fare. *Phila. & P. R. R. Co.* v. *Derby*, 14 How. 485; *Steamship New World* v. *King*, 16 How. 469; *Waterbury* v. *N. Y. C. & H. R. R. Co.*, 17 Fed. Rep. 67.

The contract of exemption is void as against public policy. *Muldoon* v. *Seattle & City Ry. Co.*, 7 Washington, 528; *S. C.*, 10 Washington, 311, distinguished, as being brought by the party himself and not by his heirs.

The liability of a carrier of passengers for negligence is not a question of local or state law but is one of general law, upon which the Federal courts will reach a conclusion, independent of the ruling of any state court or courts. *New York Cent. Ry. Co.* v. *Lockwood*, 17 Wall. 357; *Balt. & Ohio R. Co.* v. *Baugh*, 149 U. S. 370; *Chicago M. & St. P. Ry. Co.* v. *Solan*, 169 U. S. 136; Chase's Blackstone (2d ed.), 72; *Ill. Cent. R. R. Co.* v. *Hammer*, 72 Illinois, 350; dissenting opinion in *Wells* v. *N. Y. Cent. R. R. Co.*, 24 N. Y. 194. One cannot bind himself by relinquishing the safeguards with which the law surrounds his life. *Cancemi* v. *The People*, 18 N. Y. 129.

A man may not barter away his life or his freedom or his substantial rights. *Home Insurance Co.* v. *Morse*, 20 Wall. 445; *Doyle* v. *Continental Ins. Co.*, 94 U. S. 535; *Warnock* v. *Davis*, 104 U. S. 775. The State protected its interest in human life by making suicide felony at common law. Negligent killing was manslaughter at common law and indictable. Chase's Blackstone's Com. (2d ed.), 937, 940; 1 East P. C. p. 262, § 38; Story on Bailments, § 601*a*.

The obligation on a common carrier for the safety of the passengers does not grow out of contract; the State, the law, and public policy, impose it as a general rule. *Phila. & Reading R. R. Co.* v. *Derby*, 14 How. 485; *The Steamboat New World* v.

King, 16 How. 469; *Cleveland, P. & A. R. R. Co.* v. *Curran*, 19 Ohio St. 1; *S. C.*, 2 Am. Rep. 365; *The E. B. Ward*, 16 Fed. Rep. 261; *Chicago, M. & St. P. R. R. Co.* v. *Solan*, 169 U. S. 135; *Inman* v. *So. Car. R. R. Co.*, 129 U. S. 139; *The Kensington*, 183 U. S. 268; *Oscanyan* v. *Arms Co.*, 103 U. S. 261; Ray on Contractual Limitations, 2.

The exact question at issue here that a contract, made with a person carried free, exempting the carrier from liability for injury caused by the carrier's negligence, was void as against public policy has been raised in *Vette* v. *Harmon*, 102 Fed. Rep. 17; *Jacobus* v. *St. Paul & Chi. Ry. Co.*, 20 Minnesota, 125; *S. C.*, 18 Am. Rep. 360; *Railroad Co.* v. *Hopkins*, 41 Alabama, 486; *S. C.*, 94 Am. Dec. 607; *Gulf, Col. & S. F. Ry. Co.* v. *McGown*, 65 Texas, 640; *Penn. R. R. Co.* v. *Butler*, 57 Pa. St. 335; *Rose* v. *Railway Co.*, 39 Iowa, 246; *Railroad Co.* v. *Henderson*, 51 Pa. St. 315; *Roesner* v. *Herman*, 8 Fed. Rep. 782; Wharton on Negligence, 589, 592, 641; *Baltimore, O. &c. R. R. Co.* v. *Voigt*, 176 U. S. 494; *Grand Trunk* v. *Stevens*, 95 U. S. 655; *Balis* v. *Old Colony R. R. Co.*, 147 Massachusetts, 255, distinguished. A common carrier may not be divested of its character as such by special contract. *Bank of Kentucky* v. *Adams Exp. Co.*, 93 U. S. 174; *Woodburn* v. *Railroad Co.*, 42 Am. & Eng. R. R. Cas. 514; *Kinney* v. *Cent. R. R. Co.*, 32 N. J. L. 407, distinguished.

The duty owing by the carrier is a public duty; it does not grow out of private contract with each individual carrier, but is imposed for the welfare of the public. *Grand Trunk Ry.* v. *Stevens*, 95 U. S. 655; *Chicago, M. & St. P. R. Co.* v. *Solan*, 169 U. S. 135; *Munn* v. *Illinois*, 94 U. S. 113; *United States* v. *Joint Traffic Assn.*, 171 U. S. 505; *Rose* v. *Des Moines Val. Ry. Co.*, 39 Iowa, 246.

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

As the negligence of the company, found by the jury to have

caused the death, as well as the resulting death took place in Idaho, the plaintiffs' right of action rests on the statute of that State. What is the scope and meaning of that statute? The Circuit Court charged the jury:

"You are not to consider what was the duty of this carrier toward Mr. Adams who was killed, but the duty which the defendant owed to these plaintiffs; and the duty which they have the right to exact from the defendant in this case is the same duty which the defendant company owed to the public in general."

In other words, although it should appear that the company in no respect failed in its duty to the deceased, it could yet be held responsible to the widow and son for the damages they suffered by reason of the death. But this is a misconception. Their right of action arises only when his death is caused by "the wrongful act or neglect." If there be no omission of duty to the decedent, his heirs have no claim. Suppose an individual is wantonly assailed and in order to protect his own life is obliged to kill the assailant, may the heirs of the decedent have that act of taking life, rightful as against the decedent, adjudged wrongful as against them, and recover damages from one who did only that which his duty to himself and family required him to do? The statute does not provide that when one's life is taken by another the heirs of the former may recover damages, but only when it is wrongfully taken, that is, when it is taken in violation of the rights of the decedent, wrongful as against him. "Neglect" stands in the same category with "wrongful act." It implies some omission of duty. The trial court in this case charged the jury:

"Negligence to create a liability on the part of parties in fault must be a failure to observe the degree of care and prudence that is demanded in the discharge of the duty which the person charged with the negligence owed under the peculiar circumstances of the case to the injured party."

As stated in Pollock on Torts, p. 355, quoting from Baron

Alderson in *Blyth* v. *Birmingham Waterworks Company*, 11 Ex. 784; 25 L. J. Ex. 213:

" 'Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do,' provided, of course, that the party whose conduct is in question is already in a situation that brings him under the duty of taking care."

The two terms, therefore, wrongful act and neglect, imply alike the omission of some duty, and that duty must, as stated, be a duty owing to the decedent. It cannot be that, if the death was caused by a rightful act, or an unintentional act with no omission of duty owing to the decedent, it can be considered wrongful or negligent at the suit of the heirs of the decedent. They claim under him, and they can recover only in case he could have recovered damages had he not been killed, but only injured. The company is not under two different measures of obligation—one to the passenger and another to his heirs. If it discharges its full obligation to the passenger, his heirs have no right to compel it to pay damages.

Did the company omit any duty which it owed to the decedent? He was riding on a pass which provided that the company should "not be liable, under any circumstances, whether of negligence of agents of otherwise, for any injury to the person." He was a free passenger, paying nothing for the privilege given him of riding in the coaches of the defendant. He entered those coaches as a licensee, upon conditions which he, with full knowledge, accepted. He was not a passenger for hire, such as was held to be the condition of the parties recovering in *Railroad Company* v. *Lockwood*, 17 Wall. 357, and *Railway Company* v. *Stevens*, 95 U. S. 655. In the first of these cases Mr. Justice Bradley, who delivered the opinion of the court, closed an elaborate discussion of the questions with these words:

"We purposely abstain from expressing any opinion as to

what would have been the result of our judgment had we considered the plaintiff a free passenger instead of a passenger for hire."

The question then is distinctly presented whether a railroad company is liable in damages to a person injured, through the negligence of its employés, who at the time is riding on a pass given as a gratuity, and upon the condition known to and accepted by him that it shall not be responsible for such injuries. It will be perceived that the question excludes injuries resulting from wilful or wanton acts, but applies only to cases of ordinary negligence. The facts of this case certainly do not call for any broader inquiry than this. The specific matters of negligence charged are the placing a non-vestibuled car in a vestibuled train, and the high rate of speed at which the train passed around the curve at the place of injury. But non-vestibuled cars are in constant use all over the country—were the only cars in use up to a few years ago—and further, the deceased, having passed over the open platform, knew exactly its condition. As the court charged the jury, "Mr. Adams must be presumed to have known that it was not vestibuled and to have acted with perfect knowledge of the fact." The rate of speed was no greater than is common on other trains everywhere in the land, and the train was, in fact, run safely on this occasion. We shall assume, however, but without deciding, that the jury were warranted, considering the absence of the vestibuled platform and the high rate of speed in coming around the curve, in finding the company guilty of negligence; but clearly it was not acting either wilfully or wantonly in running its trains at this not uncommon rate of speed, and all that can at most be said is that there was ordinary negligence. Is the company responsible for injuries resulting from ordinary negligence to an individual whom it permits to ride without charge on condition that he take all the risks of such negligence?

This question has received the consideration of many courts and been answered in different and opposing ways. We shall

not attempt to review the cases in state courts. Among those which hold that the company is not responsible may be mentioned *Rogers* v. *Kennebec &c. Company*, 86 Maine, 261; *Quimby* v. *Boston &c. Railroad Company*, 150 Massachusetts, 365; *Griswold* v. *New York &c. Railroad Company*, 53 Connecticut, 371; *Kinney* v. *Central Railroad Company*, 34 N. J. Law, 513; *Payne* v. *Terre Haute &c. Railway Company*, 157 Indiana, 616; *Muldoon* v. *Seattle City Railway Company*, 7 Washington, 528; *S. C.*, 10 Washington, 311. This last case was decided by the Supreme Court of the State, in which the Federal court rendering the judgment in controversy was held. The English decisions are to the same effect. *McCawley* v. *Furness Railway Company*, L. R. 8 Q. B. 57; *Hall* v. *Northeastern Railway Company*, L. R. 10 Q. B. 437; *Duff* v. *Great Northern Railroad Company*, Ir. L. R. 4 Com. Law, 178; *Alexander* v. *Toronto &c. Railway Company*, 33 Up. Can. Q. B. 474. Among those holding that the company is responsible are: *Rose* v. *Des Moines Valley Railroad Company*, 39 Iowa, 246, though that case is rested partially on a state statute; *Pennsylvania Railroad Company* v. *Butler*, 57 Pa. St. 335; *Mobile & Ohio Railroad Company* v. *Hopkins*, 41 Alabama, 486; *Gulf, Colorado &c. Railway Company* v. *McGowan*, 65 Texas, 640.

Turning to the decisions of this court, in *Philadelphia & Reading Railroad Company* v. *Derby*, 14 How. 468, and *Steamboat New World* v. *King*, 16 How. 469, the parties injured were free passengers, but it does not appear that there were any stipulations concerning the risk of negligence, and the companies were held guilty of gross negligence. In *Baltimore & Ohio &c. Railway* v. *Voigt*, 176 U. S. 498, Voigt, an express messenger riding in a car set apart for the use of an express company, was injured by the negligence of the railway company. There was an agreement between the two companies that the former would hold the railway company free from all liability for negligence, whether caused by the negligence of the railway company or its employés. Voigt entering into the employ of the express company, signed a contract in writ-

ing, whereby he agreed to assume all the risk of accident or injury in the course of his employment, whether occasioned by negligence or otherwise, and expressly ratified the agreement between the express company and the railway company. It was held that he could not maintain an action against the railway company for injuries resulting from the negligence of its employés. Mr. Justice Shiras, who delivered the opinion of the court, reviewed many state decisions, and concluded with these words (p. 520):

"Without enumerating and appraising all the cases respectively cited, our conclusion is that Voigt, occupying an express car as a messenger in charge of express matter, in pursuance of the contract between the companies, was not a passenger within the meaning of the case of *Railroad Company* v. *Lockwood;* that he was not constrained to enter into the contract whereby the railroad company was exonerated from liability to him, but entered into the same freely and voluntarily, and obtained the benefit of it by securing his appointment as such messenger, and that such a contract did not contravene public policy."

In the light of this decision but one answer can be made to the question. The railway company was not as to Adams a carrier for hire. It waived its right as a common carrier to exact compensation. It offered him the privilege of riding in its coaches without charge if he would assume the risks of negligence. He was not in the power of the company and obliged to accept its terms. They stood on an equal footing. If he had desired to hold it to its common law obligations to him as a passenger, he could have paid his fare and compelled the company to receive and carry him. He freely and voluntarily chose to accept the privilege offered, and having accepted that privilege cannot repudiate the conditions. It was not a benevolent association, but doing a railroad business for profit; and free passengers are not so many as to induce negligence on its part. So far as the element of contract controls, it was a contract which neither party was bound to enter into,

and yet one which each was at liberty to make, and no public policy was violated thereby.

It follows from these considerations that there was error in the proceedings of the Circuit Court and Court of Appeals. The judgments of those courts will be reversed and the case remanded to the Circuit Court with instructions to set aside the verdict and grant a new trial.

MR. JUSTICE HARLAN and MR. JUSTICE MCKENNA dissent.

ST. CLAIR COUNTY *v.* INTERSTATE SAND AND CAR TRANSFER COMPANY.

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

No. 17. Argued March 19, 1903.—Decided February 23, 1904.

Conceding, *arguendo*, that the police power of a State extends to the establishment, regulation or licensing of ferries on navigable streams which are boundaries between it and another State, there are no decisions of this court importing power in a State to directly control interstate commerce or any transportation by water across such a river which does not constitute a ferry in the strict technical sense of that term.

There is an essential distinction between a ferry in the restricted and legal signification of the term and the transportation of railroad cars across a boundary river between two States constituting interstate commerce, and such transportation cannot be subjected to conditions imposed by a State which are direct burdens upon interstate commerce.

THE facts in this case, which involved the right of the county to recover statutory penalties for carrying on, without a ferry license, the transportation of cars across the Mississippi River between points in Illinois and Missouri, are stated in the opinion.

Mr. Charles W. Thomas for plaintiff in error submitted:

The authority to establish and regulate ferries between States

is not included in the power of the Federal government to "regulate commerce with foreign nations and among the several States and with Indian tribes." That authority was reserved to the States respectively and never delegated to the United States. *Conway et al.* v. *Taylor's Exrs.*, 1 Black, 603; *Wiggins Ferry Co.* v. *East St. Louis*, 107 U. S. 365; *Tugwell* v. *Eagle Pass Ferry Co.*, 74 Texas, 480; *Carroll* v. *Campbell*, 108 Missouri, 550; *S. C.*, 110 Missouri, 557; *Marshall* v. *Grimes*, 41 Mississippi, 27; *People* v. *Babcock*, 11 Wend. 586; *Fanning* v. *Gregoire*, 16 How. 524. See also *Mills* v. *St. Clair County*, 3 Gil. (Ill.) 197; aff'd 8 How. 569; *Columbia & Bridge Co.* v. *Geisee*, 38 N. J. Law, 39; *Memphis* v. *Overton*, 3 Yerger, 390; *Chilvers* v. *People*, 11 Michigan, 43; *Bowman* v. *Walthen*, 2 McLean, 377. A ferry is in respect of the landing place and not of the water. The water may be to one and the ferry to another. 13 Viner's Ab. 208 A, cited in *Conway* v. *Taylor's Ex.*, 1 Black, 629.

Mr. John F. Lee, with whom *Mr. George R. Lockwood* was on the brief, for defendant in error:

The ferry business carried on by defendant is interstate commerce conducted on the Mississippi River, a navigable water of the United States; and the State of Illinois cannot require defendant to obtain a license from the Board of Commissioners of St. Clair County to conduct such commerce. *Gibbons* v. *Ogden*, 9 Wheat. 1; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196; *Covington Bridge Co.* v. *Kentucky*, 154 U. S. 204, 217; *Harman* v. *Chicago*, 147 U. S. 396; *Brown* v. *Houston*, 114 U. S. 622; *Moran* v. *New Orleans*, 112 U. S. 69; *Mobile* v. *Kimball*, 102 U. S. 691; *Hall* v. *DeCuir*, 95 U. S. 485; *Rhodes* v. *Iowa*, 170 U. S. 412; *Wabash Railway Co.* v. *Illinois*, 118 U. S. 557, 564; *Pickard* v. *Pullman Co.*, 117 U. S. 34; *Hays* v. *Pacific Mail S. S. Co.*, 17 How. 596; *Welton* v. *Missouri*, 91 U. S. 282; *In re Debs*, 158 U. S. 564; *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211; *Adams Express Co.* v. *Ohio*, 166 U. S. 185; *Philadelphia, etc.*, v. *Pennsylvania*, 122 U. S. 326; *Bowman* v. *C. & N. W. Ry. Co.*, 125 U. S. 465, 508; *Leloup* v. *Mobile*, 127 U. S. 640; *St.*

Louis v. *W. U. Tel. Co.*, 148 U. S. 92; *California* v. *Pacific R. R. Co.*, 127 U. S. 1; *Crutcher* v. *Kentucky*, 141 U. S. 47; *Brennan* v. *Titusville*, 153 U. S. 289, 302; *Fargo* v. *Michigan*, 121 U. S. 230, 245; *Hooper* v. *California*, 155 U. S. 648, 653; *Pickard* v. *Pullman Co.*, 117 U. S. 34; *Norfolk Ry. Co.* v. *Pennsylvania*, 136 U. S. 114; *Illinois Central R. R. Co.* v. *Illinois*, 163 U. S. 142; *Robbins* v. *Shelby Co.*, 120 U. S. 489; *St. Louis* v. *Consolidated Coal Co.*, 158 Missouri, 342.

Even if the State of Illinois had power to exact a license fee from all persons engaged in carrying on interstate commerce by means of ferries, the discriminations of the act in question in favor of existing ferries and landowners, and the authority given the Boards of County Commissioners to discriminate between applicants for a license, makes the act void so far as it relates to interstate commerce. *Guy* v. *Baltimore*, 100 U. S. 434.

MR. JUSTICE WHITE delivered the opinion of the court.

This suit was commenced in a court of the State of Illinois by the county of St. Clair, a municipal corporation of the State of Illinois, against the Interstate Sand and Car Transfer Company, a Missouri corporation, to recover statutory penalties. We shall hereafter refer to the one party as the county and to the other as the company. The right of the county to recover was based upon the charge that the company had, during certain years which were stated, incurred penalties to the amount sued for, because it had carried on a ferry for transporting railroad cars, loaded or unloaded, from the county of St. Clair in Illinois to the Missouri shore and from the Missouri shore to the county of St. Clair, without obtaining a license from the county, as was required by the law of Illinois. The cause of action was thus stated in the complaint.

"And plaintiff avers that the said defendant, in order to keep and use its said ferry at the time of its establishment as aforesaid, constructed and caused to be built a permanent landing

place with certain cradles and roadways thereto, within the limits of said county, and has from thence hitherto maintained the same, by means whereof as well as by means of certain steamboats and barges, then and from thence hitherto used for that purpose by the defendant, it, the said defendant, was enabled to and did, at various times and continuously since the day last aforesaid, ferry for profit and hire, property, to wit, certain railroad cars from said county across the Mississippi River aforesaid, and from the west bank of said river to the said county, and has so ferried said cars within the time aforesaid to the number of, to wit, eighty thousand railroad cars across said river, without any license from the county board of the plaintiff so to do, whereby and by virtue of the statute in such case made and provided penalties have accrued to the plaintiff in the sum of $3 for each one of said cars so ferried, to wit, the sum of two hundred and forty thousand dollars."

The case was removed by the company on diversity of citizenship to the Circuit Court of the United States for the Southern District of Illinois. In that court the company filed a general demurrer, which was sustained. From the final judgment dismissing the complaint the case was brought directly to this court because solely involving the construction or application of the Constitution of the United States.

The court below decided that the company was not liable for the penalties, because the law of Illinois purporting to impose upon the company the obligation of taking out a license was not binding, as it was repugnant to the commerce clause of the Constitution of the United States. The conclusions of the court upon this subject were in substance based on what was deemed to be the result of the rulings in *Gloucester Ferry Company* v. *Pennsylvania*, 114 U. S. 196, and *Covington & Cincinnati Bridge Company* v. *Kentucky*, 154 U. S. 204.

In the argument at bar the county insists that the lower court erred in applying the cases mentioned, because those cases did not question the power of the several States to license and regulate ferries, but prevailed upon other considerations, and

hence were inapposite. It is insisted that a consistent line of other cases decided by this court, commencing at an early day, determined that the right to establish, regulate and license ferries, even though they be across a navigable river constituting a boundary between two States, rests exclusively within the several States, as embraced within police powers reserved to the several States, and not delegated to the national government. On the other hand, the company insists that, whilst undoubtedly there are decisions of this court apparently sustaining the contention of the other side, when properly considered the cases referred to must be limited to ferries over streams wholly within a State, and to the extent that certain of the cases cannot be so limited, they have been in effect overruled. As, then, both sides confidently rely upon prior adjudications of this court, and both in effect argue that the cases which are asserted to sustain the view urged by the other side are in irreconcilable conflict with other cases, it becomes necessary to briefly advert to the cases relied upon by both parties in order to ascertain whether the asserted antagonism between the decided cases really obtains so far as it may be necessary for the decision of the question arising on this record, and if not, to apply the rule settled by the previous cases, and, if the conflict does exist between the adjudications, to determine which of the prior decisions announce the correct rule and to follow it.

In *Gibbons* v. *Ogden*, (1824) 9 Wheat. 1, wherein it was held that the acts of the legislature of New York, granting to Livingston and Fulton exclusive rights to navigation, by steamboats, in the navigable waters within the jurisdiction of the State of New York, was repugnant to the commerce clause of the Constitution, in the course of the opinion Mr. Chief Justice Marshall said (p. 65):

"Internal commerce must be that which is wholly carried on within the limits of a State; as, where the commencement, progress and termination of the voyage are wholly confined to the territory of the State. This branch of power includes

a vast range of state legislation, such as turnpike-roads, toll-bridges, exclusive rights to run stage-wagons, auction licenses, licenses to retailers and to hawkers and pedlers, ferries over navigable rivers and lakes, and all exclusive rights to carry goods and passengers, by land or water. All such laws must necessarily affect, to a great extent, the foreign trade, and that between the States, as well as the trade among the citizens of the same State. But, although these laws do thus affect trade and commerce with other States, Congress cannot interfere, as its power does not reach the regulation of internal trade, which resides exclusively in the States."

In *Fanning* v. *Gregoire*, (1853) 16 How. 524, the question for decision was whether a subsequent grant of a license for a ferry across the Mississippi River interfered with and violated the rights of a prior license to a ferry of like character. In other words, the question was whether the grant of the first license was exclusive and prevented the grant of a second license. The court decided that the first grant was not exclusive; and in concluding the opinion—speaking through Mr. Justice McLean, and noticing the argument that the guaranty contained in the ordinance of 1787, in respect to the free navigation of the Mississippi River and the power delegated to Congress to regulate commerce between the States were in conflict with the asserted power of the State to grant the second ferry license in question—said (p. 534):

"Neither of these interfere with the police power of the States, in granting ferry licenses. When navigable rivers, within the commercial power of the Union, may be obstructed, one or both of these powers may be invoked."

In *Conway* v. *Taylor*, (1861) 1 Black, 603, the case was substantially this: An exclusive franchise had been granted by the laws of Kentucky to operate a ferry from the Kentucky shore across the Ohio River. A person having commenced to operate a ferry from the Ohio shore to the Kentucky side, in conflict with the exclusive right, his power to do so was resisted in the Kentucky courts on the ground that it was

violative of the Kentucky ferry franchise. The courts of Kentucky held that it was in conflict with the Kentucky franchise for the person operating the ferry from the Ohio shore to conduct a ferry from the Kentucky side back to Ohio, and therefore restrained the ferry to that extent. The Kentucky court in effect enforced the exclusive right of the one owning the Kentucky ferry to ferry from Kentucky across to Ohio, but declined to restrain the right of the Ohio ferryowner to ferry from Ohio to Kentucky. The judgment of the Kentucky court came to this court for review and it was affirmed. In the course of the opinion, announced by Mr. Justice Swayne, it was expressly stated that the right existed in the several States bordering on navigable rivers which were a boundary between two States to grant a ferry privilege from their own borders to cross the river. The court said (p. 629):

"The concurrent action of the two States was not necessary. 'A ferry is in respect the landing place, and not of the water. The water may be to one and the ferry to another.' 13 Viner's Ab. 208A."

* * * * * * * *

"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."

Further along in the opinion (p. 633) the language which we have previously cited from the opinion of Mr. Chief Justice Marshall in *Gibbons* v. *Ogden* was quoted in part, as follows (italicized as in the reports):

"The court said: 'They [State inspection laws] form a portion of the immense mass of legislation which embraces everything within the territory of a State *not surrendered to the General Government;* all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, *ferries, &c.*, are parts of this mass.'"

After referring to *Fanning* v. *Gregoire*, and citing the passage

which we have previously quoted as affirming the doctrine that a State had a right to grant a ferry license across a navigable river, being the boundary between the granting and another State, the question of the operation of the commerce clause of the Constitution of the United States was passed on. The court declared (p. 633) that there was no repugnancy to the commerce clause of the Constitution in the mere licensing by a State of a ferry; that the regularity and nature of the business of ferrying was such that the granting of a privilege on the subject did not regulate interstate commerce, and therefore, despite an exclusive ferry privilege, interstate commerce was free from restraint by the State. In conclusion, however, the court pointed out (p. 634) that undoubtedly if in the grant of a ferry privilege there were contained provisions repugnant to the commerce clause, it would be the duty of the court to prevent their enforcement.

In *Wiggins Ferry Company* v. *East St. Louis*, (1882) 107 U. S. 365, the case was this: The ferry company was in the enjoyment of a ferry franchise to operate across the Mississippi River between Illinois and Missouri. It was domiciled in Illinois, that State being the *situs* of its boats and other property. This property was taxed in Illinois as other property, and there was also levied upon the company a license tax for the privilege of carrying on the ferry, the validity of which last exaction was the question which the case presented. The collection of the license charge was resisted on the ground that the corporation was exempt by the contract arising from the grant of its franchise from the payment of a license charge, and that if not, the exaction of the license tax for the privilege of ferrying across a navigable river lying between two States was repugnant to the commerce and other clauses of the Constitution of the United States not necessary to be specially referred to.

After disposing adversely to the corporation of the contention concerning the alleged exemption, the court considered the application of the commerce clause of the Constitution,

and decided that proposition against the corporation. In doing so the court referred to the passage in the opinion of Chief Justice Marshall in *Gibbons* v. *Ogden*, which we have already quoted, and also referred approvingly to the opinions in *Conway* v. *Taylor* and *Fanning* v. *Gregoire*, *supra*.

In *Gloucester Ferry Company* v. *Pennsylvania*, (1885) 114 U. S. 196, the facts were these: The ferry company was incorporated and domiciled in New Jersey, carried on a ferry business over the Delaware River between Camden, New Jersey, and Philadelphia. The *situs* of its boats and property were in New Jersey; but the company owned in Philadelphia a wharf or slip at which its boats landed. The taxing officers of the State of Pennsylvania assessed against the corporation, on the ground that it was doing business within the State, a tax upon the estimated value of its capital stock, and the validity of this tax was the question decided. After referring to the reasoning of the Supreme Court of Pennsylvania affirming the validity of the tax, in which it was pointed out that the company did business in the State because it landed in the State of Pennsylvania, and there in part carried on its ferry business, the court said (p. 203):

"As to the first reason thus expressed, it may be answered that the business of landing and receiving passengers and freight at the wharf in Philadelphia is a necessary incident to, indeed a part of, their transportation across the Delaware River from New Jersey. Without it that transportation would be impossible. Transportation implies the taking up of persons or property at some point and putting them down at another. A tax, therefore, upon such receiving and landing of passengers and freight is a tax upon their transportation; that is, upon the commerce between the two States involved in such transportation.

"It matters not that the transportation is made in ferry-boats, which pass between the States every hour of the day. The means of transportation of persons and freight between the States does not change the character of the business as one

of commerce, nor does the time within which the distance between the States may be traversed. Commerce among the States consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale and exchange of commodities. The power to regulate that commerce, as well as commerce with foreign nations, vested in Congress, is the power to prescribe the rules by which it shall be governed, that is, the conditions upon which it shall be conducted; to determine when it shall be free and when subject to duties or other exactions. The power also embraces within its control all the instrumentalities by which that commerce may be carried on, and the means by which it may be aided and encouraged."

After reviewing and applying many prior adjudications of this court, in which the want of power of the several States to burthen interstate commerce had been pointed out, in its various aspects, the court considered the statement of Mr. Chief Justice Marshall in *Gibbons* v. *Ogden*, which we have previously quoted, and observed (p. 215):

"The power of the States to regulate matters of internal police includes the establishment of ferries as well as the construction of roads and bridges. In *Gibbons* v. *Ogden*, Chief Justice Marshall said that laws respecting ferries, as well as inspection laws, quarantine laws, health laws, and laws regulating the internal commerce of the States, are component parts of an immense mass of legislation, embracing everything within the limits of a State not surrendered to the general government; but in this language he plainly refers to ferries entirely within the State, and not to ferries transporting passengers and freight between the States and a foreign country."

Although no reference was made in the opinion to *Fanning* v. *Gregoire*, *Conway* v. *Taylor* and *Wiggins Ferry* v. *East St. Louis*, in concluding the opinion it was said (p. 217):

"It is true that, from the earliest period in the history of the

government, the States have authorized and regulated ferries, not only over waters entirely within their limits, but over waters separating them; and it may be conceded that in many respects the States can more advantageously manage such interstate ferries than the general government; and that the privilege of keeping a ferry, with a right to take toll for passengers and freight, is a franchise grantable by the State, to be exercised within such limits and under such regulations as may be required for the safety, comfort and convenience of the public. Still the fact remains that such a ferry is a means, and a necessary means, of commercial intercourse between the States bordering on their dividing waters, and it must, therefore, be conducted without the imposition by the States of taxes or other burdens upon the commerce between them. Freedom from such impositions does not, of course, imply exemption from reasonable charges, as compensation for the carriage of persons, in the way of tolls or fares, or from the ordinary taxation to which other property is subjected, any more than like freedom of transportation on land implies such exemption. . . . How conflicting legislation of the two States on the subject of ferries on waters dividing them is to be met and treated is not a question before us for consideration. Pennsylvania has never attempted to exercise its power of establishing and regulating ferries across the Delaware River. Any one, so far as her laws are concerned, is free, as we are informed, to establish such ferries as he may choose. No license fee is exacted from ferry-keepers. She merely exercises the right to designate the places of landing, as she does the places of landing for all vessels engaged in commerce. The question, therefore, respecting the tax in the present case is not complicated by any action of that State concerning ferries. However great her power, no legislation on her part can impose a tax on that portion of interstate commerce which is involved in the transportation of persons and freight, whatever be the instrumentality by which it is carried on."

The tax imposed by the State of Pennsylvania was decided

to be void, as being repugnant to the commerce clause of the Constitution.

In *Covington &c. Bridge Co.* v. *Kentucky*, 154 U. S. 204, a law of the State of Kentucky regulating the tolls to be charged by a bridge company operating a bridge across the Ohio River between Kentucky and Ohio came under review. After an extended consideration of the previous cases, with one exception, including the cases to which we have previously referred, it was decided that as the bridge was over a navigable stream between two States, the power to regulate the tolls thereon was in Congress, and therefore the State regulation was void.

The position of the parties as to the cases which we have reviewed is this: The county insists that the statement in *Gibbons* v. *Ogden*, that the establishment of ferries was within the reserved powers of the States, and the rulings in *Fanning* v. *Gregoire*, *Conway* v. *Taylor* and *Wiggins Ferry* v. *East St. Louis*, affirmatively settle that a State may establish ferries over a navigable river, the boundary between two States, and license the same, and that doing so is not only not repugnant to the commerce clause of the Constitution of the United States, but is in consonance therewith, since the power as to ferries was reserved to the States and not delegated to the national government. The *Gloucester Ferry* case, it is said, rested upon the nature of the particular tax imposed by the State of Pennsylvania, and that the case may hence not be considered as overruling the previous cases, not only because it did not expressly refer to them, but also because come expressions found in the opinion which we have cited are construed as substantially affirming the right of the State to regulate and license a ferry like the one here in question. On the other hand, the corporation urges that the rulings in *Fanning* v. *Gregoire* and *Conway* v. *Taylor* proceeded upon a misconception and partial view of the language of Chief Justice Marshall in *Gibbons* v. *Ogden*. That language, it is insisted, when the sentences are considered which immediately precede the pas-

sage quoted in *Fanning* v. *Gregoire* and *Conway* v. *Taylor*, clearly demonstrates that the Chief Justice was referring to the power of the States to license and control ferries on streams of a local character, and this, it is said, is demonstrated by the statement on the subject in the *Gloucester Ferry* case. The case of *Wiggins Ferry* v. *East St. Louis*, it is argued, proceeded, not upon the right of the State over the ferry, but upon its power to tax property whose *situs* was within its jurisdiction, and this was the view adopted by the court below. The *Gloucester Ferry* case, it is urged, did not proceed upon the nature of the tax, but upon the want of power in the State of Pennsylvania to exert its control over a ferry crossing a river which was a boundary between two States, so as in effect to burthen the carrying on of interstate commerce. And that case, it is further insisted, therefore qualifies, if it does not specifically overrule, the earlier cases.

We do not think, however, that for the purposes of this case we need enter into these contentions, because we consider that in any view which may be taken of the previous cases, each and all of them are conclusive of this case without reference to any real or supposed conflict between them.

First. None of the cases, whatever view may be taken of them, imports power in a State to directly control interstate commerce. Conceding, *arguendo*, that the police power of a State extends to the establishment, regulation and licensing of ferries on a navigable stream, being the boundary between two States, none of the cases justifies the proposition that such power embraces transportation by water across such a river which does not constitute a ferry in a strict technical sense. In that sense "a ferry is a continuation of the highway from one side of the water over which it passes to the other, and is for transportation of passengers or of travellers with their teams and vehicles and such other property as they may carry or have with them." *Mayor &c. of New York* v. *Starin*, 106 N. Y. 1, 11; *Broadnax* v. *Baker*, 94 N. Car. 675. It proceeds

at regular intervals, and, growing out of the local necessities and the public interest in its operation, is subject to local control, and at common law the exclusive franchise to operate a ferry within designated limits might be conferred upon a particular person or persons. In a strict sense the ferry business is confined to the transportation of persons with or without their property, and a ferryman carrying on only a ferry business is bound to transport in no other way. *Mayor &c. of New York* v. *Starin, supra; Wyckoff* v. *Queens County Ferry Company,* 52 N. Y. 32.

Indeed, the essential distinction between a ferry in the restricted and legal signification of that term and transportation as such constituting interstate commerce was pointedly emphasized in a passage from the opinion in *Conway* v. *Taylor, supra,* which we have previously quoted, and the distinction between the two was necessarily involved, if it may not be said to have been controlling, in the decision of that case.

The difference between a ferry in its true sense and transportation of the character of that now under review is shown in the case of *Mayor of New York* v. *New England Transfer Company,* 14 Blatch. 159. In that case a boat was operated from Jersey City in New Jersey to Mott Haven in New York, and from Mott Haven to Jersey City. In this boat, by means of tracks, railroad cars, both passenger and freight, were run and carried under contract with the railroad company for the purpose of further transportation. The contention was that the operation of this boat constituted the running of a ferry, and therefore to so operate it required a ferry license from the proper authority of the city of New York. The court (Shipman, J.), whilst not denying the power of the city of New York to require a license for a ferry operating over the route in question, held that the use of the boat in the manner specified was not the operation of a ferry. After pointing out the similarity between bridges and ferries and directing attention to *Bridge Proprietors* v. *Hoboken Company,* 1 Wall. 116, in which it was

held that a mere railroad bridge, utilized for the purpose of transporting cars across a navigable river, did not infringe an exclusive right to maintain a bridge for general purposes theretofore granted by state authority, and demonstrating the identity in principle between the case before it and that case, said (p. 167):

"The reasoning which denies that a railroad bridge is an interference with an exclusive right theretofore granted to build an ordinary bridge, applies with almost equal force to the question, whether a ferry franchise is interfered with by a ferry which is designed for the transportation of railroad cars only. The boat of the defendants is provided with two railroad tracks, which prevent the entrance or egress of ordinary vehicles, and also of foot passengers, except as they are transported in cars which run upon the railroad tracks. The boat is exclusively used for the transportation of railroad cars, in connection only with the arrival of trains. It is impossible to transport ordinary vehicles upon the boat, it is impracticable to transport foot passengers, except as they are conveyed to the boat in cars. The whole arrangement of boat and docks is for the ingress and egress of railroad cars, and not for the accommodation of anything else. The ferry is a part of a continuous through railroad line from places north and east of the city of New York, to places south and southwest of that city, and the trips of the boat are dependent upon the arrival of through railroad trains.

"Such a ferry is unlike an ordinary ferry for the transportation across a river of persons, animals and freight, at intervals more or less regular, for fare or toll."

Second. As we conclude from the considerations previously expressed that the transportation of railroad cars—whether loaded or unloaded—across the Mississippi River at the point in question was not the maintenance of a ferry in the proper sense of that term, and that such business was essentially interstate commerce, the only question remaining for decision

is, did the county have the power to require the obtaining of a license by the company as a prerequisite to the carrying on of such interstate commerce and to impose the penalties sued for, because a license had not been obtained? In examining this question we need not stop to determine how far, if at all, a State may, under its general police power, require the taking out of a license for the carrying on of the business of interstate commerce to the extent necessary to enable the State or its subdivisions to exercise such supervision as may be required for the safety of life and property. This results, because even conceding, *arguendo,* such power, we think it clear that such conditions were attached to the obtaining of a license in this case as relieved the company from the duty of complying with the requirements of the law under which liability is here asserted. That liability is contained in chapter 55 of the Revised Laws of Illinois, in force in 1874. By this law authority was conferred upon the county to grant a ferry license, and it was made the duty of a person or corporation desiring to carry on a ferry to make application for such license. But power was conferred upon the county to withhold the grant of a license in a particular case if deemed best, and to grant it, preferably, to a citizen of the State of Illinois; and the acceptance of the license imposed the absolute obligation upon the applicant to carry on a technical ferry business, to operate at designated hours during the day and during the entire night. In other words, the law under which license was required not only subjected the applicant for the license to discriminatory provisions, but in addition compelled the licensee, if he desired to carry on a purely interstate commerce business, to conduct a general ferry business. However valid these conditions may be when applied to a ferry business in the restricted sense, under the assumption which we have indulged in, *arguendo,* that the State had the power to regulate a ferry upon a navigable stream forming the boundary between two States, it is obvious that the conditions to which we have alluded were

illegal because a direct burden upon interstate commerce, was made a condition precedent to the doing of business of that character.

Because we have, *arguendo*, rested our conclusion in this case upon the assumption that the respective States have the power to regulate ferries over navigable rivers constituting boundaries between States, we must not be understood as deciding that that doctrine, which undoubtedly finds support in the opinions announced in *Fanning* v. *Gregoire* and *Conway* v. *Taylor*, has not been modified by the rule subsequently laid down in the *Gloucester Ferry* case and the *Covington Bridge* case. As this case has not required us to enter into those considerations we have not done so.

Affirmed.

BUTTFIELD *v.* STRANAHAN.

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

No. 294. Argued January 4, 1904.—Decided February 23, 1904.

Every intendment is in favor of the validity of a statute and it must be presumed to be constitutional unless its repugnancy to the Constitution clearly appears.

The power of Congress to regulate foreign commerce, being an enumerated power, is complete in itself, acknowledging no limitations other than those prescribed in the Constitution, and Congress can, without violating the due process clause, establish standards and provide from considerations of public policy that no right shall exist to import an article of food not equal thereto. No individual has a vested right to trade with foreign nations superior to the power of Congress to determine what, and upon what terms, articles may be imported into the United States.

Where a statute acts on a subject as far as practicable and only leaves to executive officials the duty of bringing about the result pointed out, and

provided for it is not unconstitutional as vesting executive officers with legislative powers. *Field* v. *Clark*, 143 U. S. 649.

The act of March 2, 1897, 29 Stat. 604, to prevent the importation of impure and unwholesome tea is not unconstitutional either because the power conferred to establish standards is legislative and cannot be delegated by Congress to administrative officers; because persons affected thereby have a vested interest to import teas which are in fact pure though below the standard fixed; because the establishment of and enforcement of the standard qualities constitutes a deprivation of property without due process of law; because it does not provide for notice and opportunity to be heard before the rejection of the tea; or, because the power to destroy goods upon the expiration of the time limit without a judicial proceeding is a condemnation and taking of property without due process of law.

THIS case presents for determination the question of the constitutionality of a statute known as the tea inspection act, approved March 2, 1897, 29 Stat. 604. The act is copied in full in the margin.[1]

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[1] An Act To prevent the importation of impure and unwholesome tea.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after May first, eighteen hundred and ninety-seven, it shall be unlawful for any person or persons or corporation to import or bring into the United States any merchandise as tea which is inferior in purity, quality, and fitness for consumption to the standards provided in section three of this act, and the importation of all such merchandise is hereby prohibited.

SEC. 2. That immediately after the passage of this act, and on or before February fifteenth of each year thereafter, the Secretary of the Treasury shall appoint a board, to consist of seven members, each of whom shall be an expert in teas, and who shall prepare and submit to him standard samples of tea; that the persons so appointed shall be at all times subject to removal by the said Secretary, and shall serve for the term of one year; that vacancies in the said board occurring by removal, death, resignation, or any other cause shall be forthwith filled by the Secretary of the Treasury by appointment, such appointee to hold for the unexpired term; that said board shall appoint a presiding officer, who shall be the medium of all communications to or from such board; that each member of said board shall receive as compensation the sum of fifty dollars per annum, which, together with all necessary expenses while engaged upon the duty herein provided, shall be paid out of the appropriation for "expenses of collecting the revenue from customs."

SEC. 3. That the Secretary of the Treasury, upon the recommendation of

On January 20, 1902, eight packages of tea were imported into the port of New York, per the steamer Adana, by a firm of which the plaintiff in error was the general partner. The tea was entered for import at the New York custom-house,

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the said board, shall fix and establish uniform standards of purity, quality, and fitness for consumption of all kinds of teas imported into the United States, and shall procure and deposit in the custom-houses of the ports of New York, Chicago, San Francisco, and such other ports as he may determine, duplicate samples of such standards; that said Secretary shall procure a sufficient number of other duplicate samples of such standards to supply the importers and dealers in tea at all ports desiring the same at cost. All teas, or merchandise described as tea, of inferior purity, quality, and fitness for consumption to such standards shall be deemed within the prohibition of the first section hereof.

SEC. 4. That on making entry at the custom-house of all teas, or merchandise described as tea, imported into the United States, the importer or consignee shall give a bond to the collector of the port that such merchandise shall not be removed from the warehouse until released by the collector, after it shall have been duly examined with reference to its purity, quality, and fitness for consumption; that for the purpose of such examination samples of each line in every invoice of tea shall be submitted by the importer or consignee to the examiner, together with the sworn statement of such importer or consignee that such samples represent the true quality of each and every part of the invoice and accord with the specifications therein contained; or in the discretion of the Secretary of the Treasury, such samples shall be obtained by the examiner and compared by him with the standards established by this act; and in cases where said tea, or merchandise described as tea, is entered at ports where there is no qualified examiner as provided in section seven, the consignee or importer shall in the manner aforesaid furnish under oath a sample of each line of tea to the collector or other revenue officer to whom is committed the collection of duties, and said officer shall also draw or cause to be drawn samples of each line in every invoice and shall forward the same to a duly qualified examiner as provided in section seven: *Provided, however*, That the bond above required shall also be conditioned for the payment of all custom-house charges which may attach to such merchandise prior to its being released or destroyed (as the case may be) under the provisions of this act.

SEC. 5. That if, after an examination as provided in section four, the tea is found by the examiner to be equal in purity, quality, and fitness for consumption to the standards hereinbefore provided, and no reëxamination shall be demanded by the collector as provided in section six, a permit shall at once be granted to the importer or consignee declaring the tea free from

and was stored in a bonded warehouse. At that time certain standards, enumerated in the margin,[2] which were selected by the board of tea inspectors, had been put in force by the Treasury regulations under said act of March 2, 1897.

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the control of the custom authorities; but if on examination such tea, or merchandise described as tea, is found, in the opinion of the examiner, to be inferior in purity, quality, and fitness for consumption to the said standards the importer or consignee shall be immediately notified, and the tea, or merchandise described as tea, shall not be released by the custom-house, unless on a reëxamination called for by the importer or consignee the finding of the examiner shall be found to be erroneous: *Provided*, That should a portion of the invoice be passed by the examiner, a permit shall be granted for that portion and the remainder held for further examination, as provided in section six.

SEC. 6. That in case the collector, importer or consignee shall protest against the finding of the examiner, the matter in dispute shall be referred for decision to a board of three United States general appraisers, to be designated by the Secretary of the Treasury, and if such board shall, after due examination, find the tea in question to be equal in purity, quality, and fitness for consumption to the proper standards, a permit shall be issued by the collector for its release and delivery to the importer; but if upon such final reëxamination by such board the tea shall be found to be inferior in purity, quality, and fitness for consumption to the said standards, the importer or consignee shall give a bond, with security satisfactory to the collector, to export said tea or merchandise described as tea, out of the limits of the United States within a period of six months after such final reëxamination; and if the same shall not have been exported within the time specified, the collector, at the expiration of that time, shall cause the same to be destroyed.

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[2] No. 1. Formosa Oolong.
No. 2. Foochon Oolong.
No. 3. North China Congon.
No. 4. South China Congon.
No. 5. India Tea (used for Ceylon tea).
No. 6. Pingsuey, green tea.
No. 7. Country green tea.
No. 8. Japan tea, pan fried (used for sun dried).
No. 9. Japan tea, basket fried.
No. 10. Japan tea, dust or fannings.
No. 11. Capers (used for scented orange Pekoe).
No. 12. Canton Oolong (*a*).
No. 13. Scented Canton (*a*).

The eight packages of tea in question were embraced in the class known as "Country green teas," numbered 7 on list of standards. The tea was examined on February 7, 1902, and was rejected as "inferior to standard in quality." By the

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SEC. 7. That the examination herein provided for shall be made by a duly qualified examiner at a port where standard samples are established, and where the merchandise is entered at ports where there is no qualified examiner, the examination shall be made at that one of said ports which is nearest the port of entry, and that for this purpose samples of the merchandise, obtained in the manner prescribed by section four of this act, shall be forwarded to the proper port by the collector or chief officer at the port of entry; that in all cases of examination or reëxamination of teas, or merchandise described as tea, by examiners or boards of United States general appraisers under the provisions of this act, the purity, quality, and fitness for consumption of the same shall be tested according to the usages and customs of the tea trade, including the testing of an infusion of the same in boiling water, and, if necessary, chemical analysis.

SEC. 8. That in cases of reëxamination of teas, or merchandise described as teas, by a board of United States general appraisers in pursuance of the provisions hereof, samples of the tea, or merchandise described as tea, in dispute, for transmission to such board for its decision, shall be put up and sealed by the examiner in the presence of the importer or consignee if he so desires, and transmitted to such board, together with a copy of the finding of the examiner, setting forth the cause of condemnation and the claim or ground of the protest of the importer relating to the same, such samples, and the papers therewith, to be distinguished by such mark that the same may be identified; that the decision of such board shall be in writing, signed by them, and transmitted, together with the record and samples, within three days after the rendition thereof, to the collector, who shall forthwith furnish the examiner and the importer or consignee with a copy of said decision or finding. The board of United States general appraisers herein provided for shall be authorized to obtain the advice, when necessary, of persons skilled in the examination of teas, who shall each receive for his services in any particular case a compensation not exceeding five dollars.

SEC. 9. That no imported teas which have been rejected by a customs examiner or by a board of United States general appraisers, and exported under the provisions of this act, shall be reimported into the United States under the penalty of forfeiture for a violation of this prohibition.

SEC. 10. That the Secretary of the Treasury shall have the power to enforce the provisions of this act by appropriate regulations.

SEC. 11. That teas actually on shipboard for shipment to the United States at the time of the passage of this act shall not be subject to the prohibition hereof, but the provisions of the act entitled "An act to prevent the impor-

term quality as thus used was meant the cup quality of the tea, that is to say, its taste and flavor. An appeal was taken by the importer to the board of general appraisers, and that board, on March 10, 1902, certified to the collector that "the said tea is inferior in quality to the standard prescribed by law," and accordingly overruled the appeal. The firm was notified of the decision on March 12, 1902.

In November following the plaintiff in error—who had acquired the interest of his partner in the tea—applied to the collector for permission to withdraw the tea for consumption, on payment of the duties. The request was refused. Application was then made for the release of the tea from bond in order to export it. This was also refused on the ground that the tea had been finally rejected under the act of March 2, 1897, more than six months previous to the application. The plaintiff in error was also notified that the tea would be ordered to the public stores for destruction.

This action was commenced in the Supreme Court of the State of New York, county of New York, against the collector of the port of New York, to recover damages for the alleged wrongful seizure, removal and destruction of the tea in question. Averments were made of the importation, storing, tender of duties and refusal to accept the same, and of demand for the tea and refusal to deliver. A general denial was filed. The action being on account of acts done by the defendant under the revenue laws of the United States, as collector of customs, it was removed on his application to the Circuit Court of the United States for the Southern District of New York.

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tation of adulterated and spurious teas," approved March second, eighteen hundred and eighty-three, shall be applicable thereto.

SEC. 12. That the act entitled "An act to prevent the importation of adulterated and spurious teas," approved March second, eighteen hundred and eighty-three, is hereby repealed, such repeal to take effect on the date on which this act goes into effect.

Approved, March 2, 1897.

At the trial of the case before Circuit Judge Coxe and a jury, the exhibit reproduced in the margin was introduced in evidence.[1]

[1] EXHIBIT No 8.

Schedule of Country Green Teas arranged in Order of Quality.

1 Choicest Moyune					
2 Choice Moyune	Choicest Teenkai				
3 Finest Moyune	Choice Teenkai				
4 Fine to Finest Moyune	Finest Teenkai				
5 Fine Moyune	Fine to Finest Teenkai				
6 On Fine Moyune	Fine Teenkai				
7 Fully Good Medium Moyune	On Fine Teenkai				
8 Good Medium Moyune	Fully Good Medium Teenkai	Finest Fychow			
9 On Good Medium Moyune	Good Medium Teenkai	Fine "			
10 Fair Moyune	On Good Teenkai	Good Medium Fychow	Finest Wenchow		
11 Good Common Moyune	Fair Teenkai	Fair "	Fine "		
12 Common Moyune	Good Common Moyune	Good Common "	Good Med. "	Good, clean, genuine Shanghai packed	
13	Common Teenkai	Common "	Fair "		
14			Good Common Wenchow		
15			Common Wenchow		
16				Mixed, Shanghai packed	
17				Common, refined and adulterated Shanghai packed	

As indicated on this exhibit, the Country green teas thereon designated were arranged in their order of quality, from the highest to the lowest, No. 1 being the highest grade, and No. 17 the lowest. The designation in each perpendicular column represented the teas grown in a particular district, and all the teas enumerated on the same horizontal line were considered as being equal in grade.

The chairman of the Board of Tea Experts of the Treasury Department testified that the standard for Country green teas in force at the time the tea in question was imported was Hyson of a Fine Teenkai, or No. 6 on the list of standards, and that before fixing this standard "the board made diligent search for any Country green teas of lower grades—Hysons of lower grades—of pure teas on the New York market obtainable by the trade, and were unable to find any." The term Hyson, it may be observed, indicated that the tea was made out of the coarsest leaves. For the plaintiff it was testified that the quality of the tea in controversy corresponded in quality with the grade No. 7 on Exhibit 8; while the evidence for the government was to the effect that it would grade as Fair Fychow, No. 11 on Exhibit 8. The testimony also tended to show that the tea in question differed only in respect to the cup quality from the government standard; the evidence for the government being that it was "a tea of a decidedly low grade, . . . a pure tea, but of low quality."

At the close of the evidence the court overruled a motion to direct a verdict for the plaintiff, and an exception was reserved. Thereupon the court, granting a motion on behalf of the defendant, instructed that the only question was as to the constitutionality of the statute under which the defendant, as collector of the port acted, and directed a verdict in his favor. Upon the judgment entered on the verdict, which was returned in accordance with this instruction, the case was brought directly to this court.

Mr. James L. Bishop, with whom *Mr. James H. Simpson* was on the brief, for plaintiff in error, in this case and in 294 and 516, which were argued simultaneously therewith:

The act is unconstitutional, because (1) it makes the right to import tea depend upon the arbitrary action of the Secretary of the Treasury and a board appointed by him, and (2) excludes from import wholesome, genuine and unadulterated tea, and (3) discriminates unequally in the admission of the different kinds of teas for import, and in the right to sell and purchase tea. The act confers upon the secretary and the board the uncontrolled power to fix standards of purity, quality, and fitness for consumption, and thus to prescribe arbitrarily what teas may be imported and dealt in.

For cases on this statute, see *Sang Lang* v. *Jackson*, 85 Fed. Rep. 502; *Cruikshank* v. *Bidwell*, 86 Fed. Rep. 7; *S. C.*, 176 U. S. 73; *Buttfield* v. *Bidwell*, 94 Fed. Rep. 126; *S. C.*, 96 Fed. Rep. 328.

The words "fitness for consumption" give the Secretary of the Treasury unlimited power to exclude teas according to his idea of fitness for consumption. An article which one man or class of men might regard as entirely fit for consumption might be regarded by another man or class of men as utterly unfit.

It appears from the history of the legislation that it was the intention of Congress to confer unlimited power upon the Secretary. See act of March 2, 1883, c. 64; act of 1890, c. 339; and see *Buttfield* cases, cited *supra*.

The constitutionality of the statute was not raised in the former proceedings. The application proceeded upon the assumption that the law was constitutional.

The act as heretofore construed excludes all teas from import except such as are equal to standards fixed by the uncontrolled will of the Secretary of the Treasury on the recommendation of the board of appraisers.

The power to regulate commerce with foreign nations and between the States is subject to such limitations as are pre-

scribed by the Constitution and its amendments, among others the Fifth. *Gibbons* v. *Ogden*, 9 Wheat. 196; *Cooley* v. *Port Wardens*, 12 How. 310, 319; *Monongahela Navigation Co.* v. *United States*, 148 U. S. 336; *Councilman* v. *Hitchcock*, 142 U. S. 547; *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447; *United States* v. *Joint Traffic Association*, 171 U. S. 503, 505; *Dooley Case*, 188 U. S. 321, 362; *O'Neil* v. *Vermont*, 144 U. S. 323, 371; *United States* v. *Williams*, 2 Hall L. J. 255; *S. C.*, 28 Fed. Cas. 614; 1 Von Holst Const. Law, 204, 211; Story on Const. Law; *Potapsco Guano Co.* v. *North Carolina*, 171 U. S. 345; Cooley Const. Lim. (6th ed.) 720.

As to whether the power to regulate commerce is exclusively with Congress, or whether the several States, in the absence of Congressional legislation, may enact police laws which, in effect, regulate commerce, see *Wilson* v. *The Blackbird Creek Marsh Co.*, 2 Pet. 245; *New York* v. *Miln*, 11 Pet. 182; *The License Cases*, 5 How. 504; *The Passenger Cases*, 7 How. 559. The several States may, in the absence of national legislation, pass police laws upon many subjects which do, in effect, regulate commerce. *Southern Steamship Co.* v. *The Port Wardens*, 6 Wall. 33; *Bowman* v. *Chicago &c. Ry.*, 125 U. S. 489; *N. Y., N. H. & H. R. Co.* v. *State of New York*, 165 U. S. 631; *Reid* v. *Colorado*, 187 U. S. 137.

General police power being exclusively within the control of the States, Congress cannot exercise such general police powers under the power to regulate commerce. *Lottery Cases*, 188 U. S. 364, dissenting opinions; *License Cases*, 5 How. 594, 599. It is not within the competency of Congress to prohibit trade between the States in a wholesome article of commerce, or to place such interstate commerce in the arbitrary control of an individual or of a board. J. R. Tucker, 4 Ry. & Corp. L. J. 290.

However extensive the powers of Congress may be over commerce with foreign nations, the laws which it makes for carrying into execution these powers must be "necessary and proper." Const. Art. 1, sec. 8, par. 18; *McCulloch* v.

Maryland, 4 Wheat. 421; *Legal Tender Cases,* 12 Wall. 573.

As to extent and definition of the police power the point at which the demands of government thereunder are restrained by the paramount constitutional guaranties of liberty and property cannot be fixed, but must be left to be determined by the process of exclusion, as applied to particular cases; and the question whether that limit has been overreached in a particular instance must always be a judicial question. This proposition, although now supported by the weight of authority, has not at all times met with approval. *Powell* v. *Pennsylvania,* 127 U. S. 678. But see *Marbury* v. *Madison,* 1 Cranch, 137, 176; *Smyth* v. *Ames,* 169 U. S. 468; *Lawton* v. *Steele,* 152 U. S. 133; *Holden* v. *Hardy,* 169 U. S. 366; *Cotting* v. *Goddard,* 183 U. S. 83, 86; *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 540, 558.

As the Constitution of the United States is the supreme law of the land, anything in the Constitution or statutes to the contrary notwithstanding, a statute of a State even when avowedly enacted in the exercise of its police power must yield to that law.

This opinion is confirmed by the latest and best considered opinions of the state courts. *Noel* v. *The People,* 187 Illinois, 587; *Ritchie* v. *The People,* 155 Illinois, 98; *Ruhstrat* v. *The People,* 185 Illinois, 133; *Gillespie* v. *The People,* 188 Illinois, 176; *Bessetle* v. *The People,* 193 Illinois, 334; *State* v. *Chicago, M. & St. P. R. Co.,* 68 Minnesota, 381; *In re Jacobs,* 98 N. Y. 98; *People* v. *Marx,* 99 N. Y. 377; *People* v. *Gilson,* 109 N. Y. 389; *Waters* v. *Wolff,* 162 Pa. St. 153; Am. & Eng. Ency. of Law (2d ed.), vol. 22, p. 937.

Some enlightenment upon this subject may be found from the history of the tariff rate litigation in this court. *Munn* v. *Illinois,* 94 U. S. 113; *Railroad Commission Cases,* 116 U. S. 307, 331; *Covington &c.* v. *Sandford,* 164 U. S. 578.

The act violates the Fifth Amendment, because it permanently deprives the plaintiff and other citizens of their right

to trade in a beneficial and wholesome article, except at the uncontrolled will of the Secretary of the Treasury and a board appointed by him.

The right to trade is a natural right. *Mitchell* v. *Reynolds*, 1 P. Williams, 181, 188; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Gundling* v. *Chicago*, 177 U. S. 183, 187; *Crowley* v. *Christenson*, 137 U. S. 86; *Noel* v. *The People*, 187 Illinois, 587; *People* v. *Warden*, 157 N. Y. 116; *Sioux Falls* v. *Kirby*, 25 L. R. A. 621; *Live Stock Dealers* v. *Crescent City Live Stock &c.*, 1 Abb. N. S. 399; *S. C.*, Fed. Cas. No. 8408; *People* v. *Marx*, 99 N. Y. 377.

The right of a citizen to carry on a lawful business cannot be placed under the arbitrary and uncontrolled will of an individual or board. *Cicero Lumber Co.* v. *Cicero*, 176 Illinois, 9; *S. C.*, 42 L. R. A. 696; *Harmon* v. *Ohio*, 66 Ohio St. 249; *S. C.*, 58 L. R. A. 618; *Noel* v. *The People*, 187 Illinois, 587; *Colon* v. *Lisk*, 153 N. Y. 188, 197; *In re Grice*, 79 Fed. Rep. 627; *State* v. *Ashbrook*, 154 Missouri, 375; *N. Y. S. U. Co.* v. *Dept. of Health*, 61 App. Div. N. Y. 106.

This is not inconsistent with anything decided by this court under the Alien Exclusion laws, which rest on the power of Congress to exclude aliens which is incident to every sovereign power. *Lem Moon Sing* v. *United States*, 158 U. S. 538; *Chae Chan Ping* v. *United States*, 130 U. S. 581; *Nishimura Ekiu* v. *United States*, 142 U. S. 651; *Fong Yue Ting* v. *United States*, 149 U. S. 698; *Wong Wing* v. *United States*, 163 U. S. 228; *United States* v. *Wong Kim Ark*, 169 U. S. 649; or with the legislation making the decision of immigration or custom officers against the right of aliens to enter the country final. Such laws applied to citizens would be unconstitutional. *United States* v. *Wong Kim Ark*, 169 U. S. 649.

This statute does not fall within the police restrictions and prohibitions upon universal, harmful and dangerous pursuits or with the proper regulations of professions, trades and industries, although innocent and beneficial.

At common law a man is held to warrant impliedly that he is competent to perform the service which he holds himself out

as competent to perform, and if one employing him suffers damages by reason of his want of skill, he is liable therefor. The statutory provisions are intended to safeguard the community against the want of skill which is actionable when resulting in damages.

The rules adopted by any board for the admission of persons to such pursuits must be adapted to and be suitable for the determination of such fitness and skill. Requirements which have no such relation to such calling or profession, or which are unattainable by reasonable study and application, or which are arbitrary, deprive one of his right to pursue a lawful avocation, and statutes permitting such requirements are invalid. *Dent* v. *State of W. Va.*, 129 U. S. 114; *Harmon* v. *Ohio*, 58 L. R. A. 618; *S. C.*, 66 Ohio St. 249; *Noel* v. *The People*, 187 Illinois, 587; *Gundling* v. *Chicago*, 177 U. S. 183; *Minn.* v. *Fleischer*, 41 Minnesota, 69; *City of Monmouth* v. *Popel*, 183 Illinois, 634; *Cumming* v. *Missouri*, 4 Wall. 377; *Ex parte Garland*, 4 Wall. 333.

No such standard can be applied to teas.

The action of such boards as are referred to is open to review by the courts, *Dent* v. *West Virginia*, 129 U. S. 114, 125; *Rietz* v. *Michigan*, 188 N. Y. 505, but the proceedings of the Secretary in fixing the standings are not reviewable by *certiorari*, *People* v. *Gage*, MSS. opinion, nor by bill in equity, *Sang Lung* v. *Jackson; Buttfield* v. *Bidwell*, *supra*, nor otherwise.

Apart from the arbitrary power lodged with the Secretary, the act is unconstitutional because it prevents the plaintiff and others from dealing in a wholesome and ordinary article of commerce, and destroys a trade in which he and others had been engaged. It has never been decided that under the police power a perfectly harmless trade could be prohibited. *Austin* v. *Tennessee*, 179 U. S. 343, 347; *Lottery Case*, 188 U. S. 321, 362; *Matter of Jacobs*, 98 N. Y. 98; *People* v. *Biesecker*, 169 N. Y. 53; *People* v. *Hawkens*, 157 N. Y. 18; *People* v. *Marx*, 99 N. Y. 379. A presumption of protection of health has sustained some acts. *Powell* v. *Pennsylvania*, 127 U. S. 678.

But see other cases holding oleomargarine statutes unconstitutional. *Schollenber* v. *Pennsylvania*, 171 U. S. 1; *Collins* v. *New Hampshire*, 171 U. S. 30. And as to other matters, *Minnesota* v. *Barber*, 136 U. S. 313; *Brimmer* v. *Rebman*, 138 U. S. 78; *Railroad Co.* v. *Husen*, 95 U. S. 465; *Allgeyer* v. *Louisiana*, 165 U. S. 578.

That the Legislature may not, under guise of police regulation, prohibit trade in wholesome articles is supported by other authorities. *Dorsey* v. *Texas*, 40 L. R. A. 201; *Helena* v. *Dwyer*, 39 L. R. A. 266; *Baltimore* v. *Radecke*, 49 Maryland, 417.

Cases like *Plumley* v. *Massachusetts*, 155 U. S. 461, 476; *People* v. *Arnsberg*, 105 N. Y. 123; *Booth* v. *Illinois*, 184 U. S. 425; *Otis* v. *Parker*, 187 U. S. 606, are not in conflict with this position.

The constitutional validity of a law is to be decided not by what has been done under it, but what may by its authority be done and if the act be construed according to its language as interpreted by the courts below the Secretary and the board have the right to fix a standard which will exclude wholesome tea. *Stuart* v. *Palmer*, 74 N. Y. 183, 188; *Montana Co.* v. *St. Louis, M. & M. Co.*, 152 U. S. 160, 170; *People* v. *Mosher*, 163 N. Y. 32, 42; *Colon* v. *Lisk*, 153 N. Y. 194; *Gilman* v. *Tucker*, 128 N. Y. 190.

The act is unconstitutional because it discriminates unequally in the importation of different kinds of tea and, therefore, denies the plaintiff the equal administration of the laws. It is a sumptuary law and interferes with the right of a man to do what he will do with his own. Cooley Const. Lim. (7th ed.) 549; *People* v. *Budd*, 143 U. S. 517. It is a weapon which may be used to destroy the business of competitors. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 558; *People* v. *Marx*, 99 N. Y. 380.

This law ought not to be sustained because the establishment of this precedent will open the door to methods of government which experience has shown to be fatal to liberty. *Boyd* v. *United States*, 116 U. S. 635.

The act is unconstitutional because it attempts to delegate to the Secretary of the Treasury and a board named by him legislative powers which can only be exercised by Congress.

The power to regulate commerce cannot be delegated. *Stoutenbergh* v. *Hennick*, 129 U. S. 148; *Robbins* v. *Shelby County*, 120 U. S. 489; *Asher* v. *Texas*, 128 U. S. 129; *Dent* v. *United States*, 71 Pac. Rep. 920; *United States* v. *Blasingame*, 116 Fed. Rep. 654. But see *United States* v. *Dastervignes*, 118 Fed. Rep. 199; *United States* v. *Keokuk Co.*, 45 Fed. Rep. 178; *United States* v. *Rider*, 50 Fed. Rep. 406; *United States* v. *City of Moline*, 82 Fed. Rep. 592; *Harmon* v. *Ohio*, 66 Ohio St. 249; *S. C.*, 58 L. R. A. 618; *Schazlin* v. *Cabaniss*, 67 Pac. Rep. 755; *Dowling* v. *Insurance Co.*, 31 L. R. A. 112; *O'Neil* v. *Insurance Co.*, 166 Pa. St. 71; *Adams* v. *Brudge*, 95 Wisconsin, 390; *Barto* v. *Himrod*, 8 N. Y. 483; *Field* v. *Clark*, 143 U. S. 649; *In re Kollock*, 165 U. S. 526; *United States* v. *Eaton*, 144 U. S. 677; *Kilburn* v. *Thompson*, 103 U. S. 168, 191; *Miller* v. *Mayor*, 109 U. S. 385.

While the legislature may delegate powers not legislative which it may rightfully exercise itself, *Wayman* v. *Southard*, 10 Wheat. 43, it cannot under the guise of conferring discretion confer an authority to make the law.

By this statute all teas are excluded from import. No one has a right to import tea until the Secretary makes a standard. He, therefore, makes the right.

Executive officers are frequently empowered to make regulations to carry into effect duties imposed upon them. These are rules and methods of administration not laws. The act is not confined to establishing a standard of purity only. *Morrell* v. *Jones*, 106 U. S. 466; *United States* v. *Eaton*, 144 U. S. 677; *United States* v. *Three Barrels of Whiskey*, 77 Fed. Rep. 963.

It has been repeatedly held that under the power to make regulations the Executive can neither extend nor contract the law. *Balfour* v. *Sullivan*, 19 Fed. Rep. 578; *Pascal* v. *Sulli-*

van, 21 Fed. Rep. 496; *Siegfried* v. *Phelps*, 40 Fed. Rep. 660, and cases above cited.

The cases cited by defendant in error can be distinguished from this case.

The act is unconstitutional in not providing for notice and an opportunity to be heard before the rejection of the tea.

The act itself must provide for the notice, if not specifically it should fix the time and place for the hearing. *The Railroad Tax Cases*, 13 Fed. Rep. 722, 752, 753; *Kuntz* v. *Sumption*, 117 Indiana, 1; *S. C.*, 2 L. R. A. 655; *Reetz* v. *Michigan*, 188 U. S. 505, 509; *Stuart* v. *Palmer*, 74 N. Y. 186. Voluntary notice will not suffice, because what is conferred as a favor to-day may be withheld to-morrow. As to what is due process of law, see *Turpin* v. *Lemon*, 187 U. S. 58; *Hagar* v. *Reclamation District*, 111 U. S. 701; *Simon* v. *Craft*, 182 U. S. 427, 436; *Lent* v. *Tillson*, 140 U. S. 316; *Davidson* v. *New Orleans*, 96 U. S. 97, 107; *Palmer* v. *McMahon*, 133 U. S. 66; *Passavant* v. *United States*, 148 U. S. 214, 222.

This is not a proceeding for the collection of public revenue, in which cases summary remedies may be used which could not be applied in cases of a judicial character. *King* v. *Mullins*, 171 U. S. 429; *Bells Gap R. R. Co.* v. *Pennsylvania*, 134 U. S. 232, 239.

The act is unconstitutional because it authorizes the confiscation of the importer's property without due process of law, as was the fact in the *Stranahan* case.

These teas were not a nuisance. *Yates* v. *Milwaukee*, 10 Wall. 497.

There was no trial as to whether the teas were lawfully rejected and whether the time for their removal had expired. None of these or other questions were concluded by the finding of the board of general appraisers. *Colon* v. *Lisk*, 153 N. Y. 133; *Peck* v. *Anderson*, 57 California, 251; *Dunn* v. *Burleigh*, 62 Maine, 24; *King* v. *Hayes*, 80 Maine, 206; *Lowry*

v. *Rainwater*, 70 Maine, 152; *State* v. *Robbins*, 124 Indiana, 308; *Ridgway* v. *West*, 60 Indiana, 371.

In *Buttfield* v. *Bidwell* (No. 296), the evidence establishes a case of personal liability against the defendant.

The teas having been entered for import at the custom-house, were in the control of the collector. *Conrad* v. *Pacific Ins. Co.*, 6 Pet. 262, 281; *Tracy* v. *Swartwout*, 10 Pet. 80.

It is not sought to hold the collector liable for the negligence, misconduct or other wrongful act of a subordinate official, but for duress of goods under a duty imposed upon him by an unconstitutional law. *United States* v. *Lee*, 106 U. S. 196; *Stanley* v. *Schwartz*, 147 U. S. 508, 518.

Officials acting under unconstitutional statutes which are ineffectual to protect them, are liable for damages sustained by their wrongful act or where officials have been restrained from proceeding to enforce such unconstitutional law. *Osborn* v. *Bank*, 9 Wheat. 738; *Poindexter* v. *Greenhow*, 114 U. S. 270; *Pennoyer* v. *McConaughy*, 140 U. S. 1; *Smith* v. *Ames*, 169 U. S. 466; *Scott* v. *Donald*, 165 U. S. 56; *Tendal* v. *Wesley*, 167 U. S. 204. The same thing is true whenever an official, exceeding his lawful powers, inflicts an injury under color of office. *Siegfried* v. *Phelps*, 40 Fed. Rep. 660; *Leslin* v. *Hedden*, 28 Fed. Rep. 416; *Pascal* v. *Sullivan*, 21 Fed. Rep. 496.

The rule that an officer is not liable for the tortious acts of his subordinate has no application where the act performed is a duty imposed by a law. *Cleveland &c. Ry. Co.* v. *McClung*, 119 U. S. 454; *Belknap* v. *Achild*, 161 U. S. 10, 18; *Iselin* v. *Hedden*, 28 Fed. Rep. 416; *Head* v. *Porter*, 48 Fed. Rep. 482.

Where a public officer has established a regulation in the course of business that he will not do a certain act except upon certain terms which are illegal, or that he will not accept payment except upon conditions that he has no right to impose, a tender and demand are waived. *United States* v. *Lee*, 106 U. S. 196; *Swift* v. *United States*, 101 U. S. 22.

In the *Seven Package* case the plaintiff in error is not estopped by giving a bond under duress, from questioning the

constitutionality of the act. If the act was unconstitutional the bond was plainly void as being without consideration, and extorted by duress, and the giving of the bond under such circumstances would not operate as an estoppel. *O'Brien* v. *Wheelock*, 184 U. S. 450; *Coburn* v. *Townsend*, 103 California, 233; Am. & Eng. Ency. of Law (2d ed.), vol. 4, p. 667.

If the act is unconstitutional for any of the reasons argued it is wholly void because it is impossible to sever the invalid provisions from the valid provisions, if there be any. *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U. S. 636; *Spraigue* v. *Thompson*, 118 U. S. 93, 95; *Trade Mark Cases*, 100 U. S. 98.

Mr. Edward B. Whitney, special assistant to the Attorney General, with whom *Mr. Solicitor General Hoyt* was on the brief, for defendant in error:

This is the last of a series of cases which have been brought in different forms for the purpose of testing the constitutionality of the tea-inspection act of March 2, 1897, 29 Stat. 604. *Sang Lung* v. *Jackson*, 85 Fed. Rep. 502; *Cruickshank* v. *Bidwell*, 86 Fed. Rep. 7; 176 U. S. 73; *Buttfield* v. *Bidwell*, 94 Fed. Rep. 126; 96 Fed. Rep. 328; *United States ex rel. Hamilton* v. *Gage*, Sup. Ct. Dist. Col. 1901; *Buttfield* v. *Bidwell*, No. 296 of this term.

The Treasury regulations which were in effect at the time of the importation of these teas are matter of which this court may take judicial notice. *Caha* v. *United States*, 152 U. S. 211; *Cosmos Co.* v. *Eagle Co.*, 190 U. S. 301, 309.

In construing an act not only is prior legislation *in pari materia* to be considered, but also it is important to examine the original form of the bill and the way in which the amendments thereto were inserted, for which purpose the journals of Congress may be considered, *Blake* v. *National Banks*, 23 Wall. 307; *Legal Tender Cases*, 12 Wall. 559; *United States* v. *Burr*, 159 U. S. 85; *Chesapeake Co.* v. *Manning*, 186 U. S. 238, 245, and, while it is not permitted to examine the debates of Congress, it is proper to examine the reports of Congressional

committees, upon which reports the action of Congress was based. *The Delaware*, 161 U. S. 459, 472.

The former act *in pari materia* was the act of March 2, 1883, c. 64, 22 Stat. 451.

Every intendment is in support of the constitutionality of the act. *Gettysburg Park Case*, 160 U. S. 668, 680; *Pine Grove* v. *Talcott*, 19 Wall. 666, 673; *Nicol* v. *Ames*, 173 U. S. 509, 514, 515; *Commonwealth* v. *Blackington*, 24 Pick. 353, 355.

The power to regulate commerce with foreign nations includes the power to prohibit the importation of these low-grade teas. *United States* v. *Brigantine Williams*, 2 Hall's L. J. 255; 28 Fed. Cas. 614; 2 Story on Const. §§ 1093, 1290, 1292; 1 Kent, 431; 9 Stat. 237; Rev. Stat. § 2933; *United States* v. *43 Gallons of Whiskey*, 93 U. S. 188, 194; *Lottery Case*, 188 U. S. 321, 354, 374; *United States* v. *Realty Co.*, 163 U. S. 427; *Murray's Lessee* v. *Hoboken Land & Imp. Co.*, 18 How. 272. As to governmental limitations on foreign commerce, see licenses granted to individuals showing powers of government. Leone Levi, History of British Commerce (2d ed.), pp. 30, 109, 235, 236; Adam Smith, Wealth of Nations, Book IV, c. I; New York Statutes of March 15, 1781, c. 29; 9 Hening's Virginia Statutes, 1778, p. 532; 2 Stat. 500, 506.

The power to regulate commerce with foreign nations, being an enumerated power, is entirely unlimited so long as it does not violate any of the specific constitutional restrictions upon legislative authority. *Lottery Case*, 188 U. S. 321, 353, 356. An enumerated power is "distinct and independent, to be exercised in any case whatever." *McCulloch* v. *Maryland*, 4 Wheat. at p. 421; *Doyle* v. *Continental Insurance Co.*, 94 U. S. 535, 541. It acknowledges no limitations other than those prescribed in the Constitution. *Leisy* v. *Hardin*, 135 U. S. 100, 108. It may be used for any lawful purpose. *United States* v. *E. C. Knight Co.*, 156 U. S. 1; *Hauenstein* v. *Lynham*, 100 U. S. 483, and cases cited; *Geofroy* v. *Riggs*, 133 U. S. 258, 266, 267; *Patapsco Guano Co.* v. *North Carolina*, 171 U. S. 345.

The intent of the statute is, and for proper reason, to exclude

teas of inferior quality though sufficiently pure and not unwholesome, so decided in *Buttfield* v. *Bidwell*, 96 Fed. Rep. 328. The word "quality" must not be regarded as surplusage and the construction of the statute left to depend on the words "fitness for consumption" construed as "wholesome." As to significance of every word in a statute, see Bacon's Abridgment, § 2; *Market Co.* v. *Hoffman*, 101 U. S. 112, 115. The act is remedial and is to be construed as such. *United States* v. *Stowell*, 133 U. S. 1. The fact that the title is narrower than the scope of the act is immaterial.

The title may be used in construing a statute when the body of the statute is ambiguous; but the ambiguity must be found in the word to be construed or in its context, and not in the title. *Patterson* v. *Bark Eudora*, 190 U. S. 169, and cases cited; *Hadden* v. *The Collector*, 5 Wall. 107, 110.

For incongruities between titles and matter of acts of Congress, sponges used to appear under the heading of "Chemicals, oils, or paints," and cork under "Flax, hemp, and jute." See 21 Atty. Gen. Opin. 67; *Hollender* v. *Magone*, 149 U. S. 586, 591; *Seeberger* v. *Schlesinger*, 152 U. S. 581, 583.

The statute being based upon an unlimited power of Congress, it is unnecessary to argue in its justification.

The delegation of details to the Secretary of the Treasury was proper, and indeed absolutely necessary. There is nothing new about the establishment of physical standards. The Treasury Department at an early day had established standards of weight and measure. 5 Stat. 133, and for other instances, see 14 Stat. 560; Rev. Stat. § 2916; 13 Stat. 202 ; Rev. Stat. § 2914; *Merritt* v. *Welsh*, 104 U. S. 694, 702.

The line between the province of the legislature and that of the executive is difficult to determine, *Wayman* v. *Southard*, 10 Wheat. 1, 46; *In re Oliver*, 17 Wisconsin, 681, and the statute is to be given the benefit of any doubt. Carrying into affect in detail the legislative will is generally left to executive officers, although the details may be settled by the legislature if it desires to do so.

For other statutes of this nature sustained, see *Field* v. *Clark*, 143 U. S. 649, 680; *Dunlap* v. *United States*, 173 U. S. 65.

The lower courts held that the discretion lodged in the Secretary of War as to allowing bridges over navigable rivers is an unconstitutional delegation of power, but the latest decisions are to the contrary. *United States* v. *City of Moline*, 82 Fed. Rep. 592; *E. A. Chatfield Co.* v. *New Haven*, 110 Fed. Rep. 788. The question has not been passed upon in this court. *Montgomery* v. *Portland*, 190 U. S. 89, 106, 107. The Secretary of War has a general right to make rules for the regulation of navigation on navigable rivers, which have the force of law; and both he and the Secretary of the Navy have large legislative powers over their respective departments of the public defence. *United States* v. *Ormsbee*, 74 Fed. Rep. 207, 209, and cases cited. As to power of Secretary of Interior, see *Dastervignes* v. *United States*, 122 Fed. Rep. 30. See also 30 Stat. 35; 1 Stat. 372; 1 Stat. 615; 2 Stat. 9; 2 Stat. 352, 411; 3 Stat. 224; 24 Stat. 475; Rev. Stat. § 2494; 26 Stat. 414; *Jones* v. *United States*, 137 U. S. 202. As to Guano Acts, 11 Stat. 119; Porto Rico Act, 31 Stat. 78; Philippine Act, 31 Stat. 910; 1 Dillon Munic. Corp. § 308; *Paul* v. *Gloucester County*, 50 N. J. Law, 585, 600; *In re Grimer*, 16 Wisconsin, 423; Customs Regulation, 1892, p. 370; *Isenhour* v. *State*, 157 Indiana, 517, 522; 32 Stat. 1147, 1158; Tariff Act of 1897, par. 473; Alaska Act, 15 Stat. 240; Rev. Stat. § 1955; 17 Stat. 429; Rev. Stat. § 3529; *United States* v. *Bailey*, 9 Pet. 238; *Caha* v. *United States*, 152 U. S. 211, 219; *Hanover Bank* v. *Moyses*, 186 U. S. 181, 189; *Hewitt* v. *Charier*, 16 Pick. 353; *State* v. *Heinemann*, 80 Wisconsin, 253; *Dent* v. *West Virginia*, 129 U. S. 114, 122; *Reetz* v. *Michigan*, 188 U. S. 505; *Overshiner* v. *State*, 156 Indiana, 187, 193; *Scholle* v. *State*, 90 Maryland, 729; *Martin* v. *Witherspoon*, 125 Massachusetts, 175; *Brodbine* v. *Revere*, 182 Massachusetts, 598; *In re Flaherty*, 105 California, 558; *Wilson* v. *Eureka City*, 173 U. S. 32, 36, 37.

As to delegation of pardoning power, 6 Stat. 3; *The Laura*, 114 U. S. 411. As to patents, *United States* v. *Duell*, 172 U. S. 576.

Due process of law was not denied to the plaintiff. *Origel* v. *Hedden*, 155 U. S. 228, 236; *Auffmordt* v. *Hedden*, 137 U. S. 310, 323. The finding was final and the importer's only remedy was by appeal to the dispensing power of the Secretary of the Treasury. *Passavant* v. *United States*, 148 U. S. 214; *Origet* v. *Hedden, supra*, at p. 236. This "additional duty" was a penalty in the strictest sense of the word. 4 Op. 182; 20 Op. 660.

A person who imports nonimportable goods may properly be put to the expense of taking them away again. The case is similar to that of the return of an alien immigrant at the expense of the transportation company that has brought him into our ports. Acts of Sept. 13, 1888, c. 1015; March 3, 1891, c. 551. Under these statutes the inspectors are not required to take any testimony; their decision is absolutely final. *Nishimura Ekiu* v. *United States*, 142 U. S. 651, 663; *Lem Moon Sing* v. *United States*, 158 U. S. 538; *Chin Bak Kan* v. *United States*, 186 U. S. 192.

Plaintiff was not damnified by the act of 1897 or by the standard of 1901. Either his loss is due to his own failure to notify his buyers in China; or it is due to their default, for which he is responsible as against others and they are responsible to him; or it is due to a plan of his own to import teas below the standard, procure a judgment establishing the unconstitutionality of the act, and thus undersell his competitors.

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

The assignments of error assail the act of the trial court in denying the motion for the direction of a verdict in favor of plaintiff and in giving a peremptory instruction in favor of the defendant. Summarized, the contentions are as follows: 1, that the act of March 2, 1897, confers authority to establish standards, and that such power is legislative and cannot constitutionally be delegated by Congress to administrative officers; 2, that the plaintiff in error had a vested

right to engage as a trader in foreign commerce and as such to import teas into the United States, which as a matter of fact were pure, wholesome and free from adulteration, fraud and deception, and which were fit for consumption; 3, that the establishment and enforcement of standards of quality of teas, which operated to deprive the alleged vested right, constituted a deprivation of property without due process of law; 4, that the act is unconstitutional, because it does not provide that notice and an opportunity to be heard be afforded an importer before the rejection of his tea by the tea examiner, or the Tea Board of General Appraisers; and, 5, that in any event the authority conferred by the statute to destroy goods upon the expiration of the time limit for their removal for export and the destruction of such property, without a judicial proceeding, was condemnation of property without hearing and the taking thereof without due process of law.

Whether the contentions just stated are tenable are the questions for consideration.

In examining the statute in order to determine its constitutionality we must be guided by the well-settled rule that every intendment is in favor of its validity. It must be presumed to be constitutional, unless its repugnancy to the Constitution clearly appears. *Nicol* v. *Ames*, 173 U. S. 509, 514, 515; *Gettysburg Park Case*, 160 U. S. 668, 680.

The power to regulate commerce with foreign nations is expressly conferred upon Congress, and being an enumerated power is complete in itself, acknowledging no limitations other than those prescribed in the Constitution. *Lottery Case*, 188 U. S. 321, 353–356; *Leisy* v. *Hardin*, 135 U. S. 100, 108. Whatever difference of opinion, if any, may have existed or does exist concerning the limitations of the power, resulting from other provisions of the Constitution, so far as interstate commerce is concerned, it is not to be doubted that from the beginning Congress has exercised a plenary power in respect to the exclusion of merchandise brought from foreign countries; not alone directly by the enactment of embargo statutes, but

indirectly as a necessary result of provisions contained in tariff legislation. It has also, in other than tariff legislation, exerted a police power over foreign commerce by provisions which in and of themselves amounted to the assertion of the right to exclude merchandise at discretion. This is illustrated by statutory provisions which have been in force for more than fifty years, regulating the degree of strength of drugs, medicines and chemicals entitled to admission into the United States and excluding such as did not equal the standards adopted. 9 Stat. 237; Rev. Stat. sec. 2933 *et seq.*

The power to regulate foreign commerce is certainly as efficacious as that to regulate commerce with the Indian tribes. And this last power was referred to in *United States* v. *43 Gallons of Whiskey*, 93 U. S. 188, 194, as exclusive and absolute, and was declared to be "as broad and as free from restrictions as that to regulate commerce with foreign nations." In that case it was held that it was competent for Congress to extend the prohibition against the unlicensed introduction and sale of spirituous liquors in the Indian country to territory in proximity to that occupied by the Indians, thus restricting commerce with them. We entertain no doubt that it was competent for Congress, by statute, under the power to regulate foreign commerce, to establish standards and provide that no right should exist to import teas from foreign countries into the United States, unless such teas should be equal to the standards.

As a result of the complete power of Congress over foreign commerce, it necessarily follows that no individual has a vested right to trade with foreign nations, which is so broad in character as to limit and restrict the power of Congress to determine what articles of merchandise may be imported into this country and the terms upon which a right to import may be exercised. This being true, it results that a statute which restrains the introduction of particular goods into the United States from considerations of public policy does not violate the due process clause of the Constitution.

That the act of March 2, 1897, was not an exercise by Congress of purely arbitrary power is evident from the terms of the law, and a consideration of the circumstances which led to its enactment. The history of the act and its proper construction, as also the reasons for deciding that the regulations of the Secretary of the Treasury establishing the standard here in question were warranted by the statute, were succinctly stated in the opinion of the Court of Appeals for the Second Circuit in *Buttfield* v. *Bidwell*, 96 Fed. Rep. 328, and we adopt such statement. The court said:

"The basic question in this case is as to the true construction of the act of Congress of March 2, 1897, entitled 'An act to prevent the importation of impure and unwholesome tea.' Section 1 makes it unlawful 'to import or bring into the United States any merchandise as tea which is inferior in purity, quality, and fitness for consumption to the standards provided in section 3 of this act, and the importation of all such merchandise is hereby prohibited.' Section 2 provides for the appointment by the Secretary of the Treasury, immediately after the passage of the act, and on or before February 15 of each subsequent year, of the board of tea experts, 'who shall prepare and submit to him standard samples of tea.' Section 3 provides that the Secretary of the Treasury, upon the recommendation of said board, 'shall fix and establish uniform standards of purity, quality and fitness for consumption of all kinds of teas imported into the United States,' samples of such standards to be deposited in various custom-houses, and supplied to importers and dealers at cost, and declares that "all teas, or merchandise described as tea, of inferior purity, quality and fitness for consumption to such standards shall be deemed to be within the prohibition of the first section hereof." Sections 4–7 provide for the examination of importations of tea, for a reëxamination by the board of general appraisers in case of a protest by the importer or collector against the finding of the primary examiner, and for testing the purity, quality and fitness for consumption in all cases of examination or reëxamination, 'ac-

cording to the usages and customs of the tea trade, including the test of an infusion of the same in boiling water, and, if necessary, chemical analysis.' . . . The history of the enactment shows that the word ('quality') was industriously inserted to make the act a more stringent substitute for the existing legislation. By the act of March 3, 1883, then in force, any merchandise imported 'for sale as tea,' adulterated with spurious or exhausted leaves, or containing such an admixture of deleterious substances as to make it 'unfit for use,' was prohibited; and exhausted leaves were defined to include any tea which had been deprived of its proper quality, strength, or virtue by steeping, infusion, decoction, or other means. Thus the importation of tea containing such an admixture of leaves as to be deprived of its proper quality or virtue by any method of treatment was prohibited. The act, however, contained no provision for the establishment of government standards; and the establishment of uniform standards in the interest of the importer and of the consumer had become a recognized necessity. In a report by the Senate Committee on Commerce, in 1897, the provision was suggested as designed, among other things, to protect the consumer against 'worthless rubbish,' and insure his 'receiving an article fit for use.' The report pointed out that the 'lowest average grade of tea ever before known was now being used' by our consumers, and proposed as a remedy the establishment of standards of the 'lowest grades of tea fit for use.' As originally introduced in the House, the bill prohibited the importation of 'any merchandise as tea which is inferior in purity or fitness for consumption to the standards provided in section 3 of this act.' It was amended in the Senate by inserting the word 'quality' between the words 'purity' and 'fitness for consumption' wherever they occurred in the House bill. The amendment evinces the intention of the Senate to authorize the adoption of uniform standards by the Secretary of the Treasury which would be adequate to exclude the lowest grades of tea, whether demonstrably of inferior purity, or unfit for consumption, or

presumably or possibly so because of their inferior quality. The House concurred in the amendment, and the measure was enacted in its present terms. We conclude that the regulations of the Secretary of the Treasury are warranted by the provisions of the act."

The claim that the statute commits to the arbitrary discretion of the Secretary of the Treasury the determination of what teas may be imported, and therefore in effect vests that official with legislative power, is without merit. We are of opinion that the statute, when properly construed, as said by the Circuit Court of Appeals, but expresses the purpose to exclude the lowest grades of tea, whether demonstrably of inferior purity, or unfit for consumption, or presumably so because of their inferior quality. This, in effect, was the fixing of a primary standard, and devolved upon the Secretary of the Treasury the mere executive duty to effectuate the legislative policy declared in the statute. The case is within the principle of *Field* v. *Clark*, 143 U. S. 649, where it was decided that the third section of the tariff act of October 1, 1890, was not repugnant to the Constitution as conferring legislative and treaty-making power on the President, because it authorized him to suspend the provisions of the act relating to the free introduction of sugar, molasses, coffee, tea and hides. We may say of the legislation in this case, as was said of the legislation considered in *Field* v. *Clark*, that it does not, in any real sense, invest administrative officials with the power of legislation. Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute. To deny the power of Congress to delegate such a duty would, in effect, amount but to declaring that the plenary power vested in Congress to regulate foreign commerce could not be efficaciously exerted.

Whether or not the Secretary of the Treasury failed to carry into effect the expressed purpose of Congress and established

standards which operated to exclude teas which would have been entitled to admission had proper standards been adopted, is a question we are not called upon to consider. The sufficiency of the standards adopted by the Secretary of the Treasury was committed to his judgment, to be honestly exercised, and if that were important there is no assertion here of bad faith or malice on the part of that officer in fixing the standards, or on the part of the defendant in the performance of the duties resting on him.

It is urged that there was denial of due process of law in failing to accord plaintiff in error a hearing before the Board of Tea Inspectors and the Secretary of the Treasury in establishing the standard in question, and before the general appraisers upon the reëxamination of the tea. Waiving the point that the plaintiff in error does not appear to have asked for a hearing, and assuming that the statute did not confer such a right, we are of opinion that the statute was not objectionable for that reason. The provisions in respect to the fixing of standards and the examination of samples by government experts was for the purpose of determining whether the conditions existed which conferred the right to import, and they therefore in no just sense concerned a taking of property. This latter question was intended by Congress to be finally settled, not by a judicial proceeding, but by the action of the agents of the government, upon whom power on the subject was conferred.

It remains only to consider the contention that the provision of the statute commanding the destruction of teas not exported within six months after their final rejection was unconstitutional. The importer was charged with notice of the provisions of the law, and the conditions upon which teas might be brought from abroad, with a view to their introduction into the United States for consumption. Failing to establish the right to import, because of the inferior quality of the merchandise as compared with the standard, the duty was imposed upon the importer to perform certain requirements, and to take the goods from the custody of the authorities within a period

of time fixed by the statute, which was ample in duration. He was notified of the happening of the various contingencies requiring positive action on his part. The duty to take such action was enjoined upon him, and if he failed to exercise it the collector was under the obligation after the expiration of the time limit to destroy the goods. That plaintiff in error had knowledge of the various steps taken with respect to the tea, including the final rejection by the board of general appraisers, is conceded. We think the provision of the statute complained of was not wanting in due process of law.

Affirmed.

MR. JUSTICE BREWER and MR. JUSTICE BROWN, not having heard the argument, took no part in the decision of this case.

BUTTFIELD *v.* BIDWELL.

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

No. 296. Argued January 4, 1904.—Decided February 23, 1904.

DECIDED on authority of *Buttfield* v. *Stranahan*, *ante*, p. 470.

Mr. James L. Bishop, with whom *Mr. James H. Simpson* was on the brief, for plaintiff in error.

Mr. Edward B. Whitney, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Hoyt* was on the brief, for defendant in error.

MR. JUSTICE WHITE delivered the opinion of the court.

This action was brought by Buttfield to recover damages sustained by being prevented from importing into the United States a large number of packages of Country green teas, being

four shipments from China. These teas, on reëxamination by the board of general appraisers, were found to be inferior in quality to the standard prescribed by law; and Bidwell, as collector for the port of New York, so notified Buttfield. Thereupon the teas were withdrawn from the bonded warehouse and exported. Judgment was entered for Bidwell upon a directed verdict in his favor. The right to reversal of that judgment is predicated solely upon the asserted unconstitutionality of the tea inspection act of March 2, 1897. It will not be necessary to determine whether, even supposing the statute to be unconstitutional, a cause of action is stated in any of the four counts of the complaint below. The statute having been held to be valid in the opinion just announced in *Buttfield* v. *Stranahan*, the judgment must be and is hereby

Affirmed.

MR. JUSTICE BREWER and MR. JUSTICE BROWN took no part in the decision of this case.

BUTTFIELD *v.* UNITED STATES.

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

No. 516. Argued January 4, 1904.—Decided February 23, 1904.

DECIDED on authority of *Buttfield* v. *Stranahan*, *ante*, p. 470.

Mr. James L. Bishop, with whom *Mr. James H. Simpson* was on the brief, for plaintiff in error.

Mr. Edward B. Whitney, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Hoyt* was on the brief, for defendant in error.

MR. JUSTICE WHITE delivered the opinion of the court.

This was a proceeding for the condemnation of seven pack-

ages of tea, which had been reimported after export from this country upon a final rejection of the tea by the board of general appraisers as not entitled to admission into the United States for consumption under the tea inspection act of March 2, 1897. Buttfield appeared as claimant, and a demurrer filed on his behalf to the information was overruled. The claimant failing to plead further, a final decree and judgment of forfeiture was entered. A reversal is asked upon the sole ground that the act of March 2, 1897, referred to, is repugnant to the Constitution of the United States. Upon the authority of *Buttfield* v. *Stranahan* just decided, the judgment below is

Affirmed.

MR. JUSTICE BREWER and MR. JUSTICE BROWN took no part in the decision of this case.

AMERICAN STEEL & WIRE COMPANY *v.* SPEED.

ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

No. 356. Submitted January 11, 1904.—Decided February 23, 1904.

In a constitutional sense "imports" embrace only goods brought from a foreign country and do not include merchandise shipped from one State to another. The several States are not, therefore, controlled as to such merchandise by constitutional prohibitions against the taxation of imports, and goods brought from another State, and not from a foreign country, are subject to state taxation after reaching their destination and whilst held in the State for sale.

Woodruff v. *Parham*, 8 Wall. 123; *Brown* v. *Houston*, 114 U. S. 622, have never been overruled directly or indirectly by *Leisy* v. *Hardin*, 135 U. S. 100; *Lyng* v. *Michigan*, 135 U. S. 161, or other cases resting on the rule expounded in those cases.

Goods brought in original packages from another State, after they have arrived at their destination and are at rest within the State, and are enjoying the protection which the laws of the State afford, may, without violating the commerce clause of the Constitution, be taxed without discrimination like other property within the State, although at the time they are stored at a distributing point from which they are subsequently

to be delivered in the same packages, through the storage company to purchasers in various States.

Where the levy of a merchant's privilege tax violates no Federal right the mere determination of who are merchants within the state law involves no Federal question. The construction of the state law is conclusive and if it embraces all persons doing a like business there is no discrimination.

THE facts are stated in the opinion of court.

Mr. Josiah Patterson for plaintiff in error:

In the construction of the constitution or statutory law of a State, this court follows the uniform decisions of the highest court in such State, notwithstanding this court would have reached a different conclusion from an application of the principles of general jurisprudence. *Morley* v. *Lake Shore, etc., Ry. Co.*, 146 U. S. 162; *Miller* v. *Swann*, 150 U. S. 132; *Balt. Traction Co.* v. *Balt. Belt R. R. Co.*, 151 U. S. 137; *Marchant* v. *Penna. R. R. Co.*, 153 U. S. 380; *Fallbrook Irrigation Dist.* v. *Bradley*, 164 U. S. 112; *Aberdeen Bank* v. *County of Chehalis*, 166 U. S. 440; *Wilson* v. *North Carolina*, 169 U. S. 586; *Bank* v. *Skelly*, 1 Black, 436; *Christy* v. *Pridgeon*, 4 Wall. 196.

Where the court of last resort in the State has, previously to the controversy, placed an interpretation on a local statute different from the interpretation placed on it in the pending suit, this court may adopt either construction, in accordance with its own opinion of the rules of general law which should govern the case. *Roberts* v. *Nor. Pac. R. R. Co.*, 158 U. S. 1; *Wilson* v. *Ward &c. Co.*, 67 Fed. Rep. 674; *Nat. Foundry and P. Wks.* v. *Oconto Water Co.*, 68 Fed. Rep. 1006; *Knox County* v. *Ninth Natl. Bank*, 147 U. S. 91; *Bartholomew* v. *City of Austin*, 85 Fed. Rep. 359; *Jones* v. *Great Southern Fire Proof Co.*, 86 Fed. Rep. 370; *Louisville Trust Co.* v. *Cincinnati*, 76 Fed. Rep. 296.

Where the decision of a court of last resort in a State is adverse to some right claimed under the Constitution of the United States, or some law of Congress, and such decision does not involve the construction of the constitution of such State, or any of its local laws or usages, but the claim of right is denied

on the opinion of such state court as to the principles of general law applicable to the case, then such decision is not a precedent binding on this court, and the Federal questions presented will be determined by this court according to its own independent judgment of the principles of general jurisprudence involved in the controversy. *Boyce* v. *Tabb*, 18 Wall. 546; *Olcott* v. *Supervisors*, 16 Wall. 678; *Swift* v. *Tyson*, 16 Pet. 1; *Willis* v. *Commissioners*, 86 Fed. Rep. 872; *Hartford Fire Ins. Co.* v. *Chicago, M. & St. P. Ry.*, 70 Fed. Rep. 201.

Where a party brings a case on writ of error to the court of last resort in a State, and claims that he has been deprived by the decision of such court of some right secured to him under the Constitution of the United States, this court becomes the exclusive and final arbiter of such Federal question, and will, after giving the opinion of the state court respectful consideration, decide the case for itself, independently of any construction which such court of last resort may have placed on the constitution, or local laws and usages of such State. *Scott* v. *McNeal*, 154 U. S. 34; *Fallbrook Irr. Dist.* v. *Bradley*, 164 U. S. 112; *Louisville & Nashville R. R. Co.* v. *Palmes*, 109 U. S. 244; *Central Trust Co.* v. *Citizens' Street Ry. Co.*, 82 Fed. Rep. 1; *State Bank* v. *Knoop*, 16 How. 369.

Subsec. 3, § 8, Art. I, Const., in its application to a subject which is national in its character, and admits and requires uniformity of regulation affecting alike all the States, means that Congress alone has the power to provide such regulations as the exigencies of commerce may require, and the absence of any legislation on the subject is equivalent to a declaration by Congress that commerce, as to that subject, shall be free. The importation of goods from one State into another is a subject of national importance, affecting the welfare of the whole country, and, therefore, the absence of any law of Congress in respect to an article which is the subject of interstate commerce, operates as an affirmative declaration that the importation of that article shall be free from any regulation or restriction whatever by the State into which such article is

imported. *Brown* v. *Houston*, 114 U. S. 622; *Bowman* v. *Chicago & Northwestern Ry. Co.*, 125 U. S. 507; *Leisy* v. *Hardin*, 135 U. S. 100; *Pittsburg & Southern Coal Co.* v. *Bates*, 156 U. S. 577.

Goods imported from one State into another are the subjects of interstate commerce, and in the absence of any law of Congress, they will remain under the protection of the Federal Constitution exempt from any regulation or interference on the part of the State into which they are imported, until the status of such goods is changed by mingling them with the general property of the State, and thereby terminating their character as subjects of interstate commerce. *Brown* v. *Maryland*, 12 Wheat. 436; *Leisy* v. *Hardin*, 135 U. S. 100; *Lyng* v. *Michigan*, 135 U. S. 161.

The power to tax is the power to destroy, and, therefore, the taxation of the subjects of interstate commerce is a regulation of "commerce among the several States," inhibited by the Constitution. *Leloup* v. *Mobile*, 127 U. S. 640; *Bowman* v. *Chicago & Northwestern Ry. Co.*, 125 U. S. 465; *Weston* v. *Charleston*, 2 Pet. 449; *Postal Tel. Co.* v. *Adams*, 155 U. S. 688.

The constitutionality of a tax imposed by a State is not to be determined by the manner of its imposition, or the agency through which it is collected, but by the subject on which the tax is imposed. If the tax operates as a burden on a subject of interstate commerce, it is obnoxious to the Federal Constitution, without regard to its character or the method of its enforcement. *Telegraph Co.* v. *Texas*, 105 U. S. 460; *Cook* v. *Pennsylvania*, 97 U. S. 566; *State Freight Tax*, 15 Wall. 232; *Bank Tax Case*, 2 Wall. 200; *Bank of Commerce* v. *New York*, 2 Black, 620.

As long as goods imported from one State into another remain in the original packages in which they were transported, they will continue the subjects of interstate commerce, and the owner of the goods, in the absence of any law of Congress, may sell them in the original packages in the

State into which they are imported, without restriction, interference or regulation by such State. *Brown* v. *Maryland*, 12 Wheat. 436; *Leisy* v. *Hardin*, 135 U. S. 100; *Lyng* v. *Michigan*, 135 U. S. 161; *May* v. *New Orleans*, 178 U. S. 496; *Schollenberger* v. *Pennsylvania*, 171 U. S. 1; *Pabst Brewing Co.* v. *Terre Haute*, 98 Fed. Rep. 330.

The original package of commerce is a package, bundle or aggregation of goods put up for convenience of transportation into whatever covering or receptacle the importer may elect, and delivered by him to the carrier at the initial point of shipment, to be transported from one State into another; and where a number of smaller packages are, for convenience, placed within a larger package, or bound together in a bundle, such bundle or larger package will constitute the original package of commerce; and when the bundle is unbound, or the larger package opened, in order to expose the smaller packages for sale, the goods will become mingled with the general property of the State and cease to be subjects of interstate commerce. Cases cited *supra* and *Sawrie* v. *Tennessee*, 82 Fed. Rep. 615; *Keith* v. *The State*, 10 L. R. A. 430; *McGregor* v. *Cone*, 39 L. R. A. 484; *Guckenheimer* v. *Sellers*, 81 Fed. Rep. 997; *Austin* v. *State*, 17 Pick. (Tenn.) 563.

When goods designed for exportation from one State into another State start on their journey at the initial point of transportation, they at once become subjects of interstate commerce, and are protected by the Federal Constitution from any interference or regulation by any State through which they may pass, until they reach their ultimate destination, notwithstanding, on the way, they may be delayed for a reasonable time on account of inadequate means of transportation, or for reshipment, or assortment, or distribution, or on account of any accident, or any other cause which may supervene to prevent the goods going directly from the initial point of shipment to the point of destination. *Coe* v. *Errol*, 116 U. S. 517; *The Daniel Ball*, 10 Wall. 557; *Howe Machine Co.* v. *Gage*, 100 U. S. 676; *Diamond Match Co.* v. *Ontonagon*, 188 U. S.

82; *Kelley* v. *Rhoads*, 188 U. S. 1; *Caldwell* v. *North Carolina*, 187 U. S. 622; *State* v. *Engle*, 5 Vroom (N. J.), 425; *State* v. *Carrigan*, 10 Vroom (N. J.), 35; *Passenger Cases*, 7 How. 405; *Head Money Cases*, 112 U. S. 580; *New York* v. *Compagnie &c.*, 107 U. S. 59.

As the absence of legislation on the part of Congress is equivalent to a positive declaration that interstate commerce shall be free, it follows that its subjects may be transported from one State into another, and there sold in the original packages, without the imposition of burdens of any kind, and that the imposition of a tax on such subjects by the State into which they are imported cannot be justified or upheld on the ground that the tax is equal and applies impartially to all goods of like character within the limits of such State. *Robbins* v. *Shelby County Taxing Dist.*, 120 U. S. 489; *Leloup* v. *Port of Mobile*, 127 U. S. 640; *Asher* v. *Texas*, 128 U. S. 129; *Stockard* v. *Morgan*, 185 U. S. 27.

When goods imported from one State into another, whether in the original packages of commerce or not, are, by the State into which they are imported, made subjects of an invidious and discriminating tax, because of their foreign origin, the Federal Constitution will intervene to protect them from such invidious or discriminating tax, and its protection will continue as long as the goods can be identified, and the invidious discrimination exists. *Welton* v. *Missouri*, 91 U. S. 275; *Brown* v. *Maryland*, 12 Wheat. 436; *Woodruff* v. *Parham*, 8 Wall. 123; *State Freight Tax*, 15 Wall. 232; *Minneapolis Brewing Co.* v. *McGillivray*, 104 Fed. Rep. 258.

Mr. Charles T. Cates, Jr., Attorney General of the State of Tennessee, with whom *Mr. James M. Greer* and *Mr. W. H. Carroll* were on the brief, for defendant in error:

The judgment of the Supreme Court of Tennessee is final, conclusive and not reviewable by this court in respect of the questions of fact involved in said judgment. *Dower* v. *Richards*, 151 U. S. 664; *In re Buchanan*, 158 U. S. 36. And of the

interpretation, and application to the facts found, of the constitution and statutes of Tennessee as declared in said judgment. *Western Union Tel. Co.* v. *Gottlieb*, 190 U. S. 425; *New York* v. *Roberts*, 171 U. S. 661.

That plaintiff in error was carrying on the business of a merchant, and as such properly assessed for taxes, within the sense and meaning of the Tennessee statutes. *State* v. *Smith*, 5 Humph. 394; *Taylor* v. *Vincent*, 12 Lea, 282, distinguished. See *Kurth* v. *State*, 86 Tennessee, 134, 137, and see acts of 1885, c. 1, § 15; of 1887, c. 2, § 16; of 1901, c. 174, § 27.

The whole matter involving the status of plaintiff in error as a merchant and its liability to be assessed as such, was, on the appeal of plaintiff in error, laid before the state board of equalization where the assessment as made was in all respects affirmed. This is final as to all matters passed upon by it. Acts of 1901, c. 174, sec. 38, subsec. 10; acts of 1899, c. 4435, sec. 39, subsec. 10; *Grundy County* v. *Tenn. Coal Co.*, 94 Tennessee, 305; *Ward* v. *Alsup*, 100 Tennessee, 750.

The tax assessed against plaintiff in error as a merchant contains no element of discrimination against it as a foreign dealer, or otherwise. *Oliver Finney Grocery Co.* v. *Speed*, 87 Fed. Rep. 409, 412. That it is not a strict *ad valorem* tax is conclusively shown by the provision in the revenue acts relating to the assessment of personal property. Acts of 1899, c. 435, sec. 8, class 9; acts of 1901, c. 174, sec. 8, class 9.

Section 30, art. II of the constitution of Tennessee has been before the state Supreme Court in a number of cases and it has been uniformly decided that the exemption therein provided applies only to the manufactured article in the hands of the manufacturer at his place of business, and that it does not exempt goods or articles manufactured of the produce of the State, in the hands of the merchant or dealer, from the merchant's tax. *State* v. *Crawford, McNeil & Co.*, 2 Head, 461.

The taxing acts are in no sense discriminatory against plaintiff in error as a foreign dealer or its goods as articles manufactured in another State. *New York State* v. *Roberts*, 171

U. S. 658, 666; *Bell Gap R. R. Co.* v. *Pennsylvania,* 134 U. S. 232.

The tax assessed against plaintiff in error as a merchant is not in violation of Art. I, sec. 8, subsec. 3, of the Constitution of the United States, which empowers Congress "to regulate commerce with foreign nations, and among the several States, and among the Indian tribes."

Cases cited on brief of plaintiff in error do not support its contention. See *Coe* v. *Errol,* 116 U. S. 517; *Brown* v. *Houston,* 114 U. S. 622; *Kelley* v. *Rhoads,* 188 U. S. 1.

Plaintiff in error was not entitled to escape taxation because its goods were taxed when "in transit" from one State to another, nor on the ground that goods were imported into Tennessee in original packages of commerce and there offered for sale in the original packages.

Cases on brief of plaintiff in error distinguished, and see *In re Rahrer,* 140 U. S. 545, 559; *Ficklen* v. *Shelby County,* 145 U. S. 21; *Woodruff* v. *Parham,* 8 Wall. 123.

The revenue statutes of Tennessee under which plaintiff in error was assessed upon the "average capital invested" by it in its business at Memphis was designed to require it and others in like situation with it, without discrimination, to contribute to the revenue of the State, a tax measured by the average amount of capital employed in said business, and is the same, uniform and non-discriminating tax laid upon domestic corporations, individuals and firms engaged in the same business. By whatever form or name plaintiff in error sought to cover up its business and evade the equal and just tax laws of Tennessee, the fact still remains that it was engaged in the business of a merchant in the city of Memphis. *State ex rel.* v. *Roberts,* 152 N. Y. 59, 64; *Brown* v. *Houston,* 114 U. S. 622; *Pittsburgh Sou. Coal Co.* v. *Bates,* 156 U. S. 539; Judson on Taxation, § 181; *Emert* v. *Missouri,* 156 U. S. 318. *May* v. *New Orleans,* 178 U. S. 496, is not in favor of plaintiff in error but supports the State's contention.

The principle underlying the question is not whether the

barges in which plaintiff in error brought its goods or the kegs of nails and coils of wire were the original packages, but whether said packages, that is the kegs of nails and coils of wire, had been so used and dealt with as to make them a part of the common mass of property in the State, and on the holding of the Supreme Court of Tennessee on this question, based upon the overwhelming facts as found by it, we submit that plaintiff in error was properly assessed for taxation as a merchant upon the "average capital invested" in its business in Tennessee.

MR. JUSTICE WHITE delivered the opinion of the court.

Whether the plaintiff in error is entitled to recover the sum of certain taxes which were paid under protest, on the ground that the taxes were repugnant to the Constitution of the United States, is the question for decision on this record.

Section 28, article II, of the constitution of the State of Tennessee, so far as pertinent to the issue to be decided, is as follows:

"All property, real, personal or mixed, shall be taxed. . . . All property shall be taxed according to its value, that value to be ascertained in such manner as the legislature shall direct, so that taxes shall be equal and uniform throughout the State. No one species of property from which a tax may be collected, shall be taxed higher than any other species of property of the same value, but the legislature shall have power to tax merchants, peddlers and privileges, in such manner as they may from time to time direct. The portion of a merchant's capital used in the purchase of merchandise sold by him to non-residents and sent beyond the State, shall not be taxed at a rate higher than the *ad valorem* tax on property."

Section 30, article II, of the same constitution provides:

"No article manufactured of the produce of this State shall be taxed otherwise than to pay inspection fees."

The assessing and taxing laws of the State of Tennessee in force at the time the taxes in controversy were levied provided, first, for a general *ad valorem* tax upon all property; second, for

a merchants' tax separate from the general *ad valorem* levy, this latter tax being of two classes: A tax upon the average capital invested in business and a privilege tax, which was at a different rate and in other respects distinct from the merchants' tax just referred to. Moreover, at the time the tax assessments in question were made the statutes of the State of Tennessee concerning the merchants' tax contained the following:

"The term 'merchants,' as used in this act, includes all persons, co-partnerships or corporations engaged in trade or dealing in any kind of goods, wares, merchandise, either on land or in steamboats, wharf boats or other craft stationed or plying in the waters of this State, and confectioners, whether such goods, wares or merchandise be kept on hand for sale or the same be purchased and delivered for profit as ordered."

Moreover, the assessment laws, whilst providing that all "persons, copartners and joint stock companies engaged in the manufacture of any goods, wares, merchandise or other articles of value shall pay an *ad valorem* tax upon the actual cash value of their property, real, personal or mixed, . . ." made the following exception: "*Provided*, the value of articles manufactured from the produce of the State in the hands of the manufacturer shall be deducted in assessing the property." And a like exception qualified a provision imposing an *ad valorem* tax upon the capital and franchises of manufacturing corporations. Besides, the assessing statutes contained a general provision exempting "all growing crops of whatever nature or kind—the direct product of the soil of this State in the hands of the producer or his immediate vendee, and manufactured articles from the produce of this State in the hands of the manufacturer."

Whilst these laws were in force the officer whose duty it was to list the merchant tax assessed against the American Steel and Wire Company, which we shall hereafter call the Steel Company, both the general merchants' tax and a merchants' privilege tax. The company resisted the assessment, and,

after unsuccessfully pressing, through the administrative channels provided by the law of Tennessee, its objections, paid the tax under protest, and thereupon, as authorized by the law of Tennessee, commenced this suit to recover the amount paid.

Without going into detail, it suffices to say that the bill filed in the action to recover substantially alleged as follows: That the company was a New Jersey corporation, having a place of business in the city of Chicago, and owning and operating various plants for the manufacture of wire, nails, etc., in States other than the State of Tennessee. And, for the purpose of facilitating the sale and delivery of the goods by it manufactured, it had selected Memphis, Tennessee, as a distributing point, and had made an arrangement in that city with the Patterson Transfer Company, a corporation engaged at Memphis in the transfer of merchandise. By this arrangement the Patterson Transfer Company was to take charge of the products when shipped to Memphis, consigned to the Steel Company, store them in a warehouse there, assort them and make delivery to the persons to whom the goods were sold by the Steel Company. It was averred that the Patterson Transfer Company, in fulfilling its obligations under the contract, was in no sense a merchant, but only a carrier, and that the Steel Company, in storing and delivering its goods at Memphis, was not a merchant in Memphis, but was simply a manufacturer, delivering in the original packages goods made in other States to the persons who had bought them. In substance, besides, it was alleged that the goods in the warehouse in Memphis were merely in transit from the point of manufacture outside of the State of Tennessee to the persons to whom they had been previously sold. The levy of the tax was charged to be repugnant to the commerce clause of the Constitution of the United States: First, because the goods in the warehouse in Memphis were in the original packages as shipped from other States and had not been sold in Tennessee, and hence had not been commingled with the property of that State, and because, in any event, they had acquired no *situs* in Tennessee, as they

were moving in the channels of interstate commerce from the place where the goods were manufactured, for delivery to the persons to whom in effect they had been sold. Second. Because, as the State of Tennessee exempted from taxation articles manufactured from the produce of that State, no tax could be imposed by Tennessee upon articles manufactured from the produce of other States, without operating a discrimination against articles manufactured from the produce of other States. Issue was joined on the complaint. The trial court, deducing from the proof conclusions of ultimate facts in favor of the complainant, entered a decree in favor of the Steel Company. The case was taken to the Supreme Court of the State. In that court the validity of the tax was upheld and the judgment below was reversed. The questions raised concerning the repugnancy of the tax to the Constitution of the United States were expressly considered and decided adversely to the Steel Company. This writ of error was thereupon prosecuted.

The Supreme Court of Tennessee stated the facts as follows:

"Complainant is a corporation created under the laws of New Jersey. Its *situs* is in the State of New Jersey, and its principal business office is situated at Chicago, Ill. It is engaged in the manufacture of nails, staples, barbed and smooth wire, at different points north of the Ohio River. None of its manufactories are situated in Tennessee, and all of its products consigned to Memphis are shipped from points beyond the limits of this State.

"Prior to the first of February, 1900, its manufactured products were sold and distributed throughout the Southwest from Louisville, Ky.; Memphis, Tenn.; Greenville, Vicksburg, and Natchez, Miss.; and New Orleans, La. About that time the Patterson Transfer Company, a corporation created under the laws of Tennessee, having its *situs* at Memphis, and doing business at Memphis, represented to appellee that Memphis was the most available point in the Southwest at which to mass and distribute its manufactured products to its customers in that section. At this time, and for many years prior thereto,

the Patterson Transfer Company had been engaged in the business of transferring passengers and freights to and from the various depots at Memphis, and from the landings on the Mississippi River. Appellee entered into an arrangement with the Patterson Transfer Company, whereby said company was to receive its manufactured products at Memphis, assort them so as to separate the different kinds of nails, staples and wire, and then to deliver them, either to the jobbers at Memphis, or to the jobbers beyond the limits of Tennessee, over the various lines of railroads and steamboats running into Memphis, as directed by complainants.

"None of complainant's products are ever sold to the Patterson Transfer Company, or are by it sold to others, and neither its officers nor employés have any knowledge whatever of the price at which goods are sold by complainant. Under the arrangement between them, the business of the Patterson Transfer Company, in connection with complainant's products, is confined to their transfer to the warehouses, their assortment in the warehouses, the keeping of them in storage, and their subsequent delivery to the customers of the complainant, under its general or special orders, as below indicated.

"The goods of complainant are manufactured at different points, and it is convenient and useful, from a business point of view, to mass them at some place at which they can be assorted, and from which they can be distributed to complainant's customers. It is impracticable to assort the goods either at the river landing or at the railroad depots when they reach Memphis, and, in order to facilitate the work, the Patterson Transfer Company has rented three warehouses in which the goods are stored for the purpose of assortment and distribution, and for other purposes below indicated. These warehouses are rented exclusively for this purpose, and the manufactured products of complainant, and no other goods, are stored therein.

"The evidence further shows that, as a general rule, prior to the time the goods are shipped to Memphis, sales agents of the complainant canvass the Southwestern country, and make

contracts exclusively with jobbers; and in each instance where a contract is made it is embodied in writing, on a form prepared by complainant, in which is set down the amount of goods which constitutes the subject of the contract, and the time agreed upon within which they are to be delivered. The goods so contracted for are described as so many kegs of nails, so many kegs of staples, so many reels of barbed wire, or so many coils of smooth wire, according to the terms of the contract, in respect of the quantity agreed upon. But the contract does not specify the grade and quality of the goods desired. The grade and quality are left open, to be subsequently specified when the customer desires a delivery, as below stated. The customer can, when he makes his specification, select any grade of goods he desires, and, upon so selecting, they will be delivered to him, up to the quantity contracted for, within the time agreed upon, at prices contracted for applicable to the several grades. In fixing the price of its goods, the complainant always, except when necessary to lower prices in order to meet competition, figures in the freight on the goods.

"As above indicated, it is shown in the evidence that there are many different kinds of nails, as well as different kinds of barbed and smooth wire, and it is expressly stipulated in the contract that the customer shall have the privilege of specifying, during the life of the contract, the kind of wire, or kind of nails or staples he desires delivered to him under the contract. These contracts also specify from sixty to ninety days as the time within which the products are to be delivered; and at any time during the period prescribed in the contract the customer may designate the kind of goods he desires delivered under it.

"These contracts are made, usually before the goods arrive at Memphis, their point of destination, and generally the contracts are made in advance of the production of the goods at the complainant's factory. Usually the sales agents of the complainant, not only in advance of the shipment of the goods, but in advance of their production, canvass the Southwestern country—in the manner above stated—visiting the various

jobbers, ascertaining the amount of goods they will require within sixty or ninety days, and the contract is prepared to the purport above indicated, in which the complainant obligates itself to deliver, at the price stated, as above mentioned, the amount of goods contracted for therein, and the customer agrees to receive and pay for that quantity, upon the goods being delivered to him after he shall have made, and according to, his specification, which he may make during the life of the contract; the customer reserving the right, in the face of the contract, to specify the exact grade or quality of goods he desires delivered under it. He does this after the making of the contract, and at any time he desires to do so, within the life of the contract, by writing out his specification showing precisely what grade of goods he desires, and forwards this specification to the office of complainant in Chicago, and then the goods, under an order from the Chicago office, addressed to the Patterson Transfer Company at Memphis, are selected by the latter out of the mass of goods belonging to the complainant in the aforesaid warehouses in Memphis, and are shipped by the said Patterson Transfer Company to the customer who has signed the specification. This order from the complainant to the Patterson Transfer Company is effected through the agency of a copy of the specification, which is forwarded to the latter from the complainant's central office at Chicago, it being understood, according to the course of business between the two companies, that the Patterson Transfer Company will select out of the mass of goods those set out in the specification, and will ship them to the customer whose name is signed to the specification, upon receiving such copy of the specification from the central office at Chicago.

"This method of transacting the business is modified in practice, in so far as the fulfillment of contracts made with the jobbers at Memphis is concerned. For the convenience of the Memphis trade, complainant advises the Patterson Transfer Company of the names of its customers at Memphis, and that company is instructed to deliver the goods embraced in the

contracts with the Memphis jobbers, in the following manner: The Memphis jobber makes out his specification in duplicate, and addresses a letter to complainant, as in any other case; but, instead of forwarding this letter and his specification directly to complainant, he delivers the letter to the Patterson Transfer Company, and the Patterson Transfer Company at once delivers the goods so specified, attaching the dray receipt to a copy of the specification, and forwards the specification, letter and dray receipt to the office of complainant in Chicago, and that office makes out an invoice and sends it directly to the jobber. Another variation is made in the course of the business, in favor of the Memphis jobbers, to the following effect: Any jobber in Memphis who is a recognized customer of the complainant can, without any previous written contract, or other special agreement, make out a specification of the goods he desires, and hand this, in duplicate form, to the Patterson Transfer Company. Upon this being done it is the duty of the Patterson Transfer Company, under its general instructions from the complainant, to select out of the mass of goods in the warehouses, goods corresponding to those contained in the specification, and deliver them to such jobber, this delivery usually being made by the next day, or, at most, within two or three days. Other deliveries on specifications sent direct to the Chicago office are not usually made within less than six or eight days, and sometimes a longer period is required. When the Patterson Transfer Company receives from Memphis jobbers the specifications, which are the special subject of this paragraph, one copy is kept by it, and the other copy is forwarded to the office at Chicago, where, upon its arrival and reception, the customer is charged with the goods specified, at current prices.

"The testimony shows that of the mass of goods kept on hand in Memphis, in the above-mentioned warehouses, about ninety per cent ultimately goes to jobbers who reside outside of Memphis, and beyond the limits of this State. The remaining ten per cent goes to the Memphis jobbers in fulfillment of the

general contracts previously referred to, pursuant to specifications thereunder made, and under specifications made without previous written contracts, the latter covering about two and one-half per cent of all the goods kept on hand.

"No one but an agreed or recognized customer of the complainant can make out a specification, or have goods delivered from the storehouses of the Patterson Transfer Company; and no goods are ever delivered or distributed to any one by the Patterson Transfer Company except under the express directions of complainant, or under general directions given by complainant to the Patterson Transfer Company, in favor of recognized and approved customers of the complainant, whose names are furnished by it to the Patterson Transfer Company.

"The testimony further shows that the quantity of goods which the complainant keeps on hand at Memphis fluctuates considerably, owing to the state of trade from time to time. Sometimes the stock is as low in value as $30,000, and sometimes the complainant has on hand a stock of the value of more than $100,000.

"Some of the goods, a very small amount, are shipped to Memphis by rail. Nearly all of these goods which come to the hands of the Patterson Transfer Company from this complainant are transported to Memphis on barges belonging to transportation companies, in which complainant has no interest, and which are engaged in the carrying trade. As a general rule, while the complainant endeavors to secure contracts covering its output before the goods are manufactured, yet it does not always do so; but, taking advantage of the seasons when there is a good stage of water in the rivers, which must be used in floating its products from its mills to Memphis, it masses its goods at the latter point in anticipation of future sales.

"The testimony shows that when goods are shipped from complainant's mills, consigned to Memphis, the Patterson Transfer Company is notified by the Chicago office that a certain quantity of complainant's products were shipped at

a certain time, on barges, to the port of Memphis. These barges are met at the river landing by the Patterson Transfer Company, which receives the goods, transfers them to its warehouses and assorts them. Then, from time to time, it ships the goods on specifications, as before explained. On receiving the goods they are credited to the complainant on the books of the Patterson Transfer Company, and, on being shipped out, they are charged on the same books to the complainant. When the goods reach Memphis they are always consigned to the complainant, in care of the Patterson Transfer Company.

"All the goods forwarded to Memphis are products of the factories of complainant. No part of them are ever purchased by it. Its sales agents are exclusively engaged in selling these products. They are produced by complainant beyond the limits of this State, and are made the subject of contracts by its sales agents throughout the Southwest, in the manner before explained. These sales agents report all contracts effected by them directly to the office in Chicago, whether made with the jobbers at Memphis, or elsewhere beyond the limits of this State. All invoices for goods, when sold by specifications in the manner above stated, are made out at the office at Chicago, and forwarded directly to the customer, in the manner and under the circumstances previously stated.

"Some of the complainant's goods are produced at one factory and some at another, and, consequently, when a purchaser contracts for the delivery to him, within sixty or ninety days, of a certain number of packages, it frequently turns out that some of the goods desired are the product of one factory, and some of another, and it is, accordingly, most convenient in the conduct of complainant's business that goods from complainant's various factories should be massed at some point where they can be dealt with in the manner before explained.

"Complainant's goods are put up in the following original packages: The nails and staples are put up in kegs, each keg weighing 100 pounds; the smooth wire in coils tied by wires,

and each coil weighing 100 pounds; the barbed wire on reels, the wire on each reel weighing 100 pounds. Each package is separately and distinctly made up at the factories for convenience of transportation, and is, in this form, delivered to the common carriers. In this form they are delivered at the initial point of transportation. In this form they are transported in barges, or by railroads to Memphis, and received by the Patterson Transfer Company. In this form they are assorted at the warehouses by the Patterson Transfer Company, and delivered by it to the complainant's customers at Memphis, under the circumstances previously stated, or to the various lines of steamboats and railroads running out of Memphis, consigned, under circumstances previously stated, to customers beyond the limits of Tennessee, and in this form they ultimately come to the hands of complainant's customers in such foreign States. Each package is separate and distinct in itself, and while no particular package is consigned to any special customer, each keg of nails and staples is marked so as to show exactly what the package contains, and each coil and reel of wire is marked with a tag showing what the coil or reel contains, and no package is ever changed in any particular from the time it leaves the factory until it ultimately reaches the hands of the customer.

"The testimony shows that Memphis has, within recent years become, by reason of its accessibility to railway and river transportation, a great distributing point; and it was selected as the basis of the operations which are the subject of the present controversy, by reason of these exceptional advantages.

"Other facts proven by the complainant are as follows: The testimony of Mr. Young, the tax assessor, shows that none of the cotton shipped into Memphis from the surrounding States pays any tax whatever, and that the manufacturers of lumber in Memphis pay no tax on lumber made from logs which are produced from the soil of this State."

With these facts in hand we are of opinion that the court

below was right in deciding that the goods were not in transit, but, on the contrary, had reached their destination at Memphis, and were there held in store at the risk of the Steel Company, to be sold and delivered as contracts for that purpose were completely consummated. All question, therefore, as to the power of the State to levy the merchants' tax based, on the contrary contention, being without merit, may be put out of view. The other propositions pressed upon our attention require consideration. They relate to two subjects: First, the asserted want of power of the State of Tennessee to tax because the goods were imported from another State, and were yet, it is contended, in the original packages; and, second, because of the alleged discrimination asserted to result from the provision of the state constitution exempting goods manufactured from the produce of the State.

1. Since *Brown* v. *Maryland*, 12 Wheat. 419, it has not been open to question that taxation imposed by the States upon imported goods, whether levied directly on the goods imported or indirectly by burdening the right to dispose of them, is repugnant to that provision of the Constitution providing that "No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports." Article I, sec. 10, paragraph 3. And *Brown* v. *Maryland* also settled that where goods were imported they preserved their character, as imports, and were therefore not subject to either direct or indirect state taxation as long as they were unsold in the original packages in which they were imported. A recent case referring to the authorities and restating this elementary doctrine is *May* v. *New Orleans*, 178 U. S. 496. Assuming that the goods concerning which the state taxes in this case were levied were in the original packages and had not been sold, if the bringing of the goods into Tennessee from another State constituted an importation, in the constitutional signification of that word, it is clear they could not be directly or indirectly taxed. But the goods not having been brought from abroad, they were not imported in the legal sense and

were subject to state taxation after they had reached their destination and whilst held in the State for sale. This is as conclusively foreclosed by the decisions of this court as is the doctrine resting upon the decision in *Brown* v. *Maryland*. *Woodruff* v. *Parham*, 8 Wall. 123; *Brown* v. *Houston*, 114 U. S. 622. The doctrine upon which the cases rest was this, that imports, in the constitutional sense, embraces only goods brought from a foreign country, and consequently does not include merchandise shipped from one State to another. The several States, therefore, not being controlled as to such merchandise by the prohibition against the taxation of imports, it was held that the States had the power, after the goods had reached their destination and were held for sale, to tax them, without discrimination, like other property situated within the State.

Those two cases, decided, the one more than thirty-five and the other more than eighteen years ago, are decisive of every contention urged on this record depending on the import and the commerce clause of the Constitution of the United States. The doctrine which the two cases announced has never since been questioned. It has become the basis of taxing power exerted for years, by all the States of the Union. The cases themselves have been approvingly referred to in decisions in this court too numerous to be cited, and we therefore content ourselves by mentioning two of the cases where the doctrine was restated. *Emert* v. *Missouri*, 156 U. S. 296; *Kelley* v. *Rhoads*, 188 U. S. 1. But it is strenuously insisted that the principle of the cases referred to, reiterated again and again and uniformly followed for so long a period of time, has been by inevitable implication overruled by the cases of *Leisy* v. *Hardin*, 135 U. S. 100; *Lyng* v. *Michigan*, 135 U. S. 161, and other cases resting on the rule expounded in those cases.

We might well leave the unsoundness of the proposition to be demonstrated by what we have previously said, and also by the fact that, in *Leisy* v. *Hardin* and *Lyng* v. *Michigan*, and most of the similar cases relied on, the decisions in *Woodruff*

v. *Parham* and *Brown* v. *Houston* were referred to without even an intimation that those cases were deemed to be overruled or even qualified. The earnestness with which the contention is pressed induces us, however, briefly to point out the misconception upon which it rests. It results from assuming that the rule which governs in a case where there is an absolute prohibition is applicable where no such prohibition obtains. *Brown* v. *Maryland* illustrates the first of these cases, while *Woodruff* v. *Parham*, *Brown* v. *Houston*, *Leisy* v. *Hardin*, *Lyng* v. *Michigan* are examples of the other. Thus, in *Brown* v. *Maryland* there was an absolute want of power to tax imports, and it was held that a state enactment which operated to tax imports, whether directly or indirectly, was within the positive prohibition. In other words, that imports could not be taxed at all until they had completely lost their character as such. *Woodruff* v. *Parham* and *Brown* v. *Houston*, on the other hand, so far as interstate commerce was concerned, dealt with no positive and absolute inhibition against the exercise of the taxing power, but determined whether a particular exertion of that power by a State so operated upon interstate commerce as to amount to a regulation thereof, in conflict with the paramount authority conferred upon Congress. In order to fix the period when interstate commerce terminated, the criterion announced in *Brown* v. *Maryland*, that is, sale in the original packages at the point of destination, was applied. The court, therefore, conceded that the goods which were taxed had not completely lost their character as interstate commerce, since they had not been sold in the original packages. As, however, they had arrived at their destination, were at rest in the State, were enjoying the protection which the laws of the State afforded, and were taxed without discrimination like all other property, it was held that the tax did not amount to a regulation in the sense of the Constitution, although its levy might remotely and indirectly affect interstate commerce. In *Leisy* v. *Hardin* and *Lyng* v. *Michigan* the same question in a different aspect was presented. The goods had reached their

destination and the question was not the power of the State to tax them, but its authority to treat the goods as not the subjects of interstate commerce and to prohibit their introduction or sale. This was held to be a regulation within the constitutional sense, and therefore void. The cases, therefore, did not decide that interstate commerce was to be considered as having completely terminated at one time for the purposes of import taxation, and at a different period for the purpose of interstate commerce. But both cases, whilst conceding that interstate commerce was completely terminated only after the sale at the point of destination in the original packages, were rested upon the nature and operation of the particular exertion of state authority considered in the respective cases.

2. The discrimination is asserted to have arisen from the provision of the state constitution, saying that "no article manufactured of the produce of this State shall be taxed otherwise than to pay inspection fees." But in *Kurth* v. *State*, (1887) 86 Tennessee, 134, it was decided that this provision of the constitution referred only to a direct levy of taxation on articles manufactured of the produce of the State, and did not apply to taxes levied by virtue of the grant conferred by the constitution to tax "merchants, peddlers, and privileges, in such manner as they (the legislature) may from time to time direct." The two provisions, it was held, should be construed together, so that the one would not limit the other. We have been referred to no case decided by the Supreme Court of Tennessee modifying this interpretation of the state constitution, and its correctness is in effect directly affirmed by the ruling made by the court in this case. Now the tax complained of on this record is not the general *ad valorem* tax levied on property as such but is a merchants' tax, and is therefore not within the purview of the exemption clause from which it is asserted the discrimination arises. Construing the taxing statutes of the State the court below decided in this case that they equally apply to all merchants, and hence did not discriminate as against any member of the merchants' class. The argument

is made that under the facts found by the court below it was erroneously held that the Steel Company, because of the business which it carried on in the State of Tennessee, was a merchant within the statutes and the power to review this question, it is insisted, should be exerted because the question is Federal in its nature. The contention is without merit. As the levy of the merchants' tax violated no Federal right, the mere determination of who were merchants within the state law involved no Federal question. The construction of the state law being conclusive and embracing all persons doing a like business with the Steel Company, it follows that there was no discrimination. Conceding it to be true, as argued, that in the past there would seem to have been conflict of opinion in the court of Tennessee in interpreting various statutes concerning the merchants' tax, this contrariety does not concern the meaning of the statute construed in this case. As that statute has been construed by the state court as applying to all merchants and as embracing alike all persons engaged in the character of business which the Steel Company was carrying on, it follows that there is no ground upon which to predicate the complaint of undue discrimination. Nor do we think that the opinion of the Supreme Court of Tennessee in *Benedict et al.* v. *Davidson County*, not yet officially reported, (67 S. W. Rep. 806,) conflicts with the views just expressed. That case involved, not a merchants' tax, but the validity of a general *ad valorem* levy on property as such, and, therefore, affords no ground for the contention that manufacturers in Tennessee who shipped the goods by them made from the products of the State to a depot for sale, and there sold them under conditions and circumstances identical with those presented here, could not be taxed as merchants under the law of Tennessee.

Affirmed.

UNITED STATES *v.* ST. ANTHONY RAILROAD COMPANY.

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

No. 147. Argued January 28, 1904.—Decided February 23, 1904.

Although a liberal construction of a statute may be proper and desirable, yet the fair meaning of the language used must not be unduly stretched for the purpose of reaching any particular case which, while it might appeal to the court, would plainly be beyond the limitations contained in the statute.

Without defining the exact distance within which lands must lie in order to be "adjacent" to a railroad passing through territory of the United States, public lands lying in Idaho, more than twenty miles from a two hundred foot right of way of a railroad, not exceeding forty miles in length, are not "adjacent public lands" within the meaning of the act of March 3, 1875, 18 Stat. 482, permitting railroad companies to cut timber therefrom for the construction of their roads.

A railroad company cutting timber for the construction of its road on public lands not adjacent thereto is liable to the United States for the value thereof and where there is no intention to violate any law or do a wrongful act, the measure of damages is the value of the timber at the time when, and at the place where, it was cut and not at the place of its delivery. *Wooden-ware Co.* v. *United States*, 106 U. S. 432, and *Pine River Logging Co.* v. *United States*, 186 U. S. 279, distinguished.

THIS action was brought by the United States against the railroad company to recover damages for the unlawful cutting down and conversion by the company, in the year 1899, of certain timber on the public lands belonging to the United States in the State of Idaho. The value of the timber thus cut was, as alleged, over $20,000. The trial was had in the Circuit Court of the United States for the District of Idaho, Southern Division, and resulted in a judgment dismissing the complaint, which was affirmed, upon appeal, by the Circuit Court of Appeals, Ninth Circuit, 114 Fed. Rep. 722, and the government has appealed to this court.

The defendant answered the complaint and denied its averments as to unlawfully entering upon the lands and cutting

the timber. As a further and separate defence the defendant averred that it was duly incorporated on May 18, 1899, under and pursuant to the laws of the State of Idaho, for the purpose of constructing and operating a railroad from the town of Idaho Falls in Bingham County, Idaho, to St. Anthony in Fremont County, in that State, a distance of approximately forty miles. On or about July 7, 1899, the board of directors duly adopted the route for the railway, which was practically a straight line between the town of Idaho Falls and the town of St. Anthony, and passed through and over the public lands of the United States. The defendant fully performed all things required by railroad companies by the act of Congress granting to railroads the right of way through the public lands of the United States, approved March 3, 1875, and it thereby became entitled to the benefit of the privileges therein granted to railroad companies. For the purpose of procuring the necessary material with which to construct its railroad, the defendant, through its authorized agents, entered upon the lands described in the complaint, which were, as defendant alleged, adjacent to the line of the railroad, for the purpose of procuring ties and timbers for the construction of the road, and did during the summer and fall of 1899 cut and remove timber growing on the lands, not to exceed 1,682,975 feet; that the ties and timbers were cut from the nearest public lands to said line of road, and were, as the defendant averred, adjacent thereto; that all of the ties and timbers were necessary for the original construction of the road, and were used for that purpose, and the defendant cut and removed the timber in good faith, with no intention of violating any law or committing any trespass, but believing that it had the right to enter upon the lands and take the timber.

For the purpose of the trial there was an agreed statement of facts made, and therein it was stated that the cutting of the timber was upon the lands of the government and the amount thereof was correctly stated in the answer, and its value upon delivery to the defendant was as alleged in the complaint.

The defendant did not act under any mistake of fact in regard to the status of the timber and the lands upon which it grew, and did what was done, believing it had the legal right so to do. It is not disputed that the lands were unoccupied, unentered public lands of the United States.

Upon the question whether the lands where the timber was cut were or were not adjacent, it was agreed:

"That said lands from the place where said timber was cut to the line of the road were and are the following distances, namely: from 17 to 23 miles by air line; from 20 miles to 25 miles by wagon road, and from 22 to 26 miles following the sinuosities of the river upon which said timber was in part conveyed. By far the largest part of the timber was driven or rafted down said river from said lands to said railroad, the other part being hauled by wagon. The wagon road referred to and so used is an ordinarily good road and involves no unusual grades, and said timber could with reasonable profit be hauled by wagon from the place where it was cut to said railroad, where it was used for ties and in the construction of bridges. It is further agreed that there were no other timber lands or suitable timber upon either side of said railroad as near as were the land and timber in question, and that said lands are near enough and so located with reference to said railroad as to be directly and materially benefited thereby."

The statute under which the cutting is justified is section 1 of "An act granting to railroads the right of way through the public lands of the United States," approved March 3, 1875, 18 Stat. 482; 2 Comp. Stat. 1658, and is set forth in the margin.[1]

[1] *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed 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 one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent

Mr. Assistant Attorney General Purdy for the United States:

The importance of this case to the Government cannot be measured by the value of the timber which is involved in this suit. I do not exaggerate when I say that timber worth millions of dollars is the subject of suits now pending or about to be instituted by the Government in which the sole question at issue is the proper meaning of the word *adjacent* as used in this and similar acts of Congress. The Government has from the first contended that the word *adjacent* as used in this law has reference to a comparatively narrow belt of public land situated on either side of the railroad company's right of way. In view of litigation now pending, and the great material interests involved, the Government feels especially called upon at this time to earnestly maintain that the word *adjacent* ought not to be construed as applicable to public lands more than two miles distant from a railroad company's right of way.

The Government's contention is that under the facts in this case the public lands from which the timber was cut and removed by the Railroad Company and its agents, and used by it in the construction of its line of road, were not *adjacent* lands within the meaning of said act of Congress.

As to the ordinary meaning of the word "adjacent," as defined by lexicographers, it is manifest that the word is a relative term and that in order to ascertain its true meaning in any given case resort must be had to the context and the character of the objects with reference to which the word is used. See Century Dictionary and Cyclopedia; Crabbe's English Synonyms; Bouvier's Law Dict.; Black's Law Dict.; Anderson's Dict. of Law. The word has been defined in cases in the Federal courts in *United States* v. *Den. & R. G. R. R. Co.*, 31 Fed. Rep. 886; *United States* v. *Chapin*, 31 Fed. Rep. 890; *In re Den. & R. G. R. R. Co.*, 8 Land Dec. 41. But see *In re Kootenai Valley R. R. Co.*, 28 Land Dec. 439; *Den. & R. G. R.*

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to such right of way for station-buildings, depots, machine shops, sidetracks, turnouts, and water stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road.

R. Co. v. *United States*, 34 Fed. Rep. 838; *United States* v. *Den. & R. G. R. R. Co.*, 150 U. S. 1; *United States* v. *Linde*, 47 Fed. Rep. 297; *United States* v. *Stone*, 64 Fed. Rep. 667; *S. C.*, *sub nom. Stone* v. *United States*, 167 U. S. 178; *Bacheldor* v. *United States*, 83 Fed. Rep. 986.

It will be seen that this court has, in effect, held that lands situated 50 to 100 miles distant from a railroad company's right of way are not adjacent lands within the meaning of the law, while on the other hand the Circuit Courts of Appeal for the Eighth and Ninth Circuits have held that lands lying at a distance of 17 to 25 miles from a railroad company's right of way are adjacent. This case clearly presents to this court for the first time the question whether these decisions are correct, and whether it can be said as a matter of law or fact that under even the most liberal interpretation of this statute, lands lying at so great a distance from a railroad company's right of way can be held to be *adjacent* lands within the meaning of the act.

The Government maintains that inasmuch as the precise meaning of this term as used in the statute is uncertain, it was the duty of the Land Department, having in charge the public lands, to place a reasonable interpretation upon the statute, and that this was done in 1887 by Secretary Vilas, when he held that two miles on either side of the railroad company's right of way embraced what should be understood as adjacent lands within the meaning of this law; such an interpretation is reasonable and sufficient to afford the companies all the rights and privileges proper under the act.

Definitions of "adjacent" in state courts. *Henderson* v. *Long*, 1 Cook (Tenn.), 128; *Henderson* v. *Long*, 11 Fed. Cas. 1084, No. 6354; *New York* v. *Hartford*, 16 Hun (N. Y.), 380; *Miller* v. *Cabell*, 81 Kentucky, 184; *Camphill Borough*, 142 Pa. St. 517; *In re Municipality for Opening Roffignac Street*, 7 La. Ann. 76; *People* v. *Schermerhorn*, 19 Barb. (N. Y.) 556; *People* v. *Land Office Commissioner*, 135 N. Y. 447; *Saunders* v. *N. Y. Central R. R. Co.*, 135 N. Y. 613; *Clapton* v. *Taylor*,

49 Mo. App. 118; *Carrier* v. *Schoharie Turnpike Co.*, 18 Johns. (N. Y.) 57; *Continental Imp. Co.* v. *Phelps*, 47 Michigan, 300; *Brooklyn R. R. Co.* v. *Brooklyn*, 18 N. Y. Supp. 876; *Kent* v. *Perkins*, 36 Ohio St. 639.

In English cases. *Kimberly Water Works* v. *De Beers Consolidated Mines*, 66 L. J. P. C. 108; *Birmingham* v. *Allen*, 46 L. J. C. H. 673; *Darley Main Co.* v. *Mitchell*, 11 App. Cas. 142; *Rex* v. *Hodgkins*, M. & H. 341; *Regina* v. *Brown*, 17 Q. B. 838.

While these cases are not of much assistance in ascertaining the precise meaning of the word *adjacent*, as used in the act of Congress of March 3, 1875, they nevertheless show that the word *adjacent*, when used in any particular context, must receive a reasonable construction and one which will protect the interests of all parties concerned. It does not mean that a license is thus given to put such a construction upon the word as would embrace matters not reasonably contemplated by the parties. And while it is a term which is susceptible of different constructions and may, under the particular facts in each case, convey to different minds different ideas as to distance, the idea conveyed must in every instance be that of "proximity" or "nearness," that which is far distant or remote being necessarily excluded.

Mr. Parley L. Williams for defendant in error:

The act should be liberally construed. *United States* v. *Chaplin*, 31 Fed. Rep. 890; *United States* v. *Den. & R. G. R. R. Co.*, 150 U. S. 1. As to definition of "adjacent," see authorities and cases cited on the Government's brief, and also Worcester's Dict; Webster's Internat. Dict.; Standard Dict.; Encyclopædic Dict.; *United States* v. *Nor. Pac. R. R. Co.*, 29 Alb. Law J. 24; 1 Ency. Law (2d ed.), 633.

If the Government is to recover it is entitled to "stumpage" only. See authorities cited in *Wooden Ware Co.* v. *United States*, 106 U. S. 432. As to wilfulness and legal malice which did not exist in this case, see *Bowers* v. *State*, 24 Tex. App. 542; *Railroad Co.* v. *Nash* (Ind.), 24 N. E. Rep. 884; *State* v. *Preston*,

34 Wisconsin, 682, and cases cited; *Clark* v. *Holdridge*, 43 N. Y. Supp. 115; *S. C.*, 12 App. Div. 613; *Winchester* v. *Craig*, 33 Michigan, 205; *Forsyth* v. *Wells*, 41 Pa. St. 291; *Baker* v. *Drake*, 53 N. Y. 211; *Markham* v. *Jaudon*, 41 N. Y. 235; *Heard* v. *James*, 49 Mississippi, 236; *Gaskins* v. *Davis* (N. Car.), 25 L. R. A. 813; *United States* v. *Nor. Pac. R. R. Co.*, 67 Fed. Rep. 503, 890; Sedgwick on Damages (5th ed.), 503.

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

The important question in this case is as to the meaning of the term "adjacent" when used in the first section of the statute of 1875. The act is a general one, and is therefore applicable to no particular road, except as the facts in each case may bring the road within its language. It grants the right of way through the public lands in the United States upon conditions named, to the extent of 100 feet on each side of the central line of the road. The lands from which materials for the construction of the railroad may be taken must be adjacent to this piece of land but two hundred feet wide. The term is a somewhat relative and uncertain one, and in one aspect the case may be determined with at least some reference to the size of the strip or right of way granted, and to which the land must be adjacent. It may also be remembered that the whole length of the road is but forty miles. In some views of the case the narrowness and shortness of the line might have some effect upon the question of the distance to which the word adjacent might carry one in the search for timber. As the word is frequently uncertain and relative as to its meaning, it might naturally perhaps be regarded as more extended when used with reference to a large object than with reference to a comparatively small one. In other words, it must be defined with reference to the context, at least to some extent.

We are not disposed to unduly limit the meaning of the word as used in the statute so as to exclude lands which might other-

wise fairly be regarded as within its purpose and thereby defeat the intent of Congress. The act is not to be construed in an unnecessarily narrow manner, nor at the same time should the construction of its language be extraordinarily enlarged in order to attain some special and particular end. In *United States* v. *Denver &c. Railway*, 150 U. S. 1, another question arose under this same section, and the construction of the act in that regard was certainly as liberal as its language would warrant. It was there held that a railroad company had the right to cut and take the timber or material from public lands adjacent to the line of the road and use the same on portions of its line remote from the place from which it was taken.

In speaking of the proper construction of the act, it was said by Mr. Justice Jackson, for the court:

"It is undoubtedly, as urged by the plaintiffs in error, the well-settled rule of this court that public grants are construed strictly against the grantees, but they are not to be so construed as to defeat the intent of the legislature, or to withhold what is given either expressly or by necessary or fair implication. In *Winona & St. Peter Railroad* v. *Barney*, 113 U. S. 618, 625, Mr. Justice Field, speaking for the court, thus states the rule upon this subject: 'The acts making the grants . . . are to receive such a construction as will carry out the intent of Congress, however difficult it might be to give full effect to the language used if the grants were by instruments of private conveyance. To ascertain that intent we must look to the condition of the country when the acts were passed, as well as to the purposes declared on their face, and read all parts of them together.'

"Looking to the condition of the country, and the purposes intended to be accomplished by the act, this language of the court furnishes the proper rule of construction of the act of 1875. When an act, operating as a general law, and manifesting clearly the intention of Congress to secure public advantages, or to subserve the public interests and welfare by means of benefits more or less valuable, offers to individuals

or to corporations as an inducement to undertake and accomplish great and expensive enterprises or works of a *quasi* public character in or through an immense and undeveloped public domain, such legislation stands upon a somewhat different footing from merely a private grant, and should receive at the hands of the court a more liberal construction in favor of the purposes for which it was enacted. *Bradley* v. *New York & New Haven Railroad*, 21 Connecticut, 294; Pierce on Railroads, 491.

"This is the rule, we think, properly applicable to the construction of the act of 1875, rather than the more strict rule of construction adopted in the case of purely private grants; and in view of this character of the act, we are of opinion that the benefits intended for the construction of the railroad, in permitting the use of timber or other material, should be extended to and include the structures mentioned in the act as a part of such railroad."

It was also said that the railroad should be treated "as an entirety, in the construction of which it was the purpose of Congress to aid by conferring upon any railway company, entitled to the benefits of the act, the right to take timber necessary for such construction from the public lands adjacent to the line of the road. This intention would be narrowed, if not defeated, if it were held that the timber, which the railway company had the right to take for use in the construction of its line, could be rightfully used only upon such portions of the line as might be contiguous to the place from which the timber was taken. If Congress had intended to impose any such restriction upon the use of timber or other material taken from adjacent public lands, it should have been so expressed. No rule of interpretation requires this court to so construe the act as to confine the use of timber that may be taken from a proper place for the purpose of construction to any particular or defined portion of the railroad. To do this would require the court to read into the statute the same language, as to the place of use, which is found in the statute as to the place of

taking. In other words, it would require the court to interpolate into the statute the provision that the place at which the timber shall be used shall be '*contiguous, adjoining or adjacent*' to the place from which it is taken. The place of *use* is not, by the language of the statute, qualified, restricted or defined, except to the extent of the construction of the railroad as such, and it is not to be inferred from the restriction or limitation imposed as the *place* from which it may be rightfully taken that it is to be used only adjacent to such place."

In the above case it was admitted that the lands from which the timber was taken were adjacent to the line of the road within the meaning of the statute.

It is also seen in the extract from the opinion that the word "adjacent" is therein used in connection with the words "contiguous" and "adjoining," so as to give an impression that it is almost, though not entirely, synonymous with those words. And we think this is true. "Contiguous, lying close at hand, near," is the meaning given it by the lexicographers. It need not be adjoining or actually contiguous, but it must be, as said, near or close at hand.

Although a liberal construction of the statute may be proper and desirable, yet the fair meaning of the language used must not be unduly stretched for the purpose of reaching any particular case which, while it might appeal to the court, would yet pretty plainly be beyond the limitation contained in the statute. While not to be construed so as to defeat the intent of the legislature, or to withhold what is given either expressly or by fair implication, it is surely improper to so extend the ordinary and usual meaning of the word as to permit the railroad company to enter upon any land of the government, as being adjacent, simply because the road wants the timber. The statute was not intended to furnish a general license to the company to enter upon any public land and to range to any extent thereon for timber for its road. In all cases it must be adjacent.

In the lower Federal courts there have been some cases in

which the question of the proper construction of this section of the act of Congress received attention. In *United States* v. *Denver & Rio Grande Company*, 31 Fed. Rep. 886, that land was regarded as adjacent which could be reached by ordinary transportation by wagons. The parties in that case agreed that the timber was cut from lands adjacent to the line of railway, and the question was whether timber thus cut could be taken from lands adjacent to the line of road and used on any part of the line. But the meaning of the word was referred to in the opinion, and it was stated that it depended very much upon the context and the subject matter to which it should be applied for its proper effect; that with reference to the lands which might be taken for stations, sidetracks, etc., the word "adjacent" was used in the same sense of "contiguous" or "adjoining," while with reference to material for building the road the word should have the larger significance of nearness without actual contact. It was said to be unreasonable to limit the meaning of the word to the government subdivisions lying next to the right of way, and it was said that the meaning of the term "adjacent" probably included the right to take timber from public lands within ordinary transportation by wagon. This meaning was arrived at because the company could thus avail itself of all timber which could be so transported with a profit to the company, while excluding other lands from which transportation with profit could not be thus effected. We are not satisfied of the correctness of this construction or of its reasonableness. Lands might in this way be found adjacent which were fifty or a hundred or more miles away, and which could not be regarded as adjacent within any meaning of that word heretofore given, and could only be said to be adjacent in order to serve an exigency and to allow a railroad to procure timber gratuitously from the government. The purpose may, perhaps, be good, but the meaning cannot be stretched too far, even to accomplish a possibly desirable end.

Again, in *United States* v. *Chaplin*, 31 Fed. Rep. 890, it was held, in the Circuit Court, District of Oregon, that land was

adjacent to the line of road within the purpose and intent of the act when, by reason of its proximity thereto, it is directly and materially benefited by the construction of such road. The court said in that case:

"What is 'adjacent' land, within the meaning of the statute, must depend on the circumstances of each particular case. Where the 'adjacent' ends and the non-adjacent begins may be difficult to determine. On the theory that the material is taken on account of the benefit resulting to the land from the construction of the road, my impression is that the term 'adjacent' ought not to be construed to include any land save such as by its proximity to the line of the road is directly and materially benefited by its construction."

We fail to see the correctness of this rule. Lands hundreds of miles distant might be directly and materially benefited by the construction of a railroad, and yet be far beyond the utmost extent heretofore supposed to be included by the word adjacent. To give this extended meaning to the word is, as it seems to us, merely to say that Congress might have included lands for that reason if it had so chosen, and, therefore, it is well enough to enlarge the ordinary meaning of the word to accomplish a purpose not plainly stated, but only guessed at.

In *Denver &c. Railroad* v. *United States*, 34 Fed Rep. 838, while the question as to what were adjacent lands was not in issue, as the fourth paragraph in the agreed statement of facts stipulated that the lands from which the timber was cut were adjacent to the line of railway, yet Mr. Justice Brewer, then Circuit Judge, in his opinion said that he did not agree with the idea that the proximity of the lands was immaterial, or that Congress intended to grant anything like a general right to take timber from public lands where it was most convenient. He said that while the grant was limited to adjacent lands, he did not appreciate the logic which concludes that if there be no timber on adjacent lands, the grant reaches out and justifies taking the timber from distant lands fifty or a hundred miles away. The real question in the case was whether timber taken

from land which was adjacent could be taken to any portion of the road, no matter how distant from the place of cutting. As it was agreed the timber taken was adjacent, it does not appear how far from the line of the road it was cut. The Circuit Judge, overruling in this respect the District Judge, held the timber could be used all along the line of the road. This is the same view subsequently taken by this court in 150 U. S. *supra.*

In *Bacheldor* v. *United States,* 83 Fed. Rep. 986, it was held by the Circuit Court of Appeals that under the act of June 8, 1872, 17 Stat. 339, which uses language similar to the section in question, the cutting of timber 25 miles from the road was not, as matter of law, unlawful. The question whether the lands were adjacent was held to be a mixed question of law and fact, and the test of illegality was whether the timber was within reasonable hauling distance by wagons. The judgment of the court below, 48 Pac. Rep. 310, was therefore reversed.

In *Stone* v. *United States,* 64 Fed. Rep. 667, it was held that the act in question did not authorize the taking of timber for the construction of a road from public lands, which were 50 miles distant from the end of the road. That case was affirmed in this court. 167 U. S. 178. The trial court had charged the jury that, under the act of 1875, the term "adjacent lands" means lands in proximity, contiguous to, or near to the road, and that lands so far distant from the railroad as lands in Kootenai County, Idaho, where it is claimed that the railroad ties were cut, were not adjacent lands within the meaning of the law. This court concurred with the Circuit Court of Appeals in adjudging the charge to be a sound interpretation of the act.

The report in the *Stone* case showed, as stated in the opinion of the Circuit Court of Appeals, that no timber fit for its use was found along the line of either of the railroads, that both of them penetrated a barren region, almost entirely destitute of timber, and that timber was cut from the lands along the

line of the Northern Pacific Railroad about fifty miles distant from the eastern end of the other roads, which was the nearest point where available timber could be had.

We thus have the authority of this court that lands which are adjacent within the meaning of this act of 1875 must be lands in proximity, contiguous or near to, the line of the road. While "proximity" or "nearness" to an object is somewhat uncertain as a measure of distance, yet the use of such words as a definition, brings to the mind the idea that lands which are in fact far off, or distant, are not adjacent. And the question is, whether lands which are twenty miles off can reasonably be described as in proximity or near to a line of road a couple of hundred feet wide. In our belief no one in describing the locality of such lands would say they were adjacent to the railroad.

The above cited cases show a conflict in the minds of the Federal judges, as to what are the material facts upon which to base an answer to the question, when are lands adjacent within the meaning of this statute. "Adjacent," we admit, is a relative term, and sometimes may depend for its proper application upon the facts in the particular case.

The matter of the construction of this language was the subject of a letter from Mr. Vilas, who was then Secretary of the Interior, to the Attorney General, dated January 10, 1889, after the decision of the cases in 31 Fed. Rep. *supra.* The Secretary was of the opinion that while nothing in the term "adjacent," as used in the statute, rendered it necessary to imply that the lines of survey should be resorted to to define its extent, there was at the same time nothing in this indefiniteness, which, in his opinion, could authorize the view that timber or other material could be taken from public lands so far away as may be reached by wagon transportation in a single day, or any other given period of time. He thought that the use of the word "adjacent" intended and meant the right to the public lands which were *conveniently contiguous to the right of way and immediately accessible from it,* and he did not believe

that it was the purpose of Congress or that his department ought to decide that the railroad company could range the public lands to secure material for the construction of the road, when it did not happen to exist on those lands which, in the ordinary acceptance of the phrase, would be regarded as adjacent to the right of way. Taking into consideration the whole case, the Secretary was of opinion that it was—

"As far as sound discretion will warrant executive officers to go until an authoritative decision by the courts, to hold that, under this phrase, material may be taken from the tier of sections through which the right of way extends, as immediately adjoining the right of way, and perhaps an additional tier of sections on either side, as within the idea of 'adjacency.' . . . In view of all the facts and considerations applicable, it is believed the definition and rule given are fair and just, and legitimately to be adopted. I think it wiser and safer to pursue such a rule, subject as it is to review by the courts, than to leave the matter open to the varying notions of different officers or the necessities of the companies."

There is in our judgment much to be said in favor of this view of the statute. It falls in with the general system adopted by the United States for the survey of its public lands. Those sections touching the line of the road would of course be included within the term, while those next to them might also be included, because, although not touching, they would be near to such line, and would, therefore, come within any definition of the term as being close or near to the line without being contiguous to or actually touching it. It is not at all unreasonable to say that very probably Congress had in mind this general system of division of the public lands, and that the word "adjacent" would properly be interpreted with respect thereto. If the word "adjoining" had been used instead of "adjacent," those sections touching the line of the road could be regarded as the adjoining lands, and when the word "adjacent" instead of "adjoining" is used, it might, not unnaturally, be said to include the next tier of sections away

from the line of the road. We do not think that sections still further removed could under this rule be regarded as adjacent. The rule also gives certainty and definiteness to an otherwise somewhat doubtful expression, and, as the Secretary says, prevents the companies from ranging the public lands to secure material for the construction of their roads, and thus raising questions of legality in cutting in almost every case where the lands were beyond the sections described by the Secretary. This alone is an important consideration.

If not bounded by section lines, the term "adjacent" becomes of more or less uncertain meaning. We cannot, however, conclude that within any fair construction of the statute, these lands were in any event adjacent to the line of the road. The word is also used in the same section, when speaking of the use of ground adjacent to the right of way for purposes of depots, machine shops, etc. In such use it is clear the word is greatly limited. We take it there is a limit beyond which lands could not be described as adjacent to the line of the railroad, even if they were benefited by its construction and were the nearest public lands upon which timber could be found and the timber thereon could be transported by wagon with profit to the company. Lands which are twenty miles off we cannot regard as adjacent to the line of a railroad within the meaning of this statute. On the other hand, lands within two miles, we assume all would agree, are so adjacent. Now, at what point between these two extremes lands are on one side adjacent and on the other not adjacent, is a very difficult matter to decide. It is necessarily somewhat vague and uncertain, and we are not called upon to determine it in this case. All we have to do now is to declare that lands as far off as the lands in question are not adjacent lands, and it is unnecessary to say at what point on the intervening lands adjacency begins. It is very difficult to determine just where twilight ends and night begins, but it is easy enough to distinguish noon from midnight. If we say that two miles would be within the term and twenty would be beyond it, it might be asked why nineteen

miles would not also be beyond it, or three miles be within it, and these questions might puzzle one to answer. It can only be said that a distance of twenty miles is beyond it any way and two miles would be within it. If, then, short distances be proposed and an answer requested as to whether they are or are not within or without the limit, each division might be so small that no clear and decided difference could be asserted between it and the land immediately adjoining, and so it might result in no difference being stated between two and twenty, and yet we know there is a division and it lies somewhere between those two points. The nearer an approach is made to a junction between what is stated to be the adjacent and the non-adjacent lands, the more difficult it becomes to show any difference warranting a different decision, and yet, as we have said, there is a point at which there can be no doubt. We think twenty miles is certainly beyond any fair distance in which lands could be said to be adjacent to the line of this road. And we say this while fully recognizing and keeping in mind the liberal rule of construction set forth by this court in the *Denver Railroad case*, 150 U. S. 1, *supra*. We appreciate the fact that the act was passed to "secure public advantages and to subserve the public interests," but nevertheless it does not grant free license to roam the public lands and take timber wherever thereon it may be found, or wherever by possibility it might be taken with profit to the company. The statute says that the lands must be adjacent, and there must of necessity therefore be a point where the lands are not adjacent, even though the timber might be removed therefrom with some possible profit to the company. As Congress has not given the definition of adjacent, such as has been adopted by any of the lower courts, we cannot, even by a so-called liberal construction, enlarge the ordinary meaning of the word to the extent made necessary in order to justify this cutting.

We cannot take, for the reasons already stated, the fact of wagon road transportation, as a means of deciding whether the lands are or are not adjacent, for it seems to us that it may lead

us far beyond any reasonable limit to the word. The same may be said as to the benefits to the land by the building of the road. That also would in many cases lead too far from the line. In this case most of the transportation was done by water, the timber being driven or rafted down the river, and in that way the distance was from twenty-two to twenty-six miles, although such timber might have been hauled by wagon with reasonable profit. Now, suppose the nearest timber lands of the government were a hundred miles away, but by reason of water communication the timber could be floated down to the line of the road "with reasonable profit," would such lands then be adjacent? We think clearly not. And it is because of the fact that the distance would be plainly too great to conform to any of the meanings which have heretofore been given to the word. It strikes one so at first blush. We are of opinion that the same ought to be said of these lands. They are not adjacent, for they are not near; they are not in close proximity to this strip of land two hundred feet wide. This ordinary limitation of the meaning of the word should not be enlarged for the purpose of thereby embracing lands which otherwise would not come within any fair construction of the statute.

The further question is as to the time when the value of the timber is to be ascertained.

The parties agreed that the amount of the timber growing on the lands is correctly stated in the answer, and the value thereof at the place where the timber was cut was $1.50 per thousand feet and the value upon delivery to the defendant was $12.35 per thousand feet. The delivery to the defendant was made by the Thompson Mercantile Company, with which the railroad company had entered into a contract to be supplied with the necessary ties and timbers for the construction of its road, and in such contract the mercantile company was, by the expressed terms thereof, appointed the agent of the defendant, and in that capacity it was authorized by the defendant to cut timber for the purpose mentioned. The

mercantile company did cut the timber on the lands, which it in good faith supposed were adjacent to the line of the railroad, and delivered such timber to the railroad company upon the line of its road. We think the measure of damages should be the value of the timber after it was cut at the place where it was cut. The defendant does not, in our judgment, come within either the case of *Wooden-ware Company* v. *United States*, 106 U. S. 432, or that of *Pine River Logging Company* v. *United States*, 186 U. S. 279. In both of those cases the parties doing the cutting did it willfully and in bad faith. In the *Wooden-ware* case the timber was sold by the original trespasser to a third party without notice of the trespass, and the party purchasing was guilty of no willful wrong. It was, however, held that the defendant, having purchased from the original wrongdoer and willful trespasser, was liable for the value of the timber at the time and place it was purchased by defendant.

In the *Pine River Logging* case, the parties to the contract were held liable for the full value of the timber after it was cut and had increased in value by reason of the labor expended upon it by the parties who did the cutting. This was on the ground that they were willful trespassers, acting in bad faith, and ought to be made to suffer some punishment for their depredations; but it was stated that where the trespass is the result of inadvertence or mistake, and the wrong was not intentional, the value of the property when first taken must govern.

Although in this case it is agreed that the defendant did not act under a mistake, meaning thereby that the facts touching the status of the timber and the lands where the timber was cut were known, yet what was done was in the belief by the defendant that the lands were adjacent to the line of the road and that the cutting was legal. It was done upon the advice of counsel, and the defendant used ordinary care and prudence in first being advised as to the law upon the facts as they have been agreed upon, and there was no intention on the part of

the defendant to violate any law or to do any wrongful act. This, we think, clearly takes the case out of the principle of those above cited, and the measure of damages must, therefore, be the value of the timber at the time and at the place where it was cut.

The judgment must be reversed, and the case remanded to the Circuit Court for the District of Idaho, Southern Division, with directions to enter judgment in favor of the United States for the amount of the timber as stated in the answer, and for its value at the rate of $1.50 per thousand feet.

So ordered.

UNITED STATES *ex rel.* STEINMETZ *v.* ALLEN.

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

No. 383. Argued January 12, 13, 1904.—Decided February 23, 1904.

A rule of practice in the Patent Office when established by the Commissioner of Patents under section 483, Rev. Stat., constitutes, in part, the powers of the primary examiner and the Commissioner, and becomes to those officers an authority under the United States, and this court has jurisdiction under section 8 of the act of February 9, 1893, to review a final judgment of the Court of Appeals of the District of Columbia where the plaintiff in error assails the validity of such a rule.

Section 4886, Rev. Stat., gives a right, which is a substantial one, to join inventions which are related to each other in one patent and this right cannot be denied by a hard and fixed rule which prevents such joinder in all cases. Such a rule is not the exercise of discretion but a determination not to hear.

Rule 41 of Practice in the Patent Office, in so far as it requires a division between claims for a process and claims for an apparatus if they are related and dependent inventions, is invalid.

Mandamus is the proper remedy where the Commissioner of Patents has refused to require the primary examiner to forward an appeal to the board of examiners in chief to review the ruling of the primary examiner requiring the petitioner to cancel certain of the claims in his application.

THIS is a petition in mandamus filed in the Supreme Court of the District of Columbia to compel the Commissioner of

Patents to require the primary examiner to forward an appeal, prayed by the petitioner, to the board of examiners-in-chief, to review the ruling of the primary examiner requiring petitioner to cancel certain of his claims in his application for motor meters.

The Supreme Court dismissed the petition, and its action was affirmed by the Court of Appeals. This writ of error was then sued out.

The decision of the primary examiner was based upon rule 41 of practice in the Patent Office, and the case involves the validity of the rule under the patent laws.

The petitioner filed an application in the Patent Office, November 21, 1896, for a patent for "certain new and useful improvements in motor meters." He expressed his invention in thirteen claims. They are inserted in the margin.[1]

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[1] 1. The herein-described method of measuring alternating electric currents, which consists in setting up or establishing a shifting field of magnetism from three intersecting lines or axes of magnetization and adapted to actuate a rotatable armature in a motor meter arranged within the energizing coils producing said lines of magnetization.

2. The herein-described method of actuating an alternating-current motor meter, which consists in setting up or establishing a shifting field of magnetism from three intersecting lines or axes of magnetization and adapted to actuate a rotatable armature arranged within the energizing coils producing said lines of magnetization.

3. The herein-described method of actuating a single-phase alternating-current motor meter, which consists in setting up or establishing a shifting field of magnetism from three intersecting lines or axes of magnetization and adapted to actuate a rotatable armature arranged within the energizing coils producing said lines of magnetization.

4. The herein-described method of actuating an alternating-current motor meter, which consists in setting up or establishing a shifting field of magnetism by means of magneto-motive forces acting along three intersecting lines and subjecting an armature to the inductive action of said field.

5. The herein-described method of actuating an alternating-current motor meter, which consists in setting up or establishing a shifting field of magnetism by means of magneto-motive forces being proportional to the current and the other two to the electro-motive force, and subjecting an armature to the inductive action of said field.

6. The herein-described method of actuating an alternating-current motor meter which consists in setting up or establishing a shifting field of mag-

The first six were held by the primary examiner to be claims for a process; the balance of the claims to be for an apparatus; and on the fifteenth of May, 1900, ordered that the latter, that is, claims 7, 8, 9, 10, 11, 12 and 13, be cancelled from the application. In other words, he required a division between the process claims and the apparatus claims in accordance with rule 41. That rule is as follows:

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netism by means of magneto-motive forces acting along three intersecting lines, one magneto-motive force being proportional to the current and the other two to the electro-motive force, the several magneto-motive forces being so proportioned and related to each other that the resultant of the last two is displaced in phase from the first by the complement of the angle of lag, and subjecting an armature to the inductive action of said field.

7. In a Watt meter for alternating electric currents, means for producing a magnetic flux proportional to the current and varying in phase therewith, means for producing a second magnetic flux proportional to the electro-motive force and lagging in phase behind the same, and means for producing an auxiliary flux along a line at an angle to said second flux and of such magnitude and phase that the resultant of the two last-mentioned fluxes will lag behind the first by the complement of the angle of lag.

8. The combination in an electro motor of a field-magnet system and means for inducing therein magnetic fluxes of three phases, one a flux due to a series coil and proportional to the current, a second flux due to a shunt potential coil and lagging behind the electro-motor force, and a third flux lagging behind said second flux and having a fixed angular relation thereto such that the resultant of the second and third fluxes is dephased by substantially the complement of the angle of lag from the flux due to the series coil.

9. The combination in a recording electric meter of a field-magnet system acting on the armature and having a plurality of intersecting magnetic axes, means for inducing along one of said magnetic axes a flux proportional to the current and varying in phase therewith, and means for inducing along the other magnetic axes a plurality of other fluxes dependent upon the potential of the metered circuit, which lag behind the electro-motive force by different amounts and act upon the armature at different points, said fluxes being so proportioned in value and phase that their joint action upon the armature will enable the meter to register the true energy consumed in an alternating-current circuit without being substantially affected by changes of phase relation.

10. In a Watt meter for alternating currents, the combination of a field-magnet system having three intersecting magnetic axes, means for producing along one of said axes a magnetic flux proportional to the current and varying in phase therewith, means for producing along another of said axes an

"41. Two or more independent inventions cannot be claimed in one application; but where several distinct inventions are dependent upon each other and mutually contribute to produce a single result, they may be claimed in one application.

"Claims for a machine and its product must be presented in separate applications.

"Claims for a machine and the process in the performance of

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alternating flux proportional to the electro-motive force and lagging behind the same, and means for producing along the third axis an auxiliary magnetic flux also proportional to the electro-motive force, of such a magnitude and phase that the joint action of the several fluxes upon the armature will enable the meter to register the true energy consumed in an alternating-current circuit without being substantially affected by changes of phase relation.

11. In a meter for alternating currents, the combination of a field-magnet system having three intersecting magnetic axes, means for producing along one of said axes a magnetic flux proportional to the current and varying in phase therewith, means for producing along another of said axes an alternating flux proportional to the electro-motive force and lagging behind the same, and means for producing along the third axis an auxiliary magnetic flux also proportional to the electro-motive force and of such magnitude and phase that the joint action of the two potential fluxes upon the armature will produce a torque sufficient to overcome the static friction of the meter.

12. In a single-phase alternating current meter, the combination of a field-magnet system having three intersecting magnetic axes, a field coil in which the current phase varies as the conditions of the circuit change, producing a magnetization along one magnetic axis, a potential coil producing a magnetization along another magnetic axis, a reactance device in series with said potential coil for lagging the current behind the electro-motive force and a second potential coil depending for its current upon the first potential coil, producing a magnetization along the third magnetic axis; the two potential coils conveying currents which differ in phase from each other, and each generating a flux which acts upon the armature at a point removed from the point at which the flux due to the other potential coil acts upon the armature.

13. In an electric meter, the combination of a multipolar field-magnet structure having three magnetic axes, current coils mounted upon some of the field poles and producing a magnetization along one of said magnetic axes, potential coils mounted upon other field poles and producing a magnetization along another one of said magnetic axes, and other potential coils mounted upon a portion only of the last-named field poles, or some of them, and producing a magnetization along the third magnetic axis, and an armature acted upon by the flux induced by the field coils.

which the machine is used must be presented in separate applications.

"Claims for a process and its product may be presented in the same application."

Petitioner persisted in his application as filed, and the primary examiner repeated his order for a division of the claims. Petitioner regarded such order as "a second final rejection" of his claims to the apparatus, and appealed therefrom to the board of examiners-in-chief. The primary examiner refused to answer the appeal and to forward the same with his answer thereto and the statements required by the rules of the Patent Office. Thereafter, on the twentieth of August, 1900, petitioner petitioned the Commissioner of Patents to direct the primary examiner to forward said appeal, which petition was denied. It was repeated to the present Commissioner, defendant in error, and by him denied on the seventh of February, 1902.

These facts constitute petitioner's claim to relief.

The answer of the respondent asserts the validity of rule 41, justifies the action of the Patent Office, alleges that petitioner is estopped from contesting the orders of the primary examiner, and also alleges that those orders "did not involve the rejection of any claim or an action upon the merits of any claim made by the relator," as provided in rule 13, and that "the statutes and rule 133 of the rules of practice do not provide for an appeal to the examiners-in-chief from an examiner's requirement for division, and the examiners-in-chief have no jurisdiction to pass upon the question whether or not division should be required."

The answer presents also the following facts: Prior to making the order of May 15, 1900, to wit, on October 9, 1899, the primary examiner wrote a letter to petitioner regarding the division of the process claims and the apparatus claims, in accordance with rule 41, before further action would be given upon the merits of the case.

Petitioner replied December 15, 1899, requesting "that the

requirement for division be waived for the present," in order that his process claims be placed in interference with the claims of a patent to one Duncan. To this request the examiner answered:

"Pending the determination of the interference applicant may retain the method and apparatus claims in this case, but the acceptance of an interference on one of the method claims will be held by the office to be an election of the prosecution of the method claims, and further prosecution of the apparatus claims in this application will not be permitted."

Petitioner replied January 19, 1900, urging that the interference be declared, and on February 7, 1900, it was declared and decided in favor of petitioner. After the decision the examiner wrote the letter of May 15, 1900. These proceedings, respondent contends, constitute an estoppel.

The first ruling of the Commissioner of Patents upon the petition to require the primary examiner to respond to petitioner's appeal was as follows:

"Where applicant does not care to comply with the examiner's requirements in a matter of division such as is here involved, it has been the practice for the past thirty years to treat the question, not as one of merits and appealable to the examiners-in-chief, but as a proper matter for petition to the Commissioner. I see no reason for overturning this practice. This petition is denied."

The second order of the Commissioner, respondent, after reciting certain of the facts, concluded as follows:

"The requirement for division is purely a matter of form, not involving the merits of the claims, since the claims may be, and in the present case are, regarded as allowable. The examiner has not refused to grant a patent to this applicant upon any of the claims presented, but has merely required that they be included in two patents instead of one. It is a question of procedure or of the manner of securing the protection which is in controversy and not the right of the applicant to a patent upon any of the claims presented.

"The examiner was right in taking the position that the question involved is not appealable to the examiners-in-chief, and although it is a general rule of law that the appellate tribunal is the one to determine whether or not it has jurisdiction when an appeal is taken to it, it is not considered necessary in the office practice to follow that practice strictly, since the Commissioner is the head of the office and has the final decision upon all questions arising within it and may settle questions of this kind upon direct petition. The examiner's decision upon the question whether or not an appeal to the examiners-in-chief is regular and proper is not final, since it may be reviewed by the Commissioner upon petition, but he has authority to pass upon that question in the first instance.

"The petition is denied."

Mr. Frederic H. Betts and *Mr. Melville Church* for plaintiff in error:

The fundamental and underlying question is whether an applicant for a method or process patent has the right to demand protection, in that patent, of all patentable inventions he is *compelled* to disclose in setting forth his new method or process?

So strongly does this question appeal to our inherent sense of justice and fair play, that we are inclined, at once, to an affirmative answer to it, especially in view of the known favor with which the inventor has always been regarded by the laws and courts of our country.

As to the indivisibilty of patents for process and product, see *Powder Company* v. *Powder Works*, 98 U. S. 126. There is nothing in the statutes compelling division of process and apparatus. § 4886, Rev. Stat. See *Merrill* v. *Yeomans*, 94 U. S. 568; *The Telephone Case*, 126 U. S. 1; *Hoyt* v. *Horne*, 145 U. S. 302; *The Fire Extinguisher Case*, 21 Fed. Rep. 40, and cases cited p. 440.

In the Patent Office, different Commissioners have ranged

themselves on opposite sides of this question of the necessity of division between process and apparatus.

Division according to the so-called statutory requirement has been insisted upon by Commissioners Butterworth, Hall and Duell, and the contrary view has been vigorously maintained by Commissioners Montgomery, Mitchell and Simonds. Commissioner Butterworth gave expression to his views in the *Blythe Case*, 1885, C. D. 82; Commissioner Hall in *Herr's Case*, 1887, C. D. 105; Commissioner Montgomery in *Young's Case*, 1885, C. D. 108; Commissioner Mitchell in *Lord's Case*, 1890, C. D. 16; Commissioner Simonds in *Curtis' Case*, 1891, C. D. 206, and in *Kerr's Case*, 1892, C. D. 61; and Commissioner Duell in *Boucher's Case*, 1899, C. D. 133.

As to *Boucher's* case, however, see *James* v. *Campbell*, 104 U. S. 356, where an apparatus patent was reissued into a process patent and the latter was declared invalid; *Powder Co.* v. *Powder Works*, 98 U. S. 136, where a process patent was reissued into a product patent and the latter was declared invalid; *Miller* v. *Brass Co.*, 104 U. S. 350; *Parker & Whipple Co.* v. *Yale Clock Co.*, 123 U. S. 87, *Hoskins* v. *Fisher*, 125 U. S. 217, *Yale Lock Co.* v. *James*, 125 U. S. 447, and many subsequent cases where machines or apparatus patents, with narrow claims, were reissued into machines or apparatus patents, with broad claims, and the latter were declared invalid. *Hogg* v. *Emerson*, 6 How. 483, distinguished, and see *Hogg* v. *Emerson*, 11 How. 587.

The tendency on the part of the Patent Office to require too much subdivision of invention is strongly condemned in *Johns Mfg. Co.* v. *Robertson*, 89 Fed. Rep. 506.

There are many evils that grow out of requiring an inventor to take two distinct patents, one for his process and the other for his machine for carrying that process into effect.

Amongst others it gives no opportunity to the inventor to claim, in a single patent, an invention, in both aspects, where doubt exists, whether the real invention is a process or a machine. That question arose in *Boyden* v. *Westinghouse*, 170

U. S. 537. The cost is increased to the inventor too by the payment of double fees.

The protection of the inventor has always been a matter of special solicitude on the part of Congress, and Congress never intended that the cost of a patent should depend upon the whims of commissioners of patents.

When Congress fixes the cost of a patent the commissioner has, plainly, no authority to add a dollar thereto. No usage in regard to making an excess charge can legalize it, and the excess can be recovered by suit. *Ogden* v. *Maxwell*, 3 Blatch. 319; *S. C.*, Fed. Cas. No. 10,458; *Swift & Courtney Co.* v. *United States*, 111 U. S. 22.

The Commissioner's power to make mere regulations cannot be used as a cloak for requiring the division and separate patenting of the parts of a really unitary and indivisible invention, nor for exacting a double set of fees from an applicant.

In no adjudicated case is the so-called discretionary power of the Commissioner, as to requiring division of applications for original patents, directly in judgment. The cases in respondent's brief below, *Bennett* v. *Fowler*, 8 Wall. 445, and *McKay* v. *Dibert*, 19 O. G. 131; 5 C. D. 1881, 238, do not reach to the point.

The rule is arbitrary, by requiring division without any determination whatever of the question of right to the claims. No discretion has been exercised in dealing with the application and determining whether it is of such a character that its process and apparatus are or are not dependent, or so disunited as to require division. The examiner has declined to look into the application. He held himself bound by a hard and fast rule.

The examiners, the examiners-in-chief, and the Commissioner, acting as an appellate tribunal, are all judicial officers, *Butterworth* v. *Hoe*, 112 U. S. 50; *United States* v. *Duell*, 172 U. S. 576, and the duty of determining whether an application contains claims for inventions which "are dependent upon each other and mutually contribute to produce a single result,"

or even of deciding whether the claims, in a given case, are all for a process or all for a machine, or are some for a process and some for a machine, a question that bothered this court in *Boyden* v. *Westinghouse*, 170 U. S. 537, is clearly a judicial duty, involving, oftentimes, the nicest application of the rules for the interpretation of patents.

The inventor has an inherent right to a single patent covering all he is compelled to disclose as the condition of the grant to him of any protection. There being no statutory authority to require him to divide up his invention and take multiple patents for its parts, whenever an application for patent is a second time refused by the primary examiner because it contains claims to a process that can only be practiced by the use of a certain machine and also claims to the machine for practicing such process, the applicant is entitled to an appeal from the examiner's ruling, to all the statutory appellate tribunals, in turn, and upon a favorable decision of any of such tribunals, is entitled to have a patent issued to him.

The relator's right of appeal has accrued under the statute. § 482.

The decision of the primary examiner complained of was *adverse* enough. It certainly was not favorable. It barred, and still bars, the progress of the application.

It has been "rejected" in the sense in which that word is used in the section.

In the interpretation of statutes it is a general rule that common words are to be given their plain, ordinary, popular meaning. Tested by this rule we find the word "reject" (*rejectus*, to throw back) to be universally used as the equivalent of "refuse," especially when used to indicate a denial of a petition or request. As to effect of "refusal," see *Gaudy* v. *Marble*, 122 U. S. 432; *Butterworth* v. *Hoe*, 112 U. S. 50.

If rule 133, regulating appeals, adds any conditions of appeal not found in the statute it is null and void. §§ 482, 4909, Rev. Stat.

Rejections for or without reason, and rejections upon the merits of the invention or otherwise, are equally within their purview, and the Commissioner, by rule, can add nothing to nor subtract anything from the statutory requirements, to the prejudice of an applicant. *Com'r of Patents* v. *Whitely*, 4 Wall. 552; *Morrill* v. *Jones*, 106 U. S. 466; *Tracy* v. *Swartwout*, 10 Pet. 80; *Kurtz* v. *Moffit*, 115 U. S. 487; *Teal* v. *Fulton*, 12 How. 285; *Anchor* v. *How*, 50 Fed. Rep. 367; 6 Op. Atty. Gen. 38.

The refusal or rejection of an application, or of any of the claims thereof, under a rule of practice, is not different, in kind, from a refusal or a rejection under the statute itself, and is appealable.

The rules of the office made pursuant to statutory authority, *and not inconsistent with law*, have all the force and authority of the statute itself, and are, so long as they remain unrepealed, as binding upon the office as they are upon applicants. *United States* v. *Eliason*, 16 Pet. 291; *Gratiot* v. *United States*, 4 How. 80; *In re Hirsch*, 74 Fed. Rep. 931; *Wilkins* v. *United States* (C. C. A.), 96 Fed. Rep. 837; *James* v. *Germania Iron Co.*, 107 Fed. Rep. 597, 609; *Dist. of Col.* v. *Roth*, 18 App. D. C. 547; *Rio Grande Irrigation Co.* v. *Gildersleeve*, 174 U. S. 603.

Mandamus is the proper remedy.

Any interference with a right of appeal is never tolerated and mandamus is the proper remedy to remove any obstruction to the exercise of the right. *United States* v. *Gomez*, 3 Wall. 752; *Ex parte Zellner*, 9 Wall. 244; *Vigo's Case*, 21 Wall. 648; *Ex parte Jordan*, 94 U. S. 248; *Ex parte Cutting*, 94 U. S. 14; *Ex parte South, etc., R. R. Co.*, 95 U. S. 221; *Com. of Patents* v. *Whitely*, 4 Wall. 522.

Mr. Assistant Attorney General McReynolds, with whom *Mr. John M. Coit* was on the brief, for defendant in error:

The validity of an authority exercised under the United States is not here drawn in question and this court has no

jurisdiction. *Balt. & Pot. R. R. Co.* v. *Hopkins*, 130 U. S. 211, 226; *United States* v. *Lynch*, 137 U. S. 280, 285; *South Carolina* v. *Seymour*, 153 U. S. 353, 360; *Linford* v. *Ellison*, 155 U. S. 503.

The action of the Court of Appeals was right on the merits.

The Commissioner decided, upon petition to him, the matter which had been ruled upon by the primary examiner. Mandamus will not lie to compel him now to refer it to a lower tribunal in his own office.

It is fundamental that mandamus will not issue against a public officer except to compel the performance of some plain, clear, ministerial duty, and will not issue to control his discretion. *Decatur* v. *Paulding*, 14 Pet. 515; *Mississippi* v. *Johnson*, 4 Wall. 475; *Redfield* v. *Windom*, 137 U. S. 636; *Dunlap* v. *Black*, 138 U. S. 636.

Where it is the duty of the officer to pass upon a question, mandamus may be used to compel him to decide, but not to compel him to decide in any particular way, nor to set aside a ruling already made.

The Commissioner of Patents is not simply an appellate tribunal, he has power to refuse a patent. *Whitely Case*, 4 Wall. 522; *Butterworth* v. *Hoe*, 112 U. S. 50.

No appeal from the ruling of the primary examiner to the examiners-in-chief was permissible in any view of the case. *Bostwick* v. *Brinkerhoff*, 106 U. S. 3; *Butterworth* v. *Hoe*, 112 U. S. 50.

The decision of the examiner did not reach the merits.

Division is not required upon the ground that the patent covering two inventions, if granted, would be declared invalid. No question as to validity is involved, since the courts have never declared a patent invalid because of the joinder of distinct inventions. Division, therefore, involves no question of merits. *Ex parte Yale*, C. D. 1869, 110; *Bennett* v. *Fowler*, 8 Wall. 445; *Ex parte Medford*, C. D. 1883, 95; O. G. 881.

These cases announce the construction of the law which

has always been followed. *Ex parte Fefel*, 57 O. G. 409; *Ex parte Everson*, 68 O. G. 1381; *Ex parte Burgess*, 64 O. G. 1759; *Ex parte Demeny*, 64 O. G. 1649.

Substantial rights are not affected and to have a right of appeal the examiner's action must affect inventor's interests adversely and not merely embarrass a stranger.

Process and apparatus are independent. *Cochrane* v. *Deemer*, 94 U. S. 780, 788; *Corning* v. *Burden*, 15 How. 252, 268; *James* v. *Campbell*, 104 U. S. 356, 376; *Heald* v. *Rice*, 104 U. S. 736, 753; *Tilghman* v. *Proctor*, 102 U. S. 702, 728; *Rubber Co.* v. *Goodyear*, 9 Wall. 788, 796; *Ex parte Lord*, 50 O. G. 987; C. D. 1890, 16.

This has been the long established practice of the Patent Office and as such is entitled to great weight. *Bate Refrigerating Co.* v. *Sulzberger*, 157 U. S. 1, 34. There have been differences of opinion as to when division should be required, some holding that division should always be required between process and apparatus, *Ex parte Blythe*, 30 O. G. 1321; C. D. 1885, 82; *Ex parte Herr*, 41 O. G. 463; C. D. 1887, 105; *Ex parte Boucher*, 88 O. G. 545; and *Ex parte Frasch*, 91 O. G. 459, and others holding the question depended upon the circumstances of each case. There has never been a difference of opinion, however, upon the question whether division affects the merits and is an appealable matter. *Ex parte Chambers*, 51 O. G. 1943; C. D. 1890, 101; *Ex parte Billingrodt*, 54 MSS. Dec. 474, distinguished by *Ex parte Everson*, *Ex parte Demery*, *supra*.

MR. JUSTICE MCKENNA, after stating the case as above, delivered the opinion of the court.

1. The jurisdiction of this court to review the judgment of the Court of Appeals is questioned. There is no money in dispute nor anything to which a pecuniary value has been given. Jurisdiction is claimed under the clause of section 8 of the act of February 9, 1893, which gives an appeal to this court from the final judgment or decree of the Court of Appeals in cases in

which there is drawn in question the validity of "an authority exercised under the United States."

By section 483 of the Revised Statutes, the Commissioner of Patents, subject to the approval of the Secretary of the Interior, is empowered to establish from time to time regulations not inconsistent with law, for the conduct of proceedings in the Patent Office. The Commissioner of Patents, exercising the power conferred, established, among other rules of practice, rule 41. It thereby became a rule of procedure and constituted, in part, the powers of the primary examiner and Commissioner. In other words, it became an authority to those officers, and, necessarily, an authority "under the United States." Its validity was and is assailed by the plaintiff in error. We think, therefore, we have jurisdiction, and the motion to dismiss is denied.

2. The issue is well defined between the parties, both as to the right and remedy, in the Patent Office. As to right, petitioner contends that a union by an inventor of process and apparatus claims, which are essentially the same invention, is given by the patent laws, and that rule 41, so far as it takes that right away, is repugnant to those laws and invalid. As to remedy, that the decision of the primary examiner constituted a final decision upon the case, and petitioner was entitled to an appeal under the patent laws to the board of examiners-in-chief. The latter proposition depends upon the first. Assuming the right in an inventor as expressed in the first proposition, the primary examiner denied the right. True, a distinction can be made between his ruling and one on the merits, if we regard the merits to mean invention, novelty or the like. But in what situation would an applicant for a patent be? If he yield to the rule he gives up his right of joinder. If he does not yield he will not be heard at all, and may subsequently be regarded as having abandoned his application. Section 4894, Rev. Stat. A ruling having such effect must be considered as final and appealable. Whether, however, to the examiners-in-chief or to the Commissioner, and

from the latter to the courts, we may postpone answering until we have considered the right of an inventor to join process and apparatus claims in one application.

Section 4886 of the Revised Statutes of the United States provides as follows:

"Any person who has invented or discovered any new and useful art, machine, manufacture or composition of matter, or any new and useful improvement thereof, not known or used by others in this country, and not patented or described in any printed publication in this or any foreign country, before his invention or discovery thereof, and not in public use or on sale in this country for more than two years prior to his application, unless the same is proved to have been abandoned, may, upon payment of the fees required by law, and other due proceedings had, obtain a patent therefor."

There is nothing in the language of the section which necessarily precludes the joinder of two or more inventions in the same application. But the section does distinguish inventions into arts (processes), machines, manufactures and compositions of matter, and the earliest construction of the law denied the right of joinder. An exception, however, came to be made in cases of dependent and related inventions.

In *Hogg* v. *Emerson*, 6 How. 437, it was said:

"The next objection is, that this description in the letters thus considered covers more than one patent and is therefore void.

"There seems to have been no good reason at first, unless it be a fiscal one on the part of the government when issuing patents, why more than one in favor of the same inventor should not be embraced in one instrument, like more than one tract of land in one deed or patent for land. Phill. Pat. 217.

"Each could be set out in separate articles or paragraphs, as different counts for different matters in libels in admiralty or declarations at common law, and the specifications could be made distinct for each and equally clear.

"But to obtain more revenue, the public officers have gen-

erally declined to issue letters for more than one patent described in them. Renouard, 293; Phill. Pat. 218. The courts have been disposed to acquiesce in the practice, as conducive to clearness and certainty. And if letters issue otherwise inadvertently to hold them, as a general rule, null. But it is a well established exception that patents may be united, if two or more, included in one set of letters, relate to a like subject, or are in their nature or operation connected together. Phil. Pat. 218, 219; *Barret* v. *Hall*, 1 Mason, 447; *Moody* v. *Fiske*, 2 Mason, 112; *Wyeth et al.* v. *Stone et al.*, 1 Story, 273."

This language would seem to imply that not the statute but the practice of the Patent Office required separate applications for inventions, but the cases cited were explicit of the meaning of the statute. Mr. Justice Story, in *Wyeth* v. *Stone*, said:

"For, if different inventions might be joined in the same patent for entirely different purposes and objects, the patentee would be at liberty to join as many as he might choose, at his own mere pleasure, in one patent, which seems to be inconsistent with the language of the patent acts, which speak of the thing patented, and not of the things patented, and of a patent for invention, and not of a patent for inventions; and they direct a specific sum to be paid for each patent."

But he confined the requirement to independent inventions, and his illustrations indicated that he meant by independent inventions not those which, though distinct, were "for the same common purpose and auxiliary to the same common end."

Hogg v. *Emerson* came to this court again, and is reported in 11 How. 587. Of one of the objections to the patent the court said:

"It is that the improvement thus described is for more than one invention, and that one set of letters patent for more than one invention is not tolerated by law.

"But grant that such is the result when two or more inventions are entirely separate and independent, though this is doubtful on principle, yet it is well settled in the cases formerly cited, that a patent for more than one invention is not void if

they are connected in their design and operation. This last is clearly the case here."

Many other cases are to the same effect.

Can it be said that a process and an apparatus are inevitably so independent as never to be "connected in their design and operation?" They may be completely independent. *Cochrane* v. *Deener*, 94 U. S. 780. But they may be related. They may approach each other so nearly that it will be difficult to distinguish the process from the function of the apparatus. In such case the apparatus would be the dominant thing. But the dominance may be reversed and the process carry an exclusive right, no matter what apparatus may be devised to perform it. There is an illustration in the *Telephone Cases*, 126 U. S. 1. The claim passed upon in those cases was as follows:

"The method of, and apparatus for, transmitting vocal or other sounds telegraphically, as herein described, by causing electrical undulations, similar in form to the vibrations of the air accompanying the said vocal or other sounds, substantially as set forth."

The claim was held to refer to the art described, and the means of making it useful. The court observed:

"Other inventors may compete with him for the ways of giving effect to the discovery, but the new art he has found will belong to him and those claiming under him during the life of his patent."

A distinction between the process and the means employed for using it was recognized. It was said:

"The patent for the art does not necessarily involve a patent for the particular means employed for using it. Indeed, the mention of any means, in the specification or descriptive portion of the patent, is only necessary to show that the art can be used; for it is only useful arts—arts which may be used to advantage—that can be made the subject of a patent."

The patent was sustained. It was not attacked because it embraced independent inventions. The fact is not without

force. Considering the ability of counsel engaged and the division of the court in opinion, it is a proper inference that no tenable objection to the patent was overlooked.

It is said by Robinson, in his work on patents, that "special rules which govern the joinder of arts or processes with each other or with related inventions of a different class, are more stringent in the Patent Office than in the courts." (Section 473, vol. 11, Robinson on Patents.) And the author deduces the conclusion that under the rules of the Patent Office a process cannot be "joined with the apparatus that performs it, nor either of these with the product in which they result, unless they are to such an extent inseparable that the existence of some one of them is dependent upon that of the others." But rule 41 precludes even this.

If there is a divergence of views between the courts and the Patent Office and the divergence proceeds from a different interpretation of the statute, the views of the courts ought to prevail. If the courts, however, have only recognized and enforced the exercise of a discretion of the Patent Office, the question occurs, what is the extent of such discretion and can it be expressed and fixed in an inflexible rule such as rule 41? In *Bennet* v. *Fowler*, 8 Wall. 445, a discretion in the Patent Office was recognized. The question arose upon the validity of two reissued patents for improvements, which "had been embraced in one, in the original patent." The court said:

"It may be, that if the improvements set forth in both specifications had been incorporated into one patent, the patentee taking care to protect himself as to all his improvements by proper and several claims, it would have been sufficient. It is difficult, perhaps impossible, to lay down any general rule by which to determine when a given invention or improvements shall be embraced in one, two, or more patents. Some discretion must necessarily be left on this subject to the head of the Patent Office. It is often a nice and perplexing question."

Some discretion is not an unlimited discretion, and if the

discretion be not unlimited it is reviewable. In other words, the statute gives the right to join inventions in one application in cases where the inventions are related, and it cannot be denied by a hard and fixed rule which prevents such joinder in all cases. Such a rule is not the exercise of discretion; it is a determination not to hear. No inventor can reach the point of invoking the discretion of the Patent Office. He is notified in advance that he will not be heard, no matter what he might be able to show. His right is denied, therefore, not regulated. Such is the necessary effect of rule 41, as amended.

Without that rule the action of the Patent Office can be accommodated to the character of inventions, and discretion can be exercised, and when exercised, we may say in passing, except in cases of clear abuse, the courts will not review it. But the rule as amended, as we have said, precludes the exercise of any judgment and compels the separation of claims for a process and claims for its apparatus, however related or connected they may be. And the right denied is substantial. Counsel for petitioner have explained that right by the embarrassments caused by its denial, one of which is that, by disclosing the apparatus in his application for the process, he might lose the right to and a patent for the apparatus, and to sustain that view *James* v. *Campbell*, 104 U. S. 356, is cited. We are not prepared to admit such consequences nor that *James* v. *Campbell* so decides. If the classification of the statute makes a distinction between the different kinds of inventions—between a process and an apparatus—and requires or permits a separate application for each, it would seem to follow irresistibly that an application and patent for one would not preclude an application and patent for the other, and the order of the application could not affect the right which the law confers. *James* v. *Campbell* was a case of reissued patent, and by express provision of the statute as to reissued patents no new matter can be introduced in them. In other words, the reissue is to perfect, not to enlarge, the prior patent. Whether the principle of the case applies to

related as well as to independent inventions is not clear from its language. The court said:

"Where a new process produces a new substance, the invention of the process is the same as the invention of the substance, and a patent for the one may be reissued so as to include both, as was done in the case of Goodyear's vulcanized rubber patent. But a process, and a machine for applying the process, are not necessarily one and the same invention."

The facts of the case did not call for a more definite ruling. The original patent was for a device for postmarking and cancelling postage stamps by a single blow. The reissued patent claimed the act of marking and cancellation, and it was observed by the court:

"The process or act of making a postmark and cancelling a postage stamp by a single blow or operation, as a subject of invention, is a totally different thing in the patent law from a stamp constructed for performing that process."

But without attempting to enlarge the case and extend it to more intimately related inventions, it is enough now to say that there is nothing in the case which decides that if the process had been claimed in an independent application it (the process) would have been adjudged to have been dedicated to the public by the other patent. There is language indicating the contrary. It was said:

"If he (the patentee) was the author of any other invention than that which he specifically describes and claims, though he might have asked to have it patented at the same time, and in the same patent, yet if he has not done so, and afterwards desires to secure it, he is bound to make a new and distinct application for that purpose, and make it the subject of a new and different patent."

The case, however, indicates what embarrassment and peril of rights may be caused by a hard and fixed rule regarding the separation of related inventions. See also *Mosler Safe Co.* v. *Mosler*, 127 U. S. 354, and *Miller* v. *Eagle Manufacturing Co.*, 151 U. S. 186.

The Patent Office has not been consistent in its views in regard to the division of inventions. At times convenience of administration has seemed to be of greatest concern; at other times more anxiety has been shown for the rights of inventors. The policy of the office has been denominated that of "battledore and shuttlecock," and rule 41 as it now exists was enacted to give simplicity and uniformity to the practice of the office. Its enactment was attempted to be justified by the assumption that the patent laws gave to the office a discretion to permit or deny a joinder of inventions. But, as we have already said, to establish a rule applicable to all cases is not to exercise discretion. Such a rule ignores the differences which invoke discretion, and which can alone justify its exercise, and we are of opinion therefore that rule 41 is an invalid regulation.

3. Having settled the right of appellant, we may now return to the consideration of his remedy. Respondent contends:

"It is fundamental that mandamus will not issue against a public officer, except to compel the performance of some plain, clear, ministerial duty, and will not issue to control his discretion."

And it is further contended that respondent has acted, and, having acted, cannot be required to refer the case to a lower tribunal in his office. To sustain the contention *Commissioner of Patents* v. *Whiteley*, 4 Wall. 522, is cited.

The unity of the inventions claimed by petitioner in the case at bar we may assume. It is not denied by respondent. Petitioner had, therefore, the right to join them in one application. The denial of this right by the primary examiner was a rejection of the application and entitled petitioner to an appeal to the examiners-in-chief, under section 4909 of the Revised Statutes. That section provides:

"Every applicant for a patent, . . . any of the claims of which have been twice rejected, . . . may appeal from the decision of the primary examiner . . . to the board of examiners-in-chief; . . ."

Section 482 provides:

"The examiners-in-chief shall be persons of competent legal knowledge and scientific ability, whose duty it shall be, on the written petition of the appellant to revise and determine upon the validity of the adverse decisions of examiners upon applications for patents, and for reissues of patents, and in interference cases; and, when required by the Commissioner, they shall hear and report upon claims for extensions, and perform such other like duties as he may assign them."

The procedure on appeal is provided for by the rules of the Patent Office. It is taken by filing a petition praying an appeal with the primary examiner setting forth the reasons upon which the appeal is based, and it is made the duty of the examiner five days before the date of hearing to furnish the appellate tribunal and the appellant with a statement of the grounds of his decision. A petition praying an appeal was filed but the primary examiner refused to answer the appeal, and the defendant in error also refused to direct him to answer it. It is manifest that if an appeal cannot be compelled from the decision of the primary examiner, an applicant is entirely without remedy. And respondent has asserted that extreme. In *Ex parte Frasch* the Court of Appeals of the District of Columbia was persuaded that an appeal was not the proper remedy. In the case at bar it is contended that mandamus is not the proper one. One or the other must be. A suggestion made is that the inventor must await a decision on the merits, meaning by merits "lack of invention, novelty or utility," as expressed in rule 133. But after waiting he would encounter the arbitrary requirement of rule 41. Besides what would there be to review if the order of the primary examiner were complied with and the claims put into separate applications? There are some observations in *Commissioner of Patents* v. *Whiteley*, which may be quoted. Whiteley claimed to be the assignee of a patent, and filed an application for a reissue. The Commissioner declined to entertain it on the ground that Whiteley was only assignee of an interest and not of the entire patent. He also

declined to allow an appeal to be taken from his decision. The Supreme Court of the District of Columbia awarded a peremptory writ of mandamus commanding the Commissioner to refer the application to the proper examiner, or otherwise examine or cause it to be examined according to law. Error was prosecuted to this court. Under the act of 1836 it was provided that if the Commissioner decided adversely to an applicant for a patent an appeal could be taken to the board of examiners, and by the act of 1837 that remedy was given to an applicant for a reissue of a patent, and the question in the case was whether that remedy should have been pursued. In other words, whether the remedy was by appeal or mandamus. It was decided that appeal was the remedy. Singularly enough, the Commissioner in answer to the rule took the position that the application was not before him because it had not been filed. The court said if that were so "mandamus would clearly lie to compel the Commissioner to receive it. It was his first duty to receive the application. Whatever he might do subsequently, without this initial step there could be no examination, and, indeed, no rightful knowledge of the subject on his part. Examination and the exercise of judgment, with their proper fruit, were to follow, and they did follow."

And so the exercise of judgment might follow a hearing of the application under review. It was the duty of the primary examiner to accord a hearing or, refusing to do so, to grant an appeal. It was the duty of the Commissioner to compel the appeal. The Commissioner of Patents is primarily charged with granting and issuing patents. Applications for patents are made to him (section 4888, Revised Statutes), and his superintendence should be exercised to secure the rights which the statutes confer on inventors. The first of those rights is a hearing. If that be denied other rights cannot accrue.

The Commissioner justifies his decision by the rules of the Patent Office and a long practice under them. If there is inconsistency between the rules and statute, the latter must pre-

vail. But the primary examiner did not follow the rules. The rules provide that if appeal be regular *in form* (italics ours) he shall within five days of the filing thereof furnish the examiners-in-chief with a written statement of the grounds of his decision on all of the points involved in the appeal, with copies of the rejected claims and with the references applicable thereto. If he decide that the appeal is not regular in form, a petition from such decision may be made directly to the Commissioner. The regularity of the appeal in form is not questioned in the case at bar, and it was the duty of the examiner to answer the appeal by furnishing the examiners-in-chief the statement provided for in rule 135. A petition to the Commissioner was not necessary except to make the examiner perform his duty.

4. We do not think that petitioner was estopped from insisting upon his application by proceeding with the interference with Duncan after the examiner's letter of December 15, 1899. It would be pressing mere order of procedure and the convenience of the Patent Office too far to give them such result under the circumstances.

The judgment of the Court of Appeals is therefore reversed with directions to reverse that of the Supreme Court, and direct the Supreme Court to grant the writ of mandamus as prayed for.

Ex Parte FRASCH.

PETITION FOR WRIT OF MANDAMUS TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

No. 13. Original. Argued December 18, 21, 1903.—Decided February 23, 1904.

Mandamus to the Commissioner, and not to the Court of Appeals of the District of Columbia, is the proper remedy to compel the forwarding of an appeal to the board of examiners-in-chief from the primary examiner.

THE facts are stated in the opinion.

Mr. Charles J. Hedrick for petitioner.

Mr. Assistant Attorney General McReynolds, with whom *Mr. John W. Coit* was on the brief, for respondents.

Mr. Justice McKenna delivered the opinion of the court.

This is a petition for a writ of mandamus to compel the Court of Appeals of the District of Columbia to take jurisdiction of an appeal from the Commissioner of Patents.

The petition shows that petitioner was the first inventor of a new and useful improvement in the art of making salt by evaporation of brine, which improvement consisted of new and useful means for removing incrustation of calcium sulphate from brine heating surfaces.

Petitioner applied for a patent for his invention in due form, and expressed his invention in six claims, three of which were for the process of removing incrustation of calcium sulphate from heating surfaces, and three of which were for an apparatus for use in the process.

The primary examiner decided that "two different subjects of invention" were presented in the specification and claims, and required a division of the claims under rule 41 of the Patent Office. A reconsideration of the decision was requested and denied. A petition for an appeal to the board of examiners-in-chief was filed. The primary examiner refused to allow the appeal. A petition was then presented to the Commissioner of Patents praying that he make such order or take such action that petitioner's appeal to the examiners-in-chief might be heard, or, if that prayer be denied, that the Commissioner himself "consider the various matters all and severally raised by the appeal." Both prayers were denied and petitioner appealed to the Court of Appeals of the District of Columbia. That court dismissed the appeal for want of jurisdiction. This petition was then filed and a rule to show cause issued. A return to the rule was duly made.

We have just held in *Steinmetz* v. *Allen*, *ante*, p. 543, that rule 41 of the Patent Office, in so far as it requires a division between claims for a process and claims for an apparatus, if they are related and dependent inventions, is invalid. We, however,

held that mandamus to the Commissioner, not appeal to the Court of Appeals of the District, was the proper remedy. It follows, therefore, that the rule to show cause should be discharged and the petition be dismissed, and it is

So ordered.

CENTRAL STOCK YARDS COMPANY *v.* LOUISVILLE & NASHVILLE RAILWAY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 149. Argued January 28, 29, 1904.—Decided February 23, 1904.

Neither the act of Congress of February 4, 1887, c. 104, 24 Stat. 379, nor section 213 or other provisions in the constitution of the State of Kentucky imposes an obligation upon a railroad having its own stockyards in Louisville under a lease from a stockyard company, to accept live stock from other states for delivery at the stockyards of another railroad in the same city and neighborhood, although there is a physical connection between the two roads.

THE facts are stated in the opinion.

Mr. Joseph C. Dodd and *Mr. Wm. D. Washburn*, with whom *Mr. J. L. Dodd* and *Mr. W. M. Smith* were on the brief, for appellant.

Mr. Helm Bruce, with whom *Mr. Charles N. Burch* and *Mr. Ed. Baxter* were on the brief, for appellees.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of Appeals affirming a decree of the Circuit Court which dismissed the plaintiff's bill. 118 Fed. Rep. 113. The bill was brought by the appellant, a Delaware corporation, against a Kentucky corporation, to compel it to receive live stock tendered to it outside the State of Kentucky for the Central Stock Yards

station, and to deliver the same at a point of physical connection between its road and the Southern Railway, for ultimate delivery to or at the Central Stock Yards. The Central Stock Yards station is at the Central Stock Yards, just outside the boundary line of Louisville, Kentucky, on the Southern Railway Company's line, and by agreement between the two companies the Central Stock Yards are the "live stock depot for the purpose of handling live stock to and from Louisville" on the Southern Railway. The defendant, by a similar arrangement, has made the Bourbon Stock Yards its live stock depot for Louisville, and declines to receive live stock billed to the Central Stock Yards, or to deliver live stock destined to Louisville elsewhere than at the Bourbon yards. There are physical connections between the Louisville and Nashville and the Southern tracks at a point between the two stock yards, which is passed by the greater portion of the live stock carried by the Louisville and Nashville Company, and at another point which would be more convenient for delivery a little further to the northward. The details are unimportant, except that in order to deliver, as prayed, the defendant would be compelled either to build chutes or to hand over its cars to the Southern Railroad, after having made some contract for their return. The right is claimed by the plaintiff, under the Interstate Commerce Act of February 4, 1887, c. 104, § 3, 24 Stat. 379, making it unlawful for common carriers subject to the act to give unreasonable preferences, and requiring them to afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of property to and from their several lines and those connecting therewith. The right is claimed also under the Constitution of Kentucky, especially § 213, requiring Kentucky railroad companies to receive, deliver, transfer and transport freight from and to any point where there is a physical connection between the tracks, as we understand it, of the railroad concerned and any other.

For the purposes of decision we assume, without expressing an opinion, that if the Act of Congress and the Kentucky Constitution apply to the case they both confer rights upon

the plaintiff. As to the former compare §§ 8, 9, and the act of February 19, 1903, c. 708, § 2, 32 Stat. 847, 848, *Covington Stock-Yards Co.* v. *Keith*, 139 U. S. 128; *Kentucky & Indiana Bridge Co.* v. *Louisville & Nashville R. R.*, 37 Fed. Rep. 567, 610, 620. The rights under the latter, which are relied upon especially, could not be established without discussion. Compare *Atkinson* v. *Newcastle &c. Waterworks Co.*, L. R. 2 Ex. Div. 441; *Johnston* v. *Consumers' Gas Company of Toronto*, [1898] A. C. 447. For the same purpose we further assume that such rights as the plaintiff has may be enforced by bill in equity. See *Interstate Stock-Yards Co.* v. *Indianapolis Union Railway*, 99 Fed. Rep. 472. We also lay on one side the question whether the section of the Constitution of Kentucky is or is not invalid as an attempt to regulate commerce among the States. For we are of opinion that the defendant's conduct is not within the prohibitions or requirements of either the Act of Congress or the Constitution of Kentucky, as those provisions fairly should be construed.

The Bourbon Stock Yards are the defendant's depot. They are its depot none the less that they are so by contract and not so by virtue of a title in fee. Unless a preference of its own depot to that of another road is forbidden, the defendant is not within the Act of Congress. Suppose that the Southern Railway station and the Louisville and Nashville station were side by side, and that their tracks were connected within or just outside the limits of the station grounds. It could not be said that the defendant was giving an undue or unreasonable preference to itself or subjecting its neighbor to an undue or unreasonable disadvantage if it insisted on delivering live stock which it had carried to the end of the transit at its own yard. These views are sanctioned by what was said in *Covington Stock-Yards Co.* v. *Keith*, 139 U. S. 128. The fact that the plaintiff's stock yards are public does not change the case. See further *Butchers' & Drovers' Stock-Yards Co.* v. *Louisville & Nashville R. R.*, 67 Fed. Rep. 35.

If the cattle are to be unloaded, then, as was said in *Covington Stock-Yards Company* v. *Keith*, the defendant has a right to unload them where its appliances for unloading are, and

cannot be required to establish another set hard by. On the other hand, if the cattle are to remain in the defendant's cars it cannot be required to hand those cars over to another railroad without a contract, and the courts have no authority to dictate a contract to the defendant or to require it to make one. *Atchison, Topeka & Santa Fé R. R.* v. *Denver & New Orleans R. R.*, 110 U. S. 667, 680. The consensus of the Circuit Courts is to the same effect. *Kentucky and Indiana Bridge Co.* v. *Louisville & Nashville R. R.*, 37 Fed. Rep. 567, 629, 630; *Little Rock & Memphis R. R.* v. *St. Louis, Iron Mountain & Southern Ry.*, 41 Fed. Rep. 559; *Chicago & Northwestern Ry.* v. *Osborne*, 52 Fed. Rep. 912; *Oregon Short-line & Utah Northern Ry.* v. *Northern Pacific R. R.*, 61 Fed. Rep. 158, affirming *S. C.*, 51 Fed. Rep. 465; *Little Rock & Memphis R. R.* v. *St. Louis Southwestern Ry.*, 63 Fed. Rep. 775; *St. Louis Drayage Co.* v. *Louisville & Nashville R. R.*, 65 Fed. Rep. 39; *Allen* v. *Oregon R. R. & Navigation Co.*, 98 Fed. Rep. 16. All that was decided in *Wisconsin, Minnesota & Pacific R. R.* v. *Jacobson*, 179 U. S. 287, was that by statute two railroad companies might be required to make track connections. So much of the statute as undertook to regulate rates was not passed upon. See *Minneapolis & St. Louis R. R.* v. *Minnesota*, 186 U. S. 257, 263. There is no act of Congress that attempts to give courts the power to require contracts to be made in a case like this.

What we have said applies, in our opinion, to the Constitution of Kentucky with little additional argument. The requirement to deliver, transfer and transport freight to any point where there is a physical connection between the tracks of the railroad companies, must be taken to refer to cases where the freight is destined to some further point by transportation over a connecting line. It cannot be intended to sanction the snatching of the freight from the transporting company at the moment and for the purpose of delivery. It seems to us that this would be so unreasonable an interpretation of the section that we do not find it necessary to consider whether under any interpretation it can be sustained. In view of the course taken by the argument we may add that we do

not find a requirement that the railroad company shall deliver its own cars to another road. The earlier part of section 213 provides that all railroads "shall receive, transfer, deliver and switch empty or loaded cars, and shall move, transport, receive, load or unload all the freight in carloads or less quantities, coming to or going from any railroad, . . . with equal promptness and dispatch, and without any discrimination. . . ." Promptness and the absence of discrimination are the point, and that shows that the words "coming to or going from any railroad," qualify the words "empty or loaded cars" as well as "freight," and therefore that the cars referred to are cars from other roads. The same thing is shown by the word "receive," which is the starting point of all that relates to cars. See *Louisville & Nashville R. R.* v. *Commonwealth*, 108 Kentucky, 628, 633. The other sections of the Constitution need no special remark.

We have discussed the case as if the two stock yards were side by side. They were not, but they both were points of delivery for cattle having Louisville as their general destination. They both were Louisville stations in effect. It may be that a case could be imagined in which carriage to another station in the same city by another road fairly might be regarded as *bona fide* further transportation over a connecting road and within the requirements of the Kentucky Constitution. However that may be, we are of opinion that the court below was entirely right, so far as appears, in treating this as an ordinary case of stations at substantially the same point of delivery, and, therefore, as one to be dealt with as if they were side by side. As the defendant would not be bound to deliver at the Central Stock Yards if they were by the side of its track, its obligation is no greater because of the intervention of a short piece of the track of another railroad. As we have said, the delivery would have to be made either by unloading or by the surrender of the defendants' cars.

Decree affirmed.

Mr. Justice McKenna concurs in the result.

WEDDING v. MEYLER.

ERROR TO THE WARREN CIRCUIT COURT OF THE STATE OF KENTUCKY.

No. 125. Argued January 14, 15, 1904.—Decided February 23, 1904.

Under the statute passed in 1789 by Virginia, known as the "Virginia Compact," and the act of Congress of February 4, 1791, c. 4, 1 Stat. 189, making Kentucky a State, the State of Indiana has concurrent jurisdiction, including the right to serve process, with Kentucky on the Ohio River opposite its shores below low water mark. An Indiana judgment dependent for its validity upon a summons served on that part of the river is entitled to full faith and credit when sued upon in another State. The effect of the above mentioned acts in giving jurisdiction to Indiana is a Federal question.

Where a decision by the state court of the Federal question appears to have been the foundation of the judgment a writ of error lies.

The writ of error runs to a lower court when the record remains there, and the judgment has to be entered there after a decision of the question of law involved by the highest court of the State.

THE facts are stated in the opinion.

Mr. Merrill Moores, with whom *Mr. Charles W. Miller* Attorney General of the State of Indiana, and *Mr. Cassius C. Hadley* were on the brief, for plaintiffs in error:

As to the Federal question.

The first four assignments of error state a Federal question arising under the first clause of section 709, Rev. Stat.

The fifth, one arising under the third clause; and the sixth, one arising under the second clause.

As to assignments under the first and second clauses, it is sufficient that it appear that the validity of the statute was drawn in question and it is not necessary that any right be "specially set apart or claimed." *Columbia Water Power Co.* v. *Columbia Electric Street Ry. Co.*, 172 U. S. 475, 488; *Yazoo & Mississippi Valley Ry. Co.* v. *Adams*, 180 U. S. 1, 14.

The Federal questions were necessarily involved in this case, and, as the Kentucky court decided them, it is not material

whether that court stated them as Federal questions or not. *Green* v. *Van Buskirk*, 5 Wall. 307, 314; *S. C.*, 7 Wall. 139, 145; *Carpenter* v. *Strange*, 141 U. S. 87, 103; *Huntington* v. *Attrill*, 146 U. S. 657, 683; *Mills* v. *Duryee*, 7 Cranch, 481, 484; *Christmas* v. *Russell*, 5 Wall. 290, 302; *Cooper* v. *Reynolds*, 10 Wall. 308, 316; *Maxwell* v. *Stewart*, 22 Wall. 77, 81; *Insurance Company* v. *Harris*, 97 U. S. 331, 336; *Hanley* v. *Donoghue*, 116 U. S. 1; *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, 292; *Atherton* v. *Atherton*, 181 U. S. 155, 160; *Bell* v. *Bell*, 181 U. S. 175; *Jacobs* v. *Marks*, 182 U. S. 583, 587; *McCullough* v. *Virginia*, 172 U. S. 102, 116; *Douglas* v. *Kentucky*, 168 U. S. 488, 502; *Walsh* v. *Columbus, H. V. & A. R. R. Co.*, 176 U. S. 469, 475; *Stearns* v. *Minnesota*, 179 U. S. 223, 233; *Wilson* v. *Standefer*, 184 U. S. 399, 411.

Where the state court has granted a petition for a rehearing which states a Federal question, and has considered it, the question is saved. *Mallett* v. *North Carolina*, 181 U. S. 589, 592.

Under the rule requiring opinions to be sent up with the record, it is a sufficient compliance with the words "specially set up and claimed" if it appear that the right was fully considered in the opinion and ruled against the plaintiff in error. *San José Land & Water Co.* v. *San José Ranch Co.*, 189 U. S. 177, 179.

A suit in the courts of one State upon a judgment of a sister State is in itself a claim for full faith and credit and it is set up by filing the complaint.

The compact between Virginia and Kentucky is valid. For statutes and ordinances affecting same, see 11 Hen. St. at L. Virginia, 326, 571; Rev. Stat. p. 13, ed. 1878; 1 Comp. Stat. 1901, LVII, 13 Hen. St. at L. Virginia, 19; Kentucky Stat. 1899, 43, 52, 62. *Handly's Lessee* v. *Anthony*, 5 Wheat. 374, 385; *Green* v. *Biddle*, 8 Wheat. 1, 86; *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 13 How. 518, 565, 566, and 18 How. 421, 430.

This court has always sustained and enforced compacts between the States entered into with the consent of Congress, as the Constitution requires.

This compact has been recognized as valid and binding upon the States in the following cases in the Federal courts: *Hawkins* v. *Barney*, 5 Pet. 457, 465; *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 582; *McKinley* v. *Carroll*, 12 Pet. 56, 69; *Pollard* v. *Kibbe*, 14 Pet. 353, 413; *Henderson Bridge Co.* v. *Henderson City*, 173 U. S. 592, 610; *Stearns* v. *Minnesota*, 179 U. S. 223, 245; *United States* v. *New Orleans*, 17 Fed. Rep. 483, 488; *Griswold* v. *Bragg*, 48 Fed. Rep. 519, 522. And see *Poole* v. *Fleeger*, 11 Pet. 185, 209; *Virginia* v. *Tennessee*, 148 U. S. 503, 520, 525; *Wharton* v. *Wise*, 153 U. S. 155, 168.

It has been uniformly held that the contracts made by the States are protected by the Constitution precisely as are contracts between individuals. *New Jersey Bank* v. *Wilson*, 7 Cranch, 164, 167; *Providence Bank* v. *Billings*, 4 Pet. 514, 560; *Woodruff* v. *Trapnall*, 10 How. 190, 207; *Wolff* v. *New Orleans*, 103 U. S. 358, 365; *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650, 672.

Prior to the adoption of the Constitution, compacts between the States were not infrequent and they were indifferently styled as compacts or treaties. *South Carolina* v. *Georgia*, 93 U. S. 4, 9; *Aitcheson* v. *Endless Chain Dredge*, 40 Fed. Rep. 253, 256; *Ex parte Marsh*, 57 Fed. Rep. 719, 723.

The validity of this compact has been frequently admitted by the Kentucky Court of Appeals. *Arnold* v. *Shields*, 5 Dana (Ky.), 18, 22; 30 Am. Dec. 669, 673; *McFall* v. *Commonwealth*, 2 Met. (Ky.) 394, 398; *Louisville Bridge Co.* v. *Louisville*, 81 Kentucky, 189, 194; *Garner's Case*, 3 Gratt. 655, 674; *State* v. *Plants*, 25 W. Va. 119; *S. C.*, 52 Am. Dec. 211.

Compacts between the States, sanctioned by Congress, are laws of the United States, and are also treaties made under the authority of the United States, and are protected as such by the Constitution, Article VI.

There is a distinction between ownership and jurisdiction, and there may be jurisdiction without ownership. Vattel, Law of Nations, Book I, §§ 203, 295; *Garner's Case*, 3 Gratt. 655, 708; *Re Devoe Manufacturing Co.*, 108 U. S. 401, 411, 412; *The Norma*, 32 Fed. Rep. 411, 413; *Falmouth* v. *Watson*,

5 Bush (Ky.), 660; *Lutz* v. *Crawfordsville*, 109 Indiana, 466; *Emerich* v. *Indianapolis*, 118 Indiana, 279; *Kaufle* v. *Delaney*, 25 W. Va. 410; *Flack* v. *Fry*, 32 W. Va. 364; *Neal* v. *Commonwealth*, 17 S. & R. 67; *Coldwater* v. *Tucker*, 36 Michigan, 474; *S. C.*, 24 Am. Dec. 601; *Gould* v. *Rochester*, 105 N. Y. 46; *Van Hook* v. *Selma*, 70 Alabama, 361; *S. C.*, 45 Am. Dec. 85; *Chicago Packing Co.* v. *Chicago*, 88 Illinois, 221; *S. C.*, 30 Am. Dec. 545; *Albia* v. *O'Harra*, 64 Iowa, 297; *State* v. *Franklin*, 40 Kansas, 410; *Hagood* v. *Hutton*, 33 Missouri, 244.

If the language of the compact were doubtful, the fact that Indiana and Ohio had, from the very beginning, exercised the same jurisdiction over the Ohio as Kentucky and Virginia and that the jurisdiction thus exercised was acquiesced in and conceded by Kentucky and Virginia would of itself, under the rule of contemporaneous construction recognized by this court, be sufficient to put the question at rest.

As to contemporaneous construction, usage and acquiescence, see *Stuart* v. *Laird*, 1 Cranch, 299, 309; *Prigg* v. *Pennsylvania*, 16 Pet. 539, 621; *Cooley* v. *Board of Wardens*, 12 How. 299, 315; *Cooper Manufacturing Co.* v. *Ferguson*, 113 U. S. 727, 733; *The Laura*, 114 U. S. 411, 416; *Auffmordt* v. *Hedden*, 137 U. S. 310, 329; *Schell's Executors* v. *Fauché*, 138 U. S. 262, 572; *Field* v. *Clark*, 143 U. S. 649, 691; *McPherson* v. *Blacker*, 146 U. S. 1, 27; *Fairbank* v. *United States*, 181 U. S. 283, 309; *Carlisle* v. *State*, 32 Indiana, 55; *Sherlock* v. *Alling*, 44 Indiana, 184; *Dugan* v. *State*, 125 Indiana, 130; 9 L. R. A. 321; *Welsh* v. *State*, 126 Indiana, 71; 9 L. R. A. 664; *Memphis & Cincinnati Packet Co.* v. *Pikey*, 142 Indiana, 304; *Church* v. *Chambers*, 3 Dana (Ky.), 274, 278; *Arnold* v. *Shields*, 5 Dana (Ky.), 18, 22; *S. C.*, 30 Am. Dec. 669, 673; *McFall* v. *Commonwealth*, 2 Met. (Ky.) 394, 398; *Garner's Case*, 3 Gratt. 655, 676, 736; *State* v. *Plants*, 25 W. Va. 119; *S. C.*, 52 Am. Dec. 211; *State* v. *Faudré*, W. Va. Nov. 14, 1903.

In the Ohio decisions, it is apparent that the jurisdiction exercised by the State over the Ohio River is based on the Virginia compact. *Lessee of Blanchard* v. *Porter*, 11 Ohio, 138,

142; *Stephens* v. *State*, 14 Ohio, 386, 389; *Eckert* v. *Colvin*, 1 Ohio Dec. (reprint) 11; 2 West. L. J. 54; *State* v. *Hoppess*, 1 Ohio Dec. (reprint) 105; 2 West. L. J. 279; *Garner's Case*, 3 Gratt. 754; *Charge to Grand Jury*, 32 Weekly Law Bull. 275.

The Federal courts of Ohio and Indiana have always exercised admiralty jurisdiction over the Ohio River. *McGinnis* v. *The Pontiac*, 5 McLean, 359; *S. C.*, 16 Fed. Cas. 8801; *Seven Coal Barges*, 2 Biss. 297; *S. C.*, 21 Fed. Cas. 12,677; *The Lewellen*, 4 Biss. 156; *S. C.*, 16 Fed. Cas. 8307; *Longstreet* v. *Steamboat R. R. Springer*, 4 Fed. Rep. 671; *The Liberty No. 4*, 7 Fed. Rep. 226; *The Guiding Star*, 9 Fed. Rep. 521; *The Guiding Star*, 18 Fed. Rep. 263; *The Cherokee*, 15 Fed. Rep. 119; *The Thomas Sherlock*, 22 Fed. Rep. 253; *Baumgartner* v. *The W. B. Cole*, 49 Fed. Rep. 587; *Memphis & Cin. Packet Co.* v. *Overman Carriage Co.*, 93 Fed. Rep. 246; *The City of Clarksville*, 94 Fed. Rep. 201; *Bennitt* v. *Guiding Star*, 53 Fed. Rep. 936; *Wilbour* v. *Hegler et al.*, 62 Fed. Rep. 407; *Kineon* v. *The New Mary Houston*, 69 Fed. Rep. 362.

The executive, legislative and judicial departments of Indiana have not only claimed, but have actually exercised jurisdiction of every kind over the Ohio River where it serves as a boundary, for a hundred years. For an almost equal length of time the States of Ohio and Illinois have done the same thing. The States of Kentucky, Virginia and West Virginia have not only not disputed this exercise of authority, but their courts and their legislatures have conceded that it is rightful. Under such conditions, where the authority is of doubtful origin, the acquiescence of Kentucky for so long a time is, in the words of this court, "conclusive of" Indiana's "title and rightful authority." *Indiana* v. *Kentucky*, 136 U. S. 479, 509; Vattel's Law of Nations, Bk. II. cxi, § 149; *Edwards County* v. *White County*, 85 Illinois, 392. As to what is territorial concurrent jurisdiction, see 12 Am. & Eng. Ency. of Law (1st ed.), 296; Rapalje & Lawrence's Law Dictionary; Bouvier's Law Dictionary; Rorer Interstate Law (2d ed.), p. 438; *Wiggins Ferry Co.* v. *Reddig*, 24 Ill. App. 260, 265;

Sanders v. *New Orleans & St. Louis Anchor Line*, 97 Missouri, 26, 30; *Swearingen* v. *Steamboat Lynx*, 13 Missouri, 519; *State* v. *Metalf*, 65 Mo. App. 681, 687; *Cooley* v. *Golden*, 52 Mo. App. 229; *State* v. *Mullen*, 35 Iowa, 199, 201; *Buck* v. *Ellenbolt*, 84 Iowa, 394, 396; *S. C.*, 15 L. R. A. 187, 189; *Opsahl* v. *Judd*, 30 Minnesota, 126, 129; *State* v. *George*, 60 Minnesota, 503, 505; *State* v. *Cameron*, 2 Pinney (Wis.), 490, 495; *J. S. Keator Lumber Co.* v. *St. Croix Boom Corporation*, 72 Wisconsin 62, 95; *S. C.*, 7 Am. St. 837, 858; *Roberts* v. *Fullerton*, (Wis.) 93 N. W. Rep. 1111; *State* v. *Davis*, 25 N. J. L. 386; *Commonwealth* v. *Frazee*, 2 Philadelphia, 191, 193; *Neal* v. *Commonwealth*, 17 S. & R. 67; *Commonwealth* v. *Shaw*, 22 Pa. C. C. 414; *S. C.*, 8 Pa. Dist. 509; *Aitcheson* v. *Endless Chain Dredge*, 40 Fed. Rep. 253, 255; Gardner's Institutes, 209, 210.

Mr. D. W. Sanders, for defendant in error:

Plaintiffs in error are not entitled to a writ of error from this court to the Warren Circuit Court of the State of Kentucky, to review the judgment rendered in that court, dismissing the suit of the plaintiffs in error.

The rule in Kentucky is, that although a case has been decided by the Court of Appeals of Kentucky, upon its return to the trial court it is competent to amend the pleadings and set up a wholly different cause of action, and to transfer it under the amendment from an action at law to a suit in equity, notwithstanding the decision and the mandate of the Court of Appeals. *Hillerich & Son* v. *Franklin Ins. Co.*, 23 Ky. L. R. 631; *S. C.*, 63 S. W. Rep. 592; *Hord* v. *Chandler*, 10 B. Mon. 403. This rule has prevailed in Kentucky since the adoption of the code of practice. *Fisher* v. *Perkins*, 122 U. S. 527.

This court is without jurisdiction on this writ of error to review the judgment of Warren Circuit Court. *Downham* v. *Alexandria*, 9 Wallace, 659; *Gregory* v. *Mc Veigh*, 23 Wallace, 294; *Mullen* v. *Western Union Beef Co.*, 173 U. S. 116; *Pinney* v. *Nelson*, 183 U. S. 144.

The record presents no title, right, privilege or immunity that was specially set up or claimed by the plaintiffs in error, and which was passed upon by the Court of Appeals of Ken-

tucky. *Oxley Stave Co.* v. *Butler County*, 166 U. S. 653; *Louisville & N. R. R. Co.* v. *Louisville*, 166 U. S. 714, 715; *Powel* v. *Brunswick Co.*, 150 U. S. 433; *Sewing Machine Co.* v. *Radcliffe*, 137 U. S. 287; *Cole* v. *Cunningham*, 133 U. S. 107.

The state courts of Kentucky did not question the power of the Indiana court; it merely tried the question of its jurisdiction over the person of the defendant.

The State of Indiana has not concurrent jurisdiction with Kentucky over the Ohio River. As to the Virginia cession, see *Wallace* v. *Parker*, 6 Pet. 313.

Without further elaboration of the historical features of this cession of the territory of the northwest to the general government, reference is made to the Constitutional History of the United States by Curtis, volume 1, pp. 86, etc.; Bancroft's History of the Constitution of the United States, vol. 2, chap. 6, pp. 98 to 118; The Life and Times of James Madison, by Rives, vol. 1; The Critical Period of American History, by John Fiske; Randall's Life of Jefferson; Marshall's History of Kentucky, vol. 1, p. 160, and the address of Judge Alexander P. Humphrey, of Kentucky, before the alumni of the University of Virginia, July 2, 1884; History of the People of the United States, by McMasters, vol. 2, p. 477; History of the U. S. Courts in Kentucky, by Thos. Speed, pp. 1, 2.

Indiana claims concurrent jurisdiction in her constitution and legislative acts, which undertake to give her courts jurisdiction beyond the territorial limits of the State. It is settled by the decisions of this court that the territorial limits of Kentucky are to low-water mark on the north side of the Ohio river. *Hanley's Lessee* v. *Anthony*, 5 Wheaton, 474; *Gardner's Case*, 3 Grattan, 565; *Fleming* v. *Kenney*, 4 J. J. Marshall, 158; *McFall* v. *Commonwealth*, 2 Metcalf (Ky.), 394; *Louisville Bridge Co.* v. *City of Louisville*, 81 Kentucky, 194; *Indiana* v. *Kentucky*, 136 U. S. 479; *Simpson* v. *Butler*, 4 *Blatch.* 284; *Cowden* v. *Kerr*, 6 Blatch. 280; *Carlisle* v. *State*, 32 Indiana, 56; *Sherlock* v. *Alling*, 44 Indiana, 191.

The claim of concurrent jurisdiction between two sovereign States over the same territory, where the territorial limits of

each is defined, is a thing wholly unknown to the laws of nations as we usually understand their terms, and has grown up under what has been termed in the United States "interstate" law. Rorer, Interstate Law, 3, 337.

The state courts of Iowa have no power to remove a nuisance beyond the center of the Mississippi River, which consists of a permanent dam of the river on the Illinois side. *Gilbert* v. *Moline Water Power Co.*, 19 Iowa, 319.

Such permanent objects are taxable only in the State in which they are situated, and when the object is a bridge, the part of the bridge and the abutments which are in each State are there taxable. *State* v. *Metz*, 5 Dutch. 122; *Henderson Bridge Co.* v. *Kentucky*, 166 U. S. 150.

The doctrine of concurrent jurisdiction, founded upon convenience, wholly fails when the many inconsistencies are pointed out, as well as the great inconveniences which necessarily result from the enforcement of law, within territorial limits where the boundary is fixed and readily ascertained.

Mr. Justice Holmes delivered the opinion of the court.

This is a writ of error to a Circuit Court of the State of Kentucky on a judgment entered there in pursuance of a mandate of the Court of Appeals of that State. 107 Kentucky, 310, 685. The action was brought upon an Indiana judgment. The answer denied the jurisdiction of the Indiana court. It was not disputed that the service in that suit was on a steamboat in the Ohio River on the Indiana side. At the trial two questions were left to the jury, one whether the person purporting to act as the attorney of the defendant in the Indiana suit was authorized to represent him, and the other whether the summons in that suit was served on the Indiana or Kentucky side of the low-water mark of the Ohio River where it touches the Indiana shore. The jury found against the authority of the alleged attorney, and found that the service was on the Kentucky side of the low-water mark, and therefore, it is assumed, within the boundaries of Kentucky. Thereupon the plaintiffs in error (the original plaintiffs) moved for judgment notwithstanding the findings

of the jury, and judgment was ordered. The defendant excepted and appealed. The Court of Appeals sustained the exceptions and ordered a judgment on the verdict dismissing the action. A judgment was entered, as ordered, in the court below, the above mentioned Circuit Court, and this writ of error was brought.

It is suggested that the writ of error should have been directed to the Court of Appeals. But it appears from the form of the order of that court that the record remained in the lower court where judgment was ordered to be entered, and the writ properly ran to the court where the judgment had to be rendered. *Rothschild* v. *Knight*, 184 U. S. 334. It is suggested further, that the record does not show a Federal question. But the jurisdiction of the Indiana court was put in issue by the pleadings and it is apparent from what has been said that the decision went on a denial of that jurisdiction because of the place of service. That denial could be justified only on the ground that the compact of Virginia and the act of Congress of February 4, 1791, admitting Kentucky to the Union, did not confer the right of jurisdiction which the Indiana court attempted to exercise and which the State of Indiana claims. The judgment and the opinion of the Court of Appeals both disclose that the decision was against the right under the statutes referred to, and that it was on that ground only that the Indiana judgment was denied any force or effect. The question as to the right of jurisdiction sufficiently appears. *San José Land & Water Co.* v *San José Ranch Co.*, 189 U. S. 177, 180. It is not denied that that question is one which can be taken to this court. *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 13 How. 518, 566.

We pass to the question decided by the Court of Appeals. In 1789 the State of Virginia passed a statute known as the Virginia Compact. This statute proposed the erection of the district of Kentucky into an independent State upon certain conditions. One of these was: § 11. "Seventh, that the use and navigation of the river Ohio, so far as the territory of the proposed state, or the territory which shall remain within the limits of this commonwealth lies thereon, shall be

free and common to the citizens of the United States, and the respective jurisdictions of this Commonwealth and of the proposed state on the river as aforesaid, shall be concurrent only with the states which may possess the opposite shores of the said river." 13 Hening, St. at L. 17. (The previous cession by Virginia of its rights in the territory northwest of the Ohio had been on condition that the territory so ceded should be laid out and formed into States. Act of December 20, 1783, 11 Hening, St. at L. 326.) The act of Congress of February 4, 1791, c. 4, 1 Stat. 189, consents and enacts that the "district of Kentucky, within the jurisdiction of the said commonwealth" of Virginia, shall be formed into a new State and admitted into the Union. As a preliminary it recites the consent of the Virginia legislature by the above act of 1789.

Under article 4, section 3, of the Constitution, a new State could not be formed in this way within the jurisdiction of Virginia, within which Kentucky was recognized as being by the words last quoted, without the consent of the legislature of Virginia as well as of Congress. The need of such consent also was recognized by the recital in the act of Congress. But as the consent given by Virginia was conditioned upon the jurisdiction of Kentucky on the Ohio river being concurrent only with the States to be formed on the other side, Congress necessarily assented to and adopted this condition when it assented to the act in which it was contained. *Green* v. *Biddle*, 8 Wheat. 1, 87. Thus, after the passage of the two acts, it stood absolutely enacted by the powers which between them had absolute sovereignty over all the territory concerned that when States should be formed on the opposite shores of the river they should have concurrent jurisdiction on the river with Kentucky. "This compact, by the sanction of Congress, has become a law of the Union. What further legislation can be desired for judicial action?" *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 13 How. 518, 566.

It hardly is necessary to be curious or technical, when dealing with law-making power, in inquiring precisely what legal conceptions shall be invoked in order to bring to pass what the legislature enacts. If the law-making power says that a

matter within its competence shall be so, so it will be, so far as legal theory is concerned, without regard to the *elegantia juris*, or whether it fits that theory or not. But there is no trouble in giving the subsequently formed States the benefit of this legislation. In the case of Kentucky the "compact" which the Virginia statute has been treated by this court as creating, *Green* v. *Biddle*, 8 Wheat. 1, 16, 90, 92, may be regarded as having been in the first stage not only a law but a continuing offer to the expected new State when it should come into being, which was accepted by that State when it came into being on the terms prescribed. And so as to the new States to be formed thereafter on the other side of the river. It is true that they were strangers to the most immediate purposes of the transaction. But it must be remembered that this was legislation, and when it is enacted by the sovereign power that new States, when formed by that power, shall have a certain jurisdiction, those States as they come into existence fall within the range of the enactment and have the jurisdiction. Whether they be said to have it by way of acceptance of an offer, or on the theory of a trust for them, or on the ground that jurisdiction was attached to the land subject to the condition that States should be formed, or by simple legislative fiat, is not a material question, so far as this case is concerned. With that legislation in force there was no need to refer to it or to reënact it in the act which made Indiana a State. That the States opposite to Kentucky have the jurisdiction, whatever it is, over the Ohio River, which the Virginia compact provided for, was not disputed by the majority of the Kentucky Court of Appeals, and has been recognized by this court and elsewhere whenever the question has come up. *Henderson Bridge Co.* v. *Henderson*, 173 U. S. 592, 621; *Arnold* v. *Shields*, 5 Dana, 18, 22; *Commonwealth* v. *Garner*, 3 Gratt. 624, 655, 661, 710, 724, 735, 744; *State* v. *Faudre*, (W. Va.) 46 S. E. Rep. 269; *Carlisle* v. *State*, 32 Indiana, 55; *Sherlock* v. *Alling*, 44 Indiana, 184; *S. C.*, 93 U. S. 99; *Memphis & Cincinnati Packet Co.* v. *Pikey*, 142 Indiana, 304, 309, 310; *Blanchard* v. *Porter*, 11 Ohio, 138, 142.

The question that remains, then, is the construction of the

Virginia Compact. It was suggested by one of the judges below that the words "the respective jurisdictions . . . shall be concurrent only with the States which may possess the opposite shore" did not import a future grant but only a restriction; that they excluded the United States or other States, but left the jurisdiction of the States on the two sides to be determined by boundary, and therefore that the jurisdiction of Kentucky was exclusive up to its boundary line of low-water mark on the Indiana side. This interpretation seems to be without sufficient warrant to require discussion. A different one has been assumed hitherto and is required by an accurate reading. The several jurisdictions of two States respectively over adjoining portions of a river separated by a boundary line is no more concurrent than is a similar jurisdiction over adjoining counties or strips of land. Concurrent jurisdiction, properly so-called, on rivers is familar to our legislation, and means the jurisdiction of two powers over one and the same place. There is no reason to give an unusual meaning to the phrase. See *Sanders* v. *St. Louis & New Orleans Anchor Line*, 97 Missouri, 26, 30; *Opsahl* v. *Judd*, 30 Minnesota, 126, 129, 130; *J. S. Keator Lumber Co.* v. *St. Croix Boom Corp.*, 72 Wisconsin, 62, and the cases last cited.

The construction adopted by the majority of the Court of Appeals seems to us at least equally untenable. It was held that the words "meant only that the States should have legislative jurisdiction." But jurisdiction, whatever else or more it may mean, is *jurisdictio*, in its popular sense of authority to apply the law to the acts of men. *Vicat Vocab.*, *sub. v.* See *Rhode Island* v. *Massachusetts*, 12 Peters, 657, 718. What the Virginia compact most certainly conferred on the States north of the Ohio, was the right to administer the law below low-water mark on the river, and, as part of that right, the right to serve process there with effect. *State* v. *Mullen*, 35 Iowa, 199, 205, 206. What more jurisdiction, as used in the statute, may embrace, or what law or laws properly would determine the civil or criminal effect of acts done upon the river we have no occasion to decide in this case. But so far as applicable we adopt the statement of Chief Justice Robertson in *Arnold* v.

Shields, 5 Dana, 18, 22: "Jurisdiction, unqualified, being, as it is, the sovereign authority to make, decide on, and execute laws, a concurrence of jurisdiction, therefore, must entitle Indiana to as much power—legislative, judiciary, and executive, as that possessed by Kentucky, over so much of the Ohio River as flows between them."

The conveniences and inconveniences of concurrent jurisdiction both are obvious and do not need to be stated. We have nothing to do with them when the law-making power has spoken. To avoid misunderstanding it may be well to add that the concurrent jurisdiction given is jurisdiction "on" the river, and does not extend to permanent structures attached to the river bed and within the boundary of one or the other State. Therefore, such cases as *Mississippi & Missouri Railroad* v. *Ward*, 2 Black, 485, do not apply. *State* v. *Mullen*, 35 Iowa, 199, 206, 207.

Judgment reversed.

ADAMS *v.* NEW YORK.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 504. Argued January 27, 1904.—Decided February 23, 1904.

The fact that papers, which are pertinent to the issue, may have been illegally taken from the possession of the party against whom they are offered is not a valid objection to their admissibility. The court considers the competency of the evidence and not the method by which it was obtained.

There is no violation of the constitutional guaranty of privilege from unlawful searches and seizures in admitting as evidence in a criminal trial, papers found in the execution of a valid search warrant prior to the indictment; and by the introduction of such evidence defendant is not compelled to incriminate himself.

It is within the established power of a State to prescribe the evidence which is to be received in its own courts. The provisions of sections 344*a*, and 344*b*, of the Penal Code of New York making the possession of policy slips by a person other than a public officer presumption of possession

knowingly in violation of law are not violative of the Fourteenth Amendment, are not unconstitutional as depriving a citizen of his liberty or property without due process of law, and do not, on account of the exception as to public officers, deprive him of the equal protection of the laws.

A suggested construction of a state statute which would lead to a manifest absurdity and which has not, and is not likely to receive judicial sanction, will not be accepted by this court as the basis of declaring the statute unconstitutional when the courts of the State have given it a construction which is the only one consistent with its purposes and under which it is constitutional.

THIS is a writ of error to the Supreme Court of the State of New York. The plaintiff in error at the April term, 1903, of the Supreme Court of the State of New York was tried before one of the justices of that court and a jury and convicted of the crime of having in his possession, knowingly, certain gambling paraphernalia used in the game commonly known as policy, in violation of section 344*a* of the Penal Code of the State of New York. This section and the one following, section 344*b*, relating to the offence in question, are as follows:

"SEC. 344*a*. Keeping Place to Play Policy.—A person who keeps, occupies or uses, or permits to be kept, occupied or used, a place, building, room, table, establishment or apparatus for policy playing, or for the sale of what are commonly called 'lottery policies,' or who delivers or receives money or other valuable consideration in playing policy, or in aiding in the playing thereof, or for what is commonly called a 'lottery policy,' or for any writing, paper or document in the nature of a bet, wager or insurance upon the drawing or drawn numbers of any public or private lottery; or who shall have in his possession, knowingly, any writing, paper or document, representing or being a record of any chance, share or interest in numbers sold, drawn or to be drawn, or in what is commonly called 'policy,' or in the nature of a bet, wager or insurance, upon the drawing or drawn numbers of any public or private lottery; or any paper, print, writing, numbers, device, policy slip or article of any kind such as is commonly used in carrying on, promoting or playing the game commonly called 'policy'; or who is the owner, agent, superintendent, janitor or caretaker of any place, building or room where policy play-

ing or the sale of what are commonly called 'lottery policies' is carried on with his knowledge or after notification that the premises are so used, permits such use to be continued, or who aids, assists or abets in any manner, in any of the offences, acts or matters herein named, is a common gambler, and punishable by imprisonment for not more than two years, and in the discretion of the court, by a fine not exceeding one thousand dollars, or both.

"Sec. 344*b*. Possession of Policy Slip, etc., Presumptive Evidence.—The possession, by any person other than a public officer, of any writing, paper or document representing or being a record of any chance, share or interest in numbers sold, drawn or to be drawn, or in what is commonly called 'policy,' or in the nature of a bet, wager or insurance upon the drawing or drawn numbers of any public or private lottery, or any paper, print, writing, numbers or device, policy slip or article of any kind, such as is commonly used in carrying on, promoting or playing the game commonly called 'policy,' is presumptive evidence of possession thereof knowingly and in violation of the provisions of section three hundred and forty-four *a*."

The assignments of error in this court are:

"*First.* That the court erred in holding that by the reception in evidence of the defendant's private papers seized in the raid of his premises, against his protest and without his consent, which had no relation whatsoever to the game of policy, for the possession of papers used in connection with which said game he was convicted, his constitutional right to be secure in his person, papers and effects against unreasonable searches and seizures was not violated, and that he was also thereby not compelled to be a witness against himself in contravention of the Fourth, Fifth and Fourteenth Articles of Amendment to the Constitution of the United States.

"*Second.* That the court erred in holding that the statute, sections 344*a*, 344*b*, of the Penal Code of the State of New York, under which the indictment against the plaintiff in error was found, and his conviction was had, did not deprive him of rights, privileges and immunities secured to other citizens of

the United States and of said State of New York, nor of liberty or property, without due process of law, nor of the equal protection of the laws in violation of section 1 of the Fourteenth Article of Amendment to the Constitution of the United States.

"*Third.* That the court erred in affirming the judgment of conviction, and in refusing to discharge the plaintiff in error from custody."

The game of policy referred to in the sections of the statute quoted is a lottery scheme carried on, as shown in the testimony, by means of certain numbers procured at the shop or place where the game is played, and consists in an attempt to guess whether one or more of the series held by the player will be included in a list of twelve or at times thirteen of the numbers between one and seventy-eight, which are supposed to be drawn daily at the headquarters of the operators of the game. A person desiring to play the game causes the numbers to be entered on series of slips or manifold sheets. One of these pieces of paper containing the combination played by the person entering the game is kept by him and is known as a policy slip. Drawings are held twice a day, and the holder of the successful combination receives the money which goes to the winner of the game. About 3500 of these slips were found in the office occupied by the plaintiff in error, which was searched by certain police officers holding a search warrant. The officers took not only the policy slips, but certain other papers, which were received in evidence against the plaintiff in error at the trial, against his objection, for the purpose of identifying certain handwriting of the defendant upon the slips, and also to show that the papers belonged to the defendant and were in the same custody as the policy slips.

So far as the case presents a Federal question, the Court of Appeals of the State of New York held (176 N. Y. 351) that the Fourth and Fifth Amendments to the Constitution of the United States do not contain limitations upon the power of the States, and proceeded to examine the case in the light of similar provisions in the Constitution and bill of rights of that State.

Mr. L. Laflin Kellogg, with whom *Mr. Alfred C. Petté* was on the brief, for plaintiff in error:

The record in this case presents a Federal question which should be reviewed by this court. When the private papers seized in the raid of the defendant's premises were offered in evidence upon the trial, their reception was objected to on the express ground that their introduction would be in violation of the defendant's rights secured to him by the Constitution of the United States, and the same question was presented to and decided adversely by the Appellate Division and the Court of Appeals. As to the application of the Fourth and Fifth Amendments to proceedings in state court, see *Maxwell* v. *Dow*, 176 U. S. 581; *Brown* v. *New Jersey*, 175 U. S. 582.

The rights of a person to be secure in his person, papers and effects against unreasonable searches and seizures, and not to be compelled in a criminal case to be a witness against himself, are fundamental rights of American citizenship and protected by the Federal Constitution against legislation by the States. *Maxwell* v. *Dow*, *supra*.

There is no intimation, however, that if a violation of the Federal Constitution had been the ground of objection in the state court, and an adverse decision had been reached, a Federal question would not have been presented for review by this court. *Levy* v. *Superior Court of San Francisco*, 167 U. S. 175; *Mallett* v. *North Carolina*, 181 U. S. 589.

Sections 344*a*, 344*b*, New York Penal Code, are unconstitutional because to create an arbitrary presumption of guilt is to deprive a defendant of his liberty and property without "due process of law," in that the right to be presumed innocent until he is proven to be guilty is taken away, and the right to a jury trial is thereby curtailed. *State* v. *Beswick*, 13 R. I. 211; *Wynehamer* v. *People*, 13 N. Y. 446; to except from that presumption every public officer, and to make it applicable only to private citizens, is to deny the equal protection of the laws; to make the possession of these articles which are in themselves harmless, a criminal offence is an arbitrary exercise of power.

By the reception in evidence of the defendant's private

papers, seized in the raid which had no relation to the game of policy, his constitutional right to be secure in his person, papers and effects against unreasonable searches and seizures was violated, and he was also thereby compelled to be a witness against himself in contravention of the Fourth, Fifth and Fourteenth Amendments, and defendant's rights were grossly violated. *Boyd* v. *United States*, 116 U. S. 616.

These constitutional safeguards would be deprived of a large part of their value if they could be invoked only for preventing the obtaining of such evidence, and not for protection against its use. The cases cited show that they cover the use of papers for testimony when it would be a carrying out of their violation. *United States* v. *Wong Quong Wong*, 94 Fed. Rep. 832. *State* v. *Sheridan* (Iowa), 96 N. W. Rep. 730; *State* v. *Slamon*, 73 Vermont, 212.

While it is generally considered immaterial how a paper passes into the possession of one offering it in evidence, this rule is subject to another rule which is applicable that when a party invokes the constitutional right of freedom from unlawful search and seizure, the court will take notice of the question and determine it. *State* v. *Slamon*, *supra*; and for other cases holding analogous views, see *In re Jackson*, 96 U. S. 727; *In re Pacific Railway Commission*, 32 Fed. Rep. 241; *Hoover* v. *McChesney*, 81 Fed. Rep. 472.

Where a person is accused of crime, and could not himself be compelled to produce his private papers and books as evidence against himself, either by subpœna or other legal process, the fact that he has been divested of his possession wrongfully and unlawfully does not prevent him from urging the protection afforded by the constitutional provision against unreasonable searches and seizures. Cooley's Const. Lim. (6th ed.) 370.

The cases relied on by the people and cited in the opinion of the lower court are not in point. In most cases the evidence admitted was part of the *res gestæ*. A trial and conviction in an unconstitutional way is as violative of a defendant's constitutional rights as a trial and conviction under an unconstitutional law. *Ex parte Neilsen*, 131 U. S. 176.

The provisions of the penal code are wholly arbitrary, because they make an entirely innocent act a highly penal offense which the legislature has not the power to do. *People* v. *Gillson*, 109 N. Y. 389; *Matter of Jacobs*, 98 N. Y. 98; *People* v. *Marx*, 99 N. Y. 377; *People* v. *Arensberg*, 103 N. Y. 388; *Forster* v. *Scott*, 136 N. Y. 577. As to construction of this statute, see *People ex rel. &c.* v. *Flynn*, 72 App. Div. 67.

The presumption of guilt created by the statute thus eliminates all question of criminal intent, which, it would seem, is a necessary ingredient of the offense under sec. 344*a*. *United States* v. *Carll*, 105 U. S. 611.

An act which is not an offense against the New York laws, nor punishable by the New York laws, is made presumptive evidence of an offense against and punishable by such laws which is improper. *State* v. *Beswick*, 13 R. I. 211; *Wynehamer* v. *The People*, 13 N. Y. 378; *State* v. *Kartz*, 13 R. I. 328. It is like a bill of attainder. *Cummings* v. *Missouri*, 71 U. S. 277; *Green* v. *Shumuay*, 39 N. Y. 418.

Mr. Howard S. Gans, with whom *Mr. William Travers Jerome* was on the brief, for defendants in error:

The admission in evidence of the defendant's private papers does not present a Federal question, even though it be assumed that it involved an unreasonable search or seizure, or that it compelled the defendant to become a witness against himself in a criminal case.

The Fourth and Fifth Amendments to the Federal Constitution do not *ex proprio vigore* operate as limitations upon the powers of the several States, and nothing therein contained would affect the validity of a state statute compelling a person to be a witness against himself in a criminal case, or avowedly authorizing unreasonable searches and seizures. *Thorington* v. *Montgomery*, 147 U. S. 490, 492; *Brown* v. *New Jersey*, 175 U. S. 172, p. 174; *Maxwell* v. *Dow*, 176 U. S. 581.

The Fourteenth Amendment has not changed radically the relation of the Federal Government to that of the States and to the people, or extended to the state governments the restric-

tions imposed upon the power of the Federal Government by the first ten amendments. *Hurtado* v. *California*, 110 U. S. 516; *In re Kemmler*, 136 U. S. 436, 448; *Maxwell* v. *Dow*, 176 U. S. 581.

Even if the provisions of the Federal Constitution prohibited the State of New York to authorize an unreasonable search or seizure, or to compel a person to be a witness against himself in a criminal case, the reception in evidence of the papers so seized would not constitute an invasion of the rights thus guaranteed.

It was lawful to seize and introduce in evidence against the defendant the manifold sheets themselves, and this neither constituted an unreasonable search nor compelled the defendant to be a witness against himself. *Boyd* v. *United States*, 116 U. S. 616, 623; *Lawton* v. *Steele*, 152 U. S. 133, 140. The constitutional provision which exempts a person from the obligation of becoming a witness against himself in a criminal case is not to be extended so as to prevent the use of papers or documents forcibly taken from his possession which may tend to assist in his conviction of crime. *People* v. *Gardner*, 144 N. Y. 119; *People* v. *Van Wormer*, 175 N. Y. 188, 195.

The law does not concern itself with the method whereby a criminal is brought to the bar, or, with some slight exceptions, with the means whereby evidence against him has been obtained. Greenleaf on Evidence, vol. 1, sec. 254*a*; *Gindrat* v. *People*, 138 Illinois, 103; *Commonwealth* v. *Tibbetts*, 157 Massachusetts, 519; *State* v. *Van Tassel*, 103 Iowa, 6; *Chastang* v. *State*, 83 Alabama, 29; *Starchman* v. *State*, 62 Arkansas, 538; *State* v. *Flynn*, 36 N. H. 64; *Shields* v. *State*, 104 Alabama, 35; *State* v. *Atkinson*, 40 S. Car. 363; *Williams* v. *State*, 100 Georgia, 511; *State* v. *Kaub*, 15 Mo. App. 433; *Ruloff* v. *People*, 45 N. Y. 213; *Ker* v. *Illinois*, 119 U. S. 436; *Mahon* v. *Justice*, 127 U. S. 700, 708.

Section 344*a* of the Penal Code is not in conflict with any of the provisions of the Fourteenth Amendment to the Federal Constitution. *Lottery Case*, 188 U. S. 321, 356.

The power of the State in furtherance of a public purpose to declare criminal even that which in itself is innocent, and

to prohibit the possession of even a useful article is settled beyond question. The mere possession of fish or game or of the instrumentalities for their destruction may be prescribed and affected with criminal consequences. *Phelps* v. *Racy*, 60 N. Y. 10; *People* v. *Buffalo Fish Co.*, 164 N. Y. 93; *Lawton* v. *Steele*, 152 U. S. 133, at p. 143; *Geer* v. *Connecticut*, 161 U. S. 519.

A fortiori as to the power of the State to prohibit the possession of instrumentalities of gambling, or other noxious pursuits. *Stone* v. *Mississippi*, 101 U. S. 814; *Douglas* v. *Kentucky*, 168 U. S. 488.

The provisions of 344*b* making proof of possession *prima facie* proof that the possession was conscious is constitutional.

The legislature may enact that when certain facts have been proved, they shall be *prima facie* evidence of the existence of the main fact in question, provided the inference of the existence of the main fact, because of the existence of the fact actually proved, must not be merely and purely arbitrary or wholly unreasonable, unnatural or extraordinary. The connection between the fact proven and the fact in issue need not be that of inevitable inference, nor need the fact inferred be one which is within the exclusive knowledge of the person against whom the inference is drawn. *People* v. *Cannon*, 139 N. Y. 32; Cooley's Const. Lim. pp. 367, 369; *State* v. *Cunningham*, 25 Connecticut, 195; *Wooten* v. *Florida*, 1 L. R. A. 819; *Com.* v. *Williams*, 6 Gray (72 Mass.), 1; *State* v. *Hurley*, 54 Maine, 562; *State* v. *Higgins*, 13 R. I. 330; *State* v. *Mellor*, 13 R. I. 666, 669; *Com.* v. *Kelly*, 10 Cush. (64 Mass.) 69; *Com.* v. *Tuttle*, 12 Cush. 502; *Meadowcroft* v. *People*, 163 Illinois, 56; *State* v. *Buck*, 120 Missouri, 479; *State* v. *Beach*, 36 L. R. A. 179 *Morgan* v. *State*, 117 Indiana, 569.

The Federal Criminal Code includes numerous *prima facie* evidence provisions similar to the one here under discussion. See § 3082, Rev. Stat. as to effect of presumptions in regard of possession of smuggled goods. *Tilley* v. *Savannah Ry. Co.*, 5 Fed. Rep. 641, 659.

It is within the acknowledged power of every legislature to prescribe the evidence which shall be received, and the

effect of that evidence in the courts of its own government. *Fong Yue Ting* v. *United States*, 149 U. S. 698, 729; *Marks* v. *Hanthorn*, 148 U. S. 172, 182; *Pillow* v. *Roberts*, 13 How. 472, 476; *Ogden* v. *Saunders*, 12 Wheat. 212, 348.

Section 344*b* is not class legislation because it applies a different rule to public officers. *People* v. *Cannon*, 139 N. Y. 32; *People* v. *Stedeker*, 175 N. Y. 57; *People* v. *Noelke*, 29 Hun, 461, 466; *S. C.*, affirmed 94 N. Y. 137.

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

We do not feel called upon to discuss the contention that the Fourteenth Amendment has made the provisions of the Fourth and Fifth Amendments to the Constitution of the United States, so far as they relate to the right of the people to be secure against unreasonable searches and seizures and protect them against being compelled to testify in a criminal case against themselves, privileges and immunities of citizens of the United States of which they may not be deprived by the action of the States. An examination of this record convinces us that there has been no violation of these constitutional restrictions, either in an unreasonable search or seizure, or in compelling the plaintiff in error to testify against himself.

No objection was taken at the trial to the introduction of the testimony of the officers holding the search warrant as to the seizure of the policy slips; the objection raised was to receiving in evidence certain private papers. These papers became important as tending to show the custody by the plaintiff in error, with knowledge, of the policy slips. The question was not made in the attempt to resist an unlawful seizure of the private papers of the plaintiff in error, but arose upon objection to the introduction of testimony clearly competent as tending to establish the guilt of the accused of the offense charged. In such cases the weight of authority as well as reason limits the inquiry to the competency of the proffered testimony, and the courts do not stop to inquire as to the means by which the evidence was obtained. The rule is thus laid down in Greenleaf, vol. 1, sec. 254*a*:

"It may be mentioned in this place that though papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they are offered or otherwise unlawfully obtained, this is no valid objection to their admissibility if they are pertinent to the issue. The court will not take notice how they were obtained, whether lawfully or unlawfully, nor will it form an issue to determine that question."

The author is supported by numerous cases. Of them, perhaps the leading one is *Commonwealth* v. *Dana*, 2 Met. (Mass.) 329, in which the opinion was given by Mr. Justice Wilde, in the course of which he said:

"There is another conclusive answer to all these objections. Admitting that the lottery tickets and material were illegally seized, still this is no legal objection to the admission of them in evidence. If the search warrant were illegal, or if the officer serving the warrant exceeded his authority, the party on whose complaint the warrant issued, or the officer, would be responsible for the wrong done; but this is no good reason for excluding the papers seized as evidence, if they were pertinent to the issue, as they unquestionably were. When papers are offered in evidence the court can take no notice how they were obtained, whether lawfully or unlawfully; nor would they form a collateral issue to determine that question. This point was decided in the cases of *Leggatt* v. *Tallervey*, 14 East, 302, and *Jordan* v. *Lewis*, 14 East, 306 note, and we are entirely satisfied that the principle on which these cases were decided is sound and well established."

This principle has been repeatedly affirmed in subsequent cases by the Supreme Judicial Court of Massachusetts, among others *Commonwealth* v. *Tibbetts*, 157 Massachusetts, 519. In that case a police officer, armed with a search warrant calling for a search for intoxicating liquors upon the premises of the defendant's husband, took two letters which he found at the time. Of the competency of this testimony the court said:

"But two points have been argued. The first is that the criminatory articles and letters found by the officer in the defendant's possession were not admissible in evidence, because

the officer had no warrant to search for them, and his only authority was under a warrant to search her husband's premises for intoxicating liquors. The defendant contends that under such circumstances the finding of criminatory articles or papers can only be proved when by express provision of statute the possession of them is itself made criminal. This ground of distinction is untenable. Evidence which is pertinent to the issue is admissible, although it may have been procured in an irregular or even in an illegal manner. A trespasser may testify to pertinent facts observed by him, or may put in evidence pertinent articles or papers found by him while trespassing. For the trespass he may be held responsible civilly, and perhaps criminally; but his testimony is not thereby rendered incompetent." *Commonwealth* v. *Acton*, 165 Massachusetts, 11; *Commonwealth* v. *Smith*, 166 Massachusetts, 370.

To the same effect are *Chastang* v. *State*, 83 Alabama, 29; *State* v. *Flynn*, 36 N. H. 64. In the latter case it was held:

"Evidence obtained by means of a search warrant is not inadmissible, either upon the ground that it is in the nature of admissions made under duress, or that it is evidence which the defendant has been compelled to furnish against himself, or on the ground that the evidence has been unfairly or illegally obtained, even if it appears that the search warrant was illegally issued." *State* v. *Edwards*, 51 W. Va. 220; *Shields* v. *State*, 104 Alabama, 35; *Bacon* v. *United States*, 97 Fed. Rep. 35; *State* v. *Atkinson*, 40 S. Car. 363; *Williams* v. *State*, 100 Georgia, 511; *State* v. *Pomeroy*, 130 Missouri, 489; *Gindrat* v. *The People*, 138 Illinois, 103; *Trask* v. *The People*, 151 Illinois, 523; *Starchman* v. *State*, 62 Arkansas, 538.

In this court it has been held that if a person is brought within the jurisdiction of one State from another, or from a foreign country, by the unlawful use of force, which would render the officer liable to a civil action or in a criminal proceeding because of the forcible abduction, such fact would not prevent the trial of the person thus abducted in the State wherein he had committed an offence. *Ker* v. *Illinois*, 119 U. S. 436; *Mahon* v. *Justice*, 127 U. S. 700. The case most relied upon in argument by plaintiff in error is the leading one

of *Boyd* v. *United States*, 116 U. S. 616. In that case a section of the customs and revenue laws of the United States authorized the court in revenue cases, on motion of the government's attorney, to require the production by the defendant of certain books, records and papers in court, otherwise the allegation of the government's attorney as to their contents to be taken as true. It was held that the act was unconstitutional and void as applied to a suit for a penalty or a forfeiture of the party's goods. The case has been frequently cited by this court and we have no wish to detract from its authority. That case presents the question whether one can be compelled to produce his books and papers in a suit which seeks the forfeiture of his estate on pain of having the statements of government's counsel as to the contents thereof taken as true and used as testimony for the government. The court held in an opinion by Mr. Justice Bradley that such procedure was in violation of both the Fourth and Fifth Amendments; the Chief Justice and Justice Miller held that the compulsory production of such documents did not come within the terms of the Fourth Amendment as an unreasonable search or seizure, but concurred with the majority in holding that the law was in violation of the Fifth Amendment. This case has been cited and distinguished in many of the cases from the state courts which we have had occasion to examine.

The Supreme Court of the State of New York, before which the defendant was tried, was not called upon to issue process or make any order calling for the production of the private papers of the accused, nor was there any question presented as to the liability of the officer for the wrongful seizure, or of the plaintiff in error's right to resist with force the unlawful conduct of the officer, but the question solely was, were the papers found in the execution of the search warrant, which had a legal purpose in the attempt to find gambling paraphernalia, competent evidence against the accused? We think there was no violation of the constitutional guaranty of privilege from unlawful search or seizure in the admission of this testimony. Nor do we think the accused was compelled to incriminate himself. He did not take the witness stand in his

own behalf, as was his privilege under the laws of the State of New York. He was not compelled to testify concerning the papers or make any admission about them.

The origin of these amendments is elaborately considered in Mr. Justice Bradley's opinion in the *Boyd* case, *supra*. The security intended to be guaranteed by the Fourth Amendment against wrongful search and seizures is designed to prevent violations of private security in person and property and unlawful invasion of the sanctity of the home of the citizen by officers of the law, acting under legislative or judicial sanction, and to give remedy against such usurpations when attempted. But the English and nearly all of the American cases have declined to extend this doctrine to the extent of excluding testimony which has been obtained by such means, if it is otherwise competent. In Boyd's case the law held unconstitutional, virtually compelled the defendant to furnish testimony against himself in a suit to forfeit his estate, and ran counter to both the Fourth and Fifth Amendments. The right to issue a search warrant to discover stolen property or the means of committing crimes, is too long established to require discussion. The right of seizure of lottery tickets and gambling devices, such as policy slips, under such warrants, requires no argument to sustain it at this day. But the contention is that, if in the search for the instruments of crime, other papers are taken, the same may not be given in evidence. As an illustration, if a search warrant is issued for stolen property and burglars' tools be discovered and seized, they are to be excluded from testimony by force of these amendments. We think they were never intended to have that effect, but are rather designed to protect against compulsory testimony from a defendant against himself in a criminal trial, and to punish wrongful invasion of the home of the citizen or the unwarranted seizure of his papers and property, and to render invalid legislation or judicial procedure having such effect.

It is further urged that the law of the State of New York, Penal Code, § 344*b*, which makes the possession by persons other than a public officer of papers or documents, being the record of chances or slips in what is commonly known as

policy, or policy slips, or the possession of any paper, print or writing commonly used in playing or promoting the game of policy, presumption of possession thereof knowingly in violation of section 344*a*, is a violation of the Fourteenth Amendment to the Constitution of the United States in that it deprives a citizen of his liberty and property without due process of law. We fail to perceive any force in this argument. The policy slips are property of an unusual character and not likely, particularly in large quantities, to be found in the possession of innocent parties. Like other gambling paraphernalia, their possession indicates their use or intended use, and may well raise some inference against their possessor in the absence of explanation. Such is the effect of this statute. Innocent persons would have no trouble in explaining the possession of these tickets, and in any event the possession is only *prima facie* evidence, and the party is permitted to produce such testimony as will show the truth concerning the possession of the slips. Furthermore, it is within the established power of the State to prescribe the evidence which is to be received in the courts of its own government. *Fong Yue Ting* v. *United States*, 149 U. S. 698, 729.

It is argued, lastly, that section 344*b*, is unconstitutional because the possession of the policy tickets is presumptive evidence against all except public officers, and it is urged that public officials, from the governor to notaries public, would thus be excluded from the terms of the law which apply to all non-official persons. This provision was evidently put into the statute for the purpose of excluding the presumption raised by possession where such tickets or slips are seized and are in the custody of officers of the law. This was the construction given to the act by the New York courts, and is the only one consistent with its purposes. The construction suggested would lead to a manifest absurdity, which has not received, and is not likely to receive, judicial sanction. We find nothing in the record before us to warrant a reversal of the conclusions reached in the New York Court of Appeals, and its

Judgment will be affirmed.

OPINIONS PER CURIAM, ETC., FROM JANUARY 4, 1904, TO FEBRUARY 1, 1904.

No. 268. RICHARD H. LUFKIN ET AL., PLAINTIFFS IN ERROR, *v.* MARY A. LUFKIN. In error to the Supreme Judicial Court of the State of Massachusetts. Motions to dismiss or affirm submitted December 21, 1903. Decided January 4, 1904. *Per Curiam.* Dismissed for the want of jurisdiction, on the authority of *Powell* v. *Brunswick County*, 150 U. S. 433; *Miller* v. *Cornwall Railroad Company*, 168 U. S. 134; *Porter* v. *Foley*, 24 How. 415; *Ansbro* v. *United States*, 159 U. S. 695. *Mr. Charles T. Gallagher* in support of motions. *Mr. Frank H. Stewart* opposing.

No. 354. UNITED STATES, APPELLANT, *v.* JOHN M. SOMERVELL. Appeal from the Court of Claims. Submitted January 11, 1904. Decided January 18, 1904. *Per Curiam.* Judgment affirmed on the authority of *United States* v. *Finnell*, 185 U. S. 236. *The Attorney General, Mr. Assistant Attorney General Pradt* and *Mr. P. M. Ashford* for appellant. *Mr. Frank B. Crosthwaite* for appellee.

No. 410. JAMES E. WAKEFIELD, PLAINTIFF IN ERROR, *v.* ROBERT W. VAN TASSELL. In error to the Supreme Court of the State of Illinois. Motion to dismiss submitted January 11, 1904. Decided January 18, 1904. *Per Curiam.* Dismissed for the want of jurisdiction. *Sayward* v. *Denny*, 158 U. S. 180; *Mutual Life Insurance Company* v. *McGrew*, 188 U. S. 308; *Ansbro* v. *United States*, 159 U. S. 695. See 202 Illinois, 41. *Mr. Arthur Keithley* in support of motion. No one opposing.

Cases Disposed of Without Consideration by the Court.

From January 4, 1904, to February 1, 1904.

No. 231. HENRY C. PAYNE, POSTMASTER-GENERAL, PLAINTIFF IN ERROR AND PETITIONER, *v.* UNITED STATES EX REL. NATIONAL RAILWAY PUBLICATION COMPANY; and No. 232. HENRY C. PAYNE, POSTMASTER-GENERAL, PLAINTIFF IN ERROR AND PETITIONER, *v.* UNITED STATES EX REL. RAILWAY LIST COMPANY. In error to and on writ of certiorari to the Court of Appeals of the District of Columbia. January 4, 1904. Dismissed with costs, on motion of *Mr. Solicitor-General Hoyt* for the plaintiff in error and petitioner. *The Attorney General* for plaintiff in error and petitioner. *Mr. J. H. McGowan, Mr. Nathaniel Wilson* and *Mr. Clarence R. Wilson* for defendant in error and respondent in No. 231. *Mr. Charles W. Needham* for defendant in error and respondent in No. 232.

No. 534. GREEN ETHERIDGE, PLAINTIFF IN ERROR, *v.* STATE OF ALABAMA. In error to the Circuit Court of the United States for the Northern District of Alabama. January 4, 1904. Docketed and dismissed with costs, on motion of *Mr. Massey Wilson* for the defendant in error. No one opposing.

No. 377. POSTAL TELEGRAPH COMPANY, PLAINTIFF IN ERROR, *v.* MARY E. SHEVALIER; No. 378. POSTAL TELEGRAPH COMPANY, PLAINTIFF IN ERROR, *v.* MORALDUS CALKINS; No. 379. POSTAL TELEGRAPH COMPANY, PLAINTIFF IN ERROR, *v.* WILLIAM J. HUBER; No. 380. POSTAL TELEGRAPH COMPANY, PLAINTIFF IN ERROR, *v.* C. N. DECKER ET AL.; No. 381. POSTAL TELEGRAPH COMPANY, PLAINTIFF IN ERROR, *v.* GEORGE ROBERTS; and No. 382. POSTAL TELEGRAPH COMPANY, PLAINTIFF IN ERROR, *v.* WILLIAM D. GUINNIP. In error to the Superior Court of the State of Pennsylvania. January 4, 1904. Dis-

missed with costs, on motion of counsel for plaintiff in error. *Mr. Frank R. Shattuck* and *Mr. William C. Strawbridge* for plaintiff in error. No appearance for defendants in error.

No. 545. GEORGE WELLINGTON STREETER, APPELLANT, *v.* THOMAS E. BARRETT, SHERIFF OF COOK COUNTY, ILL. Appeal from the Circuit Court of the United States for the Northern District of Illinois. January 13, 1904. Docketed and dismissed with costs, on motion of *Mr. Henry M. Hoyt* for appellee. No one opposing.

No. 133. JOHN L. HENNING, APPELLANT, *v.* MORTON TRUST COMPANY ET AL. Appeal from the Circuit Court of the United States for the Northern District of New York. January 13, 1904. Dismissed with costs, pursuant to the tenth rule. *Mr. Frank E. Smith* for appellant. No appearance for appellee.

No. 137. RAINWATER-BRADFORD HAT COMPANY ET AL., APPELLANTS, *v.* W. A. MCBRIDE ET AL. Appeal from the United States Circuit Court of Appeals for the Eighth Circuit. January 14, 1904. Dismissed with costs, pursuant to the tenth rule. *Mr. N. B. Maxey* for appellants. *Mr. Melven Cornish* for appellees.

No. 548. LO SING, ETC., APPELLANT, *v.* UNITED STATES; and No. 549. LI CHUNG HONG, ETC., APPELLANT, *v.* UNITED STATES. Appeal from the District Court of the United States for the Eastern District of New York. January 15, 1904. Docketed and dismissed on motion of *Mr. Solicitor General Hoyt* for the appellee. No one opposing.

No. 140. JOHN L. HENNING, APPELLANT, *v.* MORTON TRUST

COMPANY ET AL. Appeal from the Circuit Court of the United States for the Southern District of New York. January 15, 1904. Dismissed with costs, pursuant to the tenth rule. *Mr. Frank E. Smith* for the appellant. No appearance for appellees.

Nos. 555 and 556. ADOLPH OTTINGER, PLAINTIFF IN ERROR, *v.* PEOPLE OF THE STATE OF CALIFORNIA. January 18, 1904. Docketed and dismissed with costs, on motion of *Mr. William A. Maury* for the defendants in error. No one opposing.

No. 144. UNION FIRE INSURANCE COMPANY OF LINCOLN, NEB., PLAINTIFF IN ERROR, *v.* ELIZA MCCULLOUGH. In error to the Supreme Court of the State of Nebraska. January 19, 1904. Dismissed with costs, pursuant to the tenth rule. *Mr. Andrew E. Harvey* for plaintiff in error. No appearance for defendant in error.

No. 164. LOGANSPORT RAILWAY COMPANY, APPELLANT, *v.* CITY OF LOGANSPORT ET AL. Appeal from the Circuit Court of the United States for the District of Indiana. February 1, 1904. Dismissed with costs, on authority of counsel for appellant. *Mr. W. H. H. Miller* for appellant. *Mr. John G. Williams* for appellees.

Decisions on Petitions for Writs of Certiorari.

From January 4, 1904, to February 1, 1904.

No. 511. BOSTON DRY GOODS COMPANY, PETITIONER, *v.* JEREMIAH SMITH, JR., ET AL. January 4, 1904. Petition for a writ of certiorari to the United States Circuit Court of Ap-

peals for the First Circuit denied. *Mr. Frank H. Stewart* for petitioner. *Mr. Arthur Dehon Hill* for respondents.

No. 445. HOWE SCALE COMPANY OF 1886 ET AL., PETITIONERS, *v.* WYCKOFF, SEAMANS & BENEDICT. January 11, 1904. Petition for cross-writ of certiorari granted. *Mr. Edmund Wetmore* and *Mr. Henry D. Donnelly* for cross-petitioner. *Mr. Austen G. Fox, Mr. James H. Peirce, Mr. George P. Fisher, Jr.*, and *Mr. Wm. Henry Dennis* for cross-respondent.

No. 517. MARTIN H. SULLIVAN, PETITIONER, *v.* WILLIAM A. MILLIKEN. January 11, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Thomas H. Watts* for petitioner. *Mr. William A. Blount* for respondent.

No. 522. AMERICAN CREDIT INDEMNITY COMPANY OF NEW YORK, PETITIONER, *v.* CARROLLTON FURNITURE MANUFACTURING COMPANY. January 11, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Albert Stickney* for petitioner. No appearance for respondent.

No. 526. WILLIAM A. CHAPMAN ET AL., PETITIONERS, *v.* MONTGOMERY WATER POWER COMPANY. January 11, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. W. A. Gunter* and *Mr. G. L. Smith* for petitioners. *Mr. Edward A. Graham, Mr. Robert E. Steiner* and *Mr. Horace Stringfellow* for respondent.

No. 533. MONTGOMERY WATER POWER COMPANY, PETI-

TIONER, *v.* WILLIAM A. CHAPMAN & Co. January 11, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Edward A. Graham, Mr. Robert E. Steiner, Mr. Horace Stringfellow* and *Mr. Thomas H. Clark* for petitioner. *Mr. W. A. Gunter* and *Mr. G. L. Smith* for respondents.

No. 527. H. HACKFELD & Co. (LIMITED), PETITIONER, *v.* UNITED STATES. January 11, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Maxwell Evarts* for petitioner. *The Attorney General* and *Mr. Solicitor General Hoyt* for respondent.

No. 361. PERRY F. DUNTON, MASTER, ETC., PETITIONER, *v.* ALLAN STEAMSHIP COMPANY (LIMITED), OWNER, ETC. January 18, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Robert H. Smith* for petitioner. *Mr. Henry R. Edmunds* for respondent.

No. 539. THOMAS H. PHILLIPS, PETITIONER, *v.* IOLA PORTLAND CEMENT COMPANY. January 18, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. John Charles Harris* and *Mr. Edward F. Harris* for petitioner. *Mr. G. B. Webster* for respondent.

No. 518. BANK OF BRITISH COLUMBIA, PETITIONER, *v.* PERCY P. MOORE, ADMINISTRATOR, ETC. January 25, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. John F. Dillon, Mr. Harry Hubbard, Mr. John M. Dillon, Mr. Fisher A.*

Baker and *Mr. Sidney T. Smith* for petitioner. *Mr. Charles S. Wheeler* for respondent.

No. 531. LOUISVILLE AND NASHVILLE RAILROAD COMPANY, PETITIONER, *v.* J. M. SUMMERS, ADMINISTRATOR, ETC. January 25, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. J. W. Judd* for petitioner. No appearance for respondent.

No. 551. BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF KEARNY, KAN., PETITIONER, *v.* LOUISE M. IRVINE; and No. 552. BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF KEARNY, KAN., PETITIONER, v. WILLIAM EDWARD COFFIN ET AL. January 25, 1904. Petitions for writs of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Milton Brown*, *Mr. George Getty* and *Mr. Chester I. Long* for petitioners. No appearance for respondents.

No. 530. J. EDWARD ADDICKS, PETITIONER, *v.* SAMUEL L. KENT. February 1, 1904. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. John G. Johnson* for petitioner. *Mr. Silas W. Pettit* for respondent.

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a debt due to the bankrupt from the bank, and in the absence of fraud or collusion between the bank and the bankrupt with the view of creating a preferential transfer, the bank need not surrender such balance, but may set it off against notes of the bankrupt held by it and prove its claim for the amount remaining due on the notes (*Pirie* v. *Chicago Title & Trust Co.*, 182 U. S. 438, distinguished). *New York County Bank* v. *Massey*, 138.

BONDS.

Of State, secured by stock for which issued—Delivery of bonds in payment of stock—Action to foreclose on stock securing bonds; necessary parties.

Where a statute provides that a State issue bonds at not less than par to pay for a subscription to stock of a railroad company; and, after advertising for bids in accordance with the statute and receiving none, the bonds are delivered to the railroad company in payment of the subscription, the transaction is equivalent to a cash sale to the company at par, and the State becomes the owner of the stock even though no formal certificates therefor are issued to it. Under the special provisions of the statute involved the endorsement on bonds that each bond for $1000 is secured by an equal amount of the par value of the stock subscribed for by the State is tantamount to a separation and identification of the number of shares mentioned and constitutes a separate and registered mortgage on that number of shares for each bond. A holder of a certain number of such bonds may foreclose on the specific number of shares securing his bonds and the holders of other bonds and of liens on the property of railroad company are not necessary parties to the foreclosure suit. *South Dakota* v. *North Carolina*, 286.

See JURISDICTION, A 5.

CABS.

See INTERSTATE COMMERCE, 1;
TAXATION, 4.

CARRIERS.

1. *Liability for damage from customs inspection accruing on line of connecting carrier where contract limits liability.*

Where a contract of shipment, from a point without to a point within the United States over the lines of several carriers, provides that each carrier shall be liable only for loss or damage accruing on its own lines the last carrier is not responsible for damages resulting from an examination by customs officers at a point not on its own line, and different from the point to which the contract provided that the goods should be delivered in bond. *Wabash R. R. Co.* v. *Pearce*, 179.

2. *Lien under laws of United States on goods in transit for import duties paid.*

A common carrier has, under the laws of the United States, a lien entitling it to possession until paid, on goods in transit over its lines for legal import duties paid thereon by it either directly to the Government or to a connecting carrier which has already paid the same. *Ib.*

CASES DISTINGUISHED.

Pine River Logging Co. v. *United States*, 186 U. S. 279, distinguished from *United States* v. *St. Anthony R. R. Co.*, 524.

Pirie v. *Chicago Title & Trust Co.*, 182 U. S. 438, distinguished from *New York County Bank* v. *Massey*, 138.

United States v. *Lynah*, 188 U. S. 445, distinguished from *Bedford* v. *United States*, 217.

Wooden Ware Co. v. *United States*, 106 U. S. 432, distinguished from *United States* v. *St. Anthony R. R. Co.*, 524.

CASES EXPLAINED.

Leisy v. *Hardin*, 135 U. S. 100, explained in *American Steel & Wire Co.* v. *Speed*, 500.

Lyng v. *Michigan*, 135 U. S. 161. *Ib.*

CASES FOLLOWED.

Andrews v. *Andrews*, 188 U. S. 14, followed in *German Savings Society* v. *Dormitzer*, 125.

Brown v. *Houston*, 114 U. S. 622, followed in *American Steel & Wire Co.* v. *Speed*, 500.

Buttfield v. *Stranahan*, 192 U. S. 470, followed in *Buttfield* v. *Bidwell*, 498, and *Buttfield* v. *United States*, 499.

Chapman v. *United States*, 164 U. S. 436, followed in *Sinclair* v. *District of Columbia*, 16.

Cronin v. *Adams*, 192 U. S. 108, followed in *Cronin* v. *City of Denver*, 115.

Field v. *Clark*, 143 U. S. 649, followed in *Buttfield* v. *Stranahan*, 470.

Gibson v. *United States*, 166 U. S. 269, followed in *Bedford* v. *United States*, 217.

Woodruff v. *Parham*, 8 Wall. 123, followed in *American Steel & Wire Co.*, v. *Speed*, 500.

is to be received in its own courts. The provisions of sections 344*a*, and 344*b*, of the Penal Code of New York making the possession of policy slips by a person other than a public officer presumption of possession knowingly in violation of law are not violative of the Fourteenth Amendment, are not unconstitutional as depriving a citizen of his liberty or property without due process of law, and do not, on account of the exception as to public officers, deprive him of the equal protection of the laws. *Adams* v. *New York*, 585.

7. *Equal protection—Exclusion of negroes from jury.*

A motion to quash an indictment for murder was made on the ground that all colored men had been excluded from the grand jury solely because of their race and color, and because of a certain provision of the state constitution alleged to deny them the franchise in violation of the Fourteenth Amendment. These provisions were set out. The motion, about two octavo pages in length, was stricken from the files by the state court on the ground of prolixity, members of the grand jury not having to have the qualifications of electors. *Held*, on error, that the reference of the motion to the constitutional requirements concerning electors as one of the motives for the exclusion of the blacks did not warrant such action as would prevent the court from passing on constitutional rights which it was the object of the motion to assert, and that the exclusion of blacks from the grand jury as alleged was contrary to the Fourteenth Amendment of the Constitution of the United States. *Rogers* v. *Alabama*, 226.

8. *Executive and legislative powers—Statute vesting executive officers with legislative powers—Due process of law.*

Where a statute acts on a subject as far as practicable and only leaves to executive officials the duty of bringing about the result pointed out, and provided for it is not unconstitutional as vesting executive officers with legislative powers. (*Field* v. *Clark*, 143 U. S. 649.) The act of March 2, 1897, 29 Stat. 604, to prevent the importation of impure and unwholesome tea is not unconstitutional either because the power conferred to establish standards is legislative and cannot be delegated by Congress to administrative officers; because persons affected thereby have a vested interest to import teas which are in fact pure though below the standard fixed; because the establishment of and enforcement of the standard qualities constitutes a deprivation of property without due process of law; because it does not provide for notice and opportunity to be heard before the rejection of the tea; or, because the power to destroy goods upon the expiration of the time limit without a judicial proceeding is a condemnation and taking of property without due process of law. *Buttfield* v. *Stranahan*, 470.

9. *Exports—Taxation of articles manufactured for export.*

The prohibition in the Constitution against taxes or duties on exports attaches to exports as such and does not relieve articles manufactured for export from the prior ordinary burdens of taxation which rest upon all property similarly situated. The fact that a quantity of "filled cheese"

CONSTRUCTION.

CONTRACTS.

POWERS OF CONGRESS.

See CONGRESS, POWERS OF.

PRACTICE.

1. *Dismissal of cross bill.*

The general rule is, where a bill is dismissed, to dismiss the cross bill also. *United States* v. *California & Ore. Land Co.*, 355.

2. *Dismissal of writ of error—Federal question lacking color of merit.*

Where the Federal question asserted to be contained in the record is manifestly lacking all color of merit the writ of error will be dismissed. *Wabash R. R. Co.* v. *Flannigan*, 29.

3. *Issues of fact—Findings of lower court relied on.*

When the issues are mainly those of fact, in the absence of clear showing of error, the findings of the two lower courts will be accepted as correct. *Shappirio* v. *Goldberg*, 232.

See APPEAL AND WRIT OF ERROR; CONSTITUTIONAL LAW, 11, 13; JURISDICTION, A 3, 6, 8; PATENT FOR INVENTION, 2, 5; STATUTES, A 8; VERDICT.

PRESUMPTION.

See CONSTITUTIONAL LAW, 6; STATUTES, A 1.

PROCESS.

See APPEAL AND WRIT OF ERROR; JURISDICTION, D 1.

PUBLIC LANDS.

1. *"Adjacent" defined—Territory from which railroad may cut timber for construction—Liability for cutting timber on land not adjacent.*

Without defining the exact distance within which lands must lie in order to be "adjacent" to a railroad passing through territory of the United States, public lands lying in Idaho, more than twenty miles from a two hundred foot right of way of a railroad, not exceeding forty miles in length, are not "adjacent public lands" within the meaning of the act of March 3, 1875, 18 Stat. 482, permitting railroad companies to cut timber therefrom for the construction of their roads. A railroad company cutting timber for the construction of its road on public lands not adjacent thereto is liable to the United States for the value thereof and where there is no intention to violate any law or do a wrongful act, the measure of damages is the value of the timber at the time when, and at the place where, it was cut and not at the place of its delivery. (*Wooden Ware Co.* v. *United States*, 106 U. S. 432, and *Pine River Logging Co.* v. *United States*, 186 U. S. 279, distinguished.) *United States* v. *St. Anthony R. R. Co.*, 524.

2. *Title acquired by adverse possession—Superiority over title under patent.*

An adjudication by commissioners under sec. 4 of the act of March 3, 1807,

3. *Immigration Act of March* 3, 1891.

The Immigration Act of March 3, 1891, 26 Stat. 1084, relates to foreigners as respects this country—to persons owing allegiance to a foreign government; citizens of Porto Rico are not "aliens," and upon arrival by water at the ports of our mainland are not "alien immigrants" within the intent and meaning of the act. *Gonzales* v. *Williams*, 1.

4. *Internal revenue—War revenue act—Suits arising under revenue laws.*

Subdivision 4, section 629, Rev. Stat., was not superseded by the Judiciary Act of 1887, 8, and under it a Circuit Court may take cognizance of a suit arising under an act providing for internal revenue without regard to the citizenship of the parties. Where the constitutionality of an act of Congress is not drawn in question, a case involving simply the construction of the act is not embraced by the fifth section of the Judiciary Act of 1891. A suit against a collector to recover sums paid under protest as taxes imposed by the War Revenue Act of 1898, 30 Stat. 448, is, within the meaning of the Judiciary Act of 1891, to be deemed one arising under both the Constitution and the laws of the United States, if relief be sought upon the ground that the taxing law is unconstitutional, and if constitutional that its provisions, properly construed, do not authorize the collection of the tax in question. The tax imposed by section 27 of the War Revenue Act of 1898, upon the gross annual receipts, in excess of $250,000 of any corporation or company carrying on or doing the business of refining sugar, is an excise, and not a direct tax to be apportioned among the States according to numbers. In estimating the gross annual receipts of the company for purposes of that tax, receipts derived from the use of wharves used by it in connection with its business should be included, but the receipts by way of interest received on its bank deposits or dividends from stock held by it in other companies should be excluded. *Spreckels Sugar Refining Co.* v. *McClain*, 397.

5. *Liberal construction—Meaning of language not to be unduly stretched.*

Although a liberal construction of a statute may be proper and desirable, yet the fair meaning of the language used must not be unduly stretched for the purpose of reaching any particular case which, while it might appeal to the court, would plainly be beyond the limitations contained in the statute. *United States* v. *St. Anthony R. R. Co.*, 524.

6. *Ordinance—Phraseology not binding on courts.*

Courts are not to be deceived by the mere phraseology in which an ordinance may be couched when it appears conclusively that it was passed for an unlawful purpose and not for the one stated therein. *Postal Telegraph-Cable Co.* v. *Taylor*, 64.

7. *Scope of act of June* 30, 1890, 26 *Stat.* 414, *prohibiting importation of adulterated food.*

The act of Congress of August 30, 1890, 26 Stat. 414, prohibiting importation into the United States of adulterated and unwholesome food is not such an action of Congress on the subject as deprives the States of their

STOCK.

See JURISDICTION, A 5;
NATIONAL BANKS.

STOCKHOLDERS.

See BONDS; LOCAL LAW (GEORGIA);
CORPORATIONS, 2; NATIONAL BANKS.

SURVEYS.

See PUBLIC LANDS, 2.

TARIFF ACT.

See STATUTES, A 10.

TAXATION.

1. *Exemption by charter, inclusive of license tax.*

Where it is *res judicata* that the original charter of a bank by which its capital is exempt from any tax constituted a contract within the impairment clause of the Constitution, and that such exemption is not affected by subsequent charters and constitutions, and there is no doubt that the State intended to offer inducements to enlist capital in the early development of the State, and no license tax was demanded for fifty-eight years although that method of taxation was in force during the whole period, the exemption from any tax may be construed as including a license tax on occupation as well as taxes on property. *Citizens' Bank* v. *Parker*, 73.

2. *Of corporation engaged in interstate commerce—License fee manifestly for raising revenue cannot be imposed.*

A license fee cannot be imposed by ordinance of a municipality for purposes of inspection on telegraph companies doing an interstate business which is so far in excess of the expenses of inspection that it is plain that it was adopted, not to repay such expenses, but as a means for raising revenue. *Postal Telegraph-Cable Co.* v. *Taylor*, 64.

3. *Of corporation engaged in interstate commerce—Unreasonableness of license fee determined by judgment for less than amount claimed.*

In an action against a telegraph company doing an interstate business for license fees taxed by a borough in Pennsylvania under an ordinance fixing the amount of the tax per pole and per mile of wire, the court held that while the question of reasonableness of the tax was one for the court he would submit it to the jury for their aid and as advisory only, directing them to find for the plaintiff if they regarded the amount as reasonable and for the defendant if they regarded it as unreasonable; the jury found a verdict for plaintiff for an amount less than that fixed by the ordinance and the court directed judgment to be entered thereon for the amount so found. *Held* that if the amount of the license fee