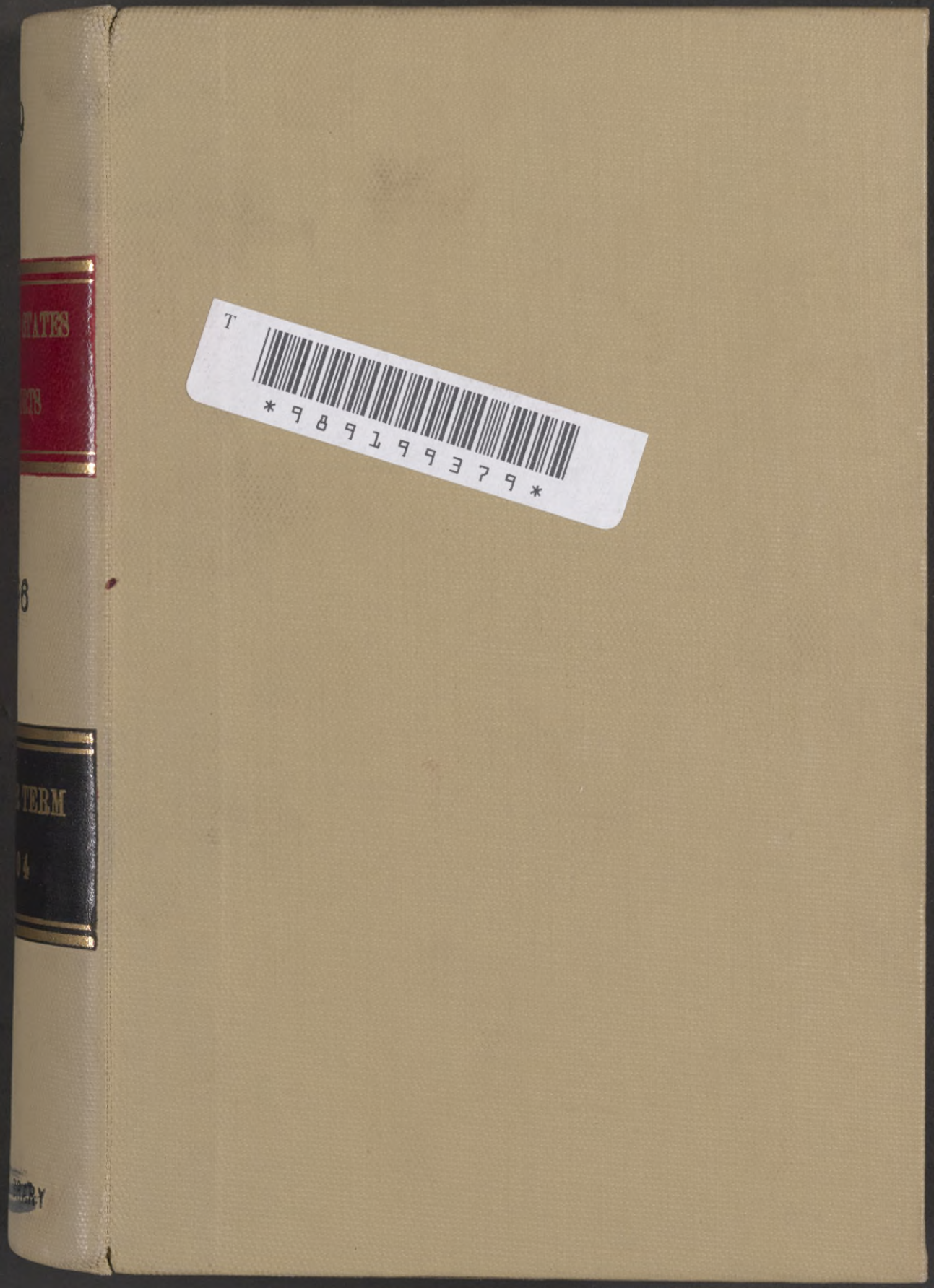
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VOLUME 196

CASES ADJUDGED

ERRATA FOR VOLUME 195 U. S. REPORTS.

Page 101. *Mr. James Hamilton Lewis* was on the brief—in *Kepner* v. *United States*.

" 607. Last word on page } should be McKean County instead of Du-
" 608. First " " " } quesne County.

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OCTOBER TERM, 1904

CHARLES HENRY BUTLER

REPORTER

THE BANKS LAW PUBLISHING CO.
21 MURRAY STREET, NEW YORK
1905

UNITED STATES REPORTS

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CASES ADJUDGED

IN

THE SUPREME COURT

AT

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1905

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.

WILLIAM HENRY MOODY, Attorney General.
HENRY MARTYN HOYT, Solicitor General.
JAMES HALL McKENNEY, Clerk.
JOHN MONTGOMERY WRIGHT, Marshal.

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(C.) Foreign Statutes.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1904.

JOHNSON *v.* SOUTHERN PACIFIC COMPANY.
SAME *v.* SAME.

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

Nos. 32, 87. Argued October 31, 1904.—Decided December 19, 1904.

1. Statutes in derogation of the common law and penal statutes are not to be construed so strictly as to defeat the obvious intention of Congress as found in the language actually used according to its true and obvious meaning.
2. Locomotive engines are included by the words "any car" contained in the second section of the act of March 2, 1893, 27 Stat. 531, c. 196, requiring cars engaged in interstate commerce to be equipped with automatic couplers. And although they were also required by the first section of the act to be equipped with power driving wheel brakes, the rule that the expression of one thing excludes others does not apply, inasmuch as there was a special reason for that requirement and in addition the same necessity for automatic couplers existed as to them as in respect to other cars.
3. A dining car regularly engaged in interstate traffic does not cease to be so when waiting for the train to make the next trip.
4. The equipment of cars with automatic couplers which will not automatically couple with each other so as to render it unnecessary for men to go between the cars to couple and uncouple is not a compliance with the law.
5. The act of March 2, 1903, 32 Stat. 943, c. 976, treats as correct the view herein expressed and is declaratory thereof.

JOHNSON brought this action in the District Court of the First Judicial District of Utah against the Southern Pacific Company to recover damages for injuries received while employed by that company as a brakeman. The case was removed to the Circuit Court of the United States for the District of Utah by defendant on the ground of diversity of citizenship.

The facts were briefly these: August 5, 1900, Johnson was acting as head brakeman on a freight train of the Southern Pacific Company, which was making its regular trip between San Francisco, California, and Ogden, Utah. On reaching the town of Promontory, Utah, Johnson was directed to uncouple the engine from the train and couple it to a dining car, belonging to the company, which was standing on a side track, for the purpose of turning the car around preparatory to its being picked up and put on the next west-bound passenger train. The engine and the dining car were equipped, respectively, with the Janney coupler and the Miller hook, so called, which would not couple together automatically by impact, and it was, therefore, necessary for Johnson, and he was ordered, to go between the engine and the dining car, to accomplish the coupling. In so doing Johnson's hand was caught between the engine bumper and the dining car bumper and crushed, which necessitated amputation of the hand above the wrist.

On the trial of the case, defendant, after plaintiff had rested, moved the court to instruct the jury to find in its favor, which motion was granted, and the jury found a verdict accordingly, on which judgment was entered. Plaintiff carried the case to the Circuit Court of Appeals for the Eighth Circuit and the judgment was affirmed. 117 Fed. Rep. 462.

Mr. W. L. Maginnis, with whom *Mr. L. A. Shaver* and *Mr. John M. Gitterman* were on the brief, for petitioner and plaintiff in error:

The act of Congress of March 2, 1893, in as far as it aims to protect the lives and limbs of men, is remedial in its character,

and should be so construed as to prevent the mischief and advance the remedy. *C., M. & St. P. R. R.* v. *Voelker*, 129 Fed. Rep. 522; *Wall* v. *Platt*, 48 N. E. Rep. 270; *Holy Trinity* v. *United States*, 143 U. S. 457; Potter's Dwarris on Statutes, 234; *Brady* v. *Daly*, 175 U. S. 156; *Reed* v. *Northfield*, 13 Pick. 94; *Huntington* v. *Attrill*, 146 U. S. 665; *United States* v. *Lacher*, 5 Wheat. 76; *Am. Fur Co.* v. *United States*, 2 Pet. 358; *United States* v. *Morris*, 14 Pet. 464; *United States* v. *Reese*, 92 U. S. 214; *United States* v. *Hartwell*, 6 Wall. 385; *United States* v. *Winn*, 3 Sumn. 209; *United States* v. *Mattock*, 2 Sawy. 148.

So construing the law, the word "car" must be held to be used in section 2 of said act in a generic sense and as embracing a locomotive or a tender as well as the other cars composing a train. This view is, moreover, sustained by definitions in the standard dictionaries and also by decisions of the courts. *Fleming* v. *Southern R. R.*, 131 N. Car. 476; *East St. Louis R. R.* v. *O'Hara*, 150 Illinois, 580; *K. C., M. & B. R. R.* v. *Crocker*, 9 Alabama, 412; *Thomas* v. *Ga. R. R.*, 38 Georgia, 222; *New York* v. *Third Avenue R. R.*, 117 N. Y. 444, 646; *Benson* v. *Railraod Co.*, 75 Minnesota, 163.

Locomotives and tenders fall within the reason of the law, as injury to or loss of life or limb of employés is as likely to occur in coupling or uncoupling a locomotive or tender as in case of cars of other descriptions. *Winkler* v. *P. & R. R. R.*, 53 Atl. Rep. 90; *S. C.*, 4 Pennywell, 384.

Even though the locomotive or tender is not to be construed as a car, under sec. 2, the dining car was not equipped so as to couple automatically by impact with the vehicle it was intended to be coupled with, and was therefore not equipped as required by the act of Congress. *B. & O. R. R.* v. *Baugh*, 149 U. S. 378; *Mobile* v. *Kimball*, 102 U. S. 691.

The history of the act of Congress shows that its purpose was not to require cars to be maintained in a condition of equipment with automatic couplers, but rather to govern the equipments only at such times as it was necessary to couple them together. 5th Annual R. Inter. Com. Comm., 1891,

apx. G; 6th Annual R., 1892, 69; 7th Annual R., 1893, 76; 10th Annual R., 1896, 94; 16th Annual R., 1902, 61; The President's Annual Messages, 1889, 1890, 1891, 1892.

Automatic couplers were already in use when this act of Congress was passed, and the evils that were to be remedied were such as grew out of the want of interchangeability between different kinds of automatic couplers so that it is a solecism to say that the statute requires the use of automatic couplers.

Nor can such interpretation of the statute be justified by its practical operation because the railroads of the country, recognizing the necessity of regulations requiring coupling appliances to be interchangeable, had adopted such regulations as a condition of receiving cars. See address of Mr. Haines, Pres. Am. Ry. Assn., at Hotel Brunswick, N. Y., 1892, published in "American Railway Management."

A common carrier cannot be compelled to receive from, and transport for, a connecting line a car defective in safety appliances. *Oregon Short Line &c.* v. *N. P. Ry. Co.*, 51 Fed. Rep. 465; *Mich. Cong. Water Co.* v. *Railway Co.*, 2 I. C. C. Rep. 594; *Railway Co.* v. *Curtis*, 71 N. W. Rep. 42; *Railroad Co.* v. *Snyder*, 45 N. E. Rep. 559; *Wilson* v. *Railroad Co.*, 129 Fed. Rep. 774 (citing *Railroad Co.* v. *Wallace*, 66 Fed. Rep. 506); *Railroad Co.* v. *Mackey*, 157 U. S. 72, 91; *Felton* v. *Bullard*, 94 Fed. Rep. 781.

Congress did not create a "coupler monopoly," because the adoption of a type merely prescribed a condition. See Report of Hearings before House Committee on Interstate and Foreign Commerce in relation to the bill for protection of trainmen, Feb. 18, 1892; Hearing before Senate Committee on Interstate Commerce, Feb. 10, 1892.

Before the enactment of the Safety Appliance Law the railroads had adopted a uniform interchangeable type of coupler. See proceedings of Master Carbuilders' Assn., 1887, 1888 and 1894; Massachusetts R. R. Repts. for 1884, 1886, 1888, 1891.

The intent of the law is that the couplers actually used on

two cars must couple with each other automatically on impact. To hold that the phrase, "couplers coupling automatically by impact," means not couplers coupling with each other but with other couplers not used, is to do violence to the natural meaning of the words and to import into the statute language which will, to a large extent, render it nugatory. A construction of a law contrary to the obvious meaning of its language and which takes from under its operation a case clearly within its reason, should not be indulged.

Automatic couplers were already in use when the act of Congress was passed and the evils to be remedied were those growing out of the want of interchangeability between the different kinds of automatic couplers used rather than the absence of such couplers.

A phrase, "any car used in moving interstate traffic," embraces a car regularly employed in that business until permanently withdrawn. A car being used in interstate traffic between two *termini*, making trips back and forth, is employed in interstate traffic to the same extent while being turned or prepared for a return trip as when actually *en route*. *Voelker* v. *C., M. & St. P. R. R.*, 116 Fed. Rep. 867; *Pullman Car Co.* v. *Pennsylvania*, 141 U. S. 19; *Crawford* v. *N. Y. C. R. R.*, 10 Am. Neg. Rep. 166.

The construction by the court below of this phrase is too narrow and would result in a divided jurisdiction. Under it, while actually moving *en route*, the car would be subject to regulation by Congress, but when it reaches its destination and is being moved preparatory to its return, it will be subject to state regulation. Regulation cannot be in this way "split up." It must be wholly in Congress or wholly in the State. *Hanley* v. *Kansas City Southern Ry. Co.*, 187 U. S. 620; *Lord* v. *S. S. Co.*, 102 U. S. 541; *Pacific Coast S. S. Co.* v. *R. R. Commissioners*, 9 Sawyer, 253.

There is a distinction between a car or instrument used in moving interstate commerce and the commerce itself. A car used in interstate traffic is one thing and the point of time

when the character of interstate commerce attaches to a commodity is another. *Coe* v. *Errol*, 116 U. S. 525, and others cited by defendants, distinguished.

The dining car was generally used in moving interstate commerce and such general use renders it subject to the Safety Appliance Act, although empty at the time of the accident. *Voelker* v. *Railway Co.*, 116 Fed. Rep. 867, 873; *Crawford* v. *Railroad Co.*, 10 Am. Neg. Rep. 166; *The R. W. Parsons*, 191 U. S. 17; *The Old Natchez*, 9 Fed. Rep. 476; *The Daniel Ball*, 10 Wall. 557; *Delaware & Hudson Canal Co.* v. *Pennsylvania*, 1 L. R. A. 232.

There is no distinction between a loaded car and an empty car, as Congress was dealing with a vehicle. *Gibbons* v. *Ogden*, 9 Wheat. 1; *In re Lennon*, 54 Fed. Rep. 746; *Malott* v. *Hood*, 99 Ill. App. 360; *Winkler* v. *P. & R. R. R.*, 53 Atl. Rep. 90.

None of the three things laid down in *Kelley* v. *Rhoads*, 188 U. S. 1, which would take a car out of interstate traffic, to wit: an indefinite delay, (2) awaiting transportation at the commencement of the journey, (3) or waiting sale or delivery at the termination, existed in this case.

The use of the Miller hook with the Janney coupler, because it greatly increased the danger, was negligence, and should be left to the jury. *Greenlee* v. *Ry. Co.*, 122 N. Car. 977, 982; *Troxler* v. *Ry. Co.*, 124 N. Car. 191; *Mather* v. *Rillston*, 156 U. S. 391; *Railway Co.* v. *Carlin*, 111 Fed. Rep. 778; Dissenting opinion in *Kilpatrick* v. *Railroad Co.*, 121 Fed. Rep. 16.

The question of contributory negligence was not considered either in the Circuit Court or the Circuit Court of Appeals; section 8 of the Safety Appliance Law expressly states that any employé injured by reason of defective equipment shall not be deemed to have assumed the risk. If there is any question of contributory negligence it should be left to the jury under proper instructions by the court. *Greenlee* v. *Ry. Co.*, 122 N. Car. 977; *Railroad Co.* v. *Ives*, 144 U. S. 409; *Carson* v. *Railroad*, 46 S. E. Rep. 525.

The amendatory act of March 2, 1903, expressly providing,

amongst other things, that the car coupler provision of section 2 of the original act shall apply to locomotives and tenders as well as ordinary cars, is merely declaratory of the intent of Congress in the original act and is a legislative construction of that act.

The *Attorney General* and the *Solicitor General* for the United States:

The testimony shows that the engine "backed up" and the tender was therefore presented for the coupling. This is in accordance with common usage and ordinary observation in practical railroading. A tender is certainly a car; but either a locomotive or a tender is a car within the meaning of section 2 of the act of March 2, 1893. The generic meaning of "car" under the definitions and authorities includes engine and tender. *Winkler* v. *P. & R. Ry. Co.*, 53 Atl. Rep. 90; *East St. Louis Ry. Co.* v. *O'Hara*, 150 Illinois, 580; *K. C., M. & B. R. R. Co.* v. *Crocker*, 9 Alabama, 412; *Thomas* v. *Georgia R. R. &c. Co.*, 38 Georgia, 222; *New York* v. *Third Ave. Ry. Co.*, 117 N. Y. 404. The fact that the first section of the act requires a locomotive engine to be equipped with a power brake, and section 2 forbids the use of any car not equipped for coupling as directed, ought not to exclude the full import of the term car in the second section, when the general intent of Congress and the necessary and invariable use of an engine or tender to make couplings are regarded. Nor should the fact that part of the language of section 2 is restricted to the conception of something drawn by the traction power exclude the engine. The language is, "it shall be unlawful for any such common carrier to haul or permit to be hauled *or used* on its lines," etc. Considering the evil and the remedy, the words "or used" ought to be viewed as intentionally enlarging the category so as to include an engine, which is of course more frequently used than any other vehicle of a train in moving traffic. *Use* is the word applied to an engine in the first section.

It is significant that notwithstanding the opposing argument as to engines, this engine was properly equipped; the dining car was in reality the offending thing. No engine of the company at this time, either passenger or freight, was furnished with a Miller hook. This in itself sharply accentuates the necessity for construing the law to include engines, and the plain duty of supplying interchangeable appliances between engines and ordinary cars.

The act of March 2, 1903, which extended the provisions of the act of 1893 relating to automatic couplers, etc., to apply to trains, locomotives, and tenders, did not change or enlarge the earlier law, but should be viewed as a legislative construction and merely declaratory thereof. *United States* v. *Freeman*, 3 How. 556; *Stockdale* v. *Insurance Co.*, 20 Wall. 323; *Koshkonong* v. *Burton*, 104 U. S. 668; *Cope* v. *Cope*, 137 U. S. 682; *Bailey* v. *Clark*, 21 Wall. 284.

The provision that the act of 1903 should not take effect until six months after its passage does not weaken this argument, because the suspension evidently related to the new features introduced into the law as to the minimum number of cars in a train to be operated by train brakes. The suspension did not affect a case arising under the original law and involving the meaning of the word "car" or the scope of the automatic coupling requirement, because it was specifically provided by the later act that nothing therein contained should be construed to relieve any common carrier from the liabilities or requirements of the act of 1893. At the very least some *cars* must have been equipped as directed by the act of 1893, and the act of 1903 was not intended to operate as a further extension of time as to them. Did the act of 1903 mean that until September 1 of that year it was not necessary to equip passenger and freight cars with couplers "coupling automatically by impact, etc.?"

The requirement of the law was not complied with by the equipment with couplers which would couple automatically by impact with others of their own type, but which were not

interchangeable with those actually presented. The test of compliance is in the words "without the necessity of men going between the ends of the cars." The loss of life and injuries to railroad employés due to the old link and pin couplings, and especially to the combination of these with patent couplings not working together, and the dilemma as to interchanges of automatic couplers of different types, were clearly in the mind of Congress at the time of the passage of the act of 1893, as appears from an examination of the messages of the President for the years 1889–1892 and from the reports of Senate and House committees and the debates upon the bill. These are proper to refer to in order to show the situation as it existed and was pressed upon the attention of Congress. *American Net & Twine Co.* v. *Worthington*, 141 U. S. 468; *Holy Trinity Church* v. *United States*, 143 U. S. 457; *Dunlap* v. *United States*, 173 U. S. 65; *Downes* v. *Bidwell*, 182 U. S. 244. The result was that Congress passed an act in which ample provision was made to cover the difficulty and to compel the railroads, whatever particular devices they respectively adopted, to act with such degree of uniformity that the danger should be eliminated by the principle of interchangeability.

The act is remedial and should be liberally construed. *Taylor* v. *United States*, 3 How. 197; *Clicquot* v. *United States*, 3 Wall. 114; *United States* v. *Hodson*, 10 Wall. 395; *Smythe* v. *Fiske*, 23 Wall. 374; *United States* v. *Stowell*, 133 U. S. 12. Even if it should be conceded that the act is penal in a strict sense, yet it should not be construed so strictly as to defeat the intention of Congress; the construction should be fair and reasonable, so as to effectuate the law rather than destroy it, and to avoid absurd and unjust results. *United States* v. *Lacher*, 134 U. S. 624; *United States* v. *Wiltberger*, 5 Wheat. 76; and cases cited on brief of plaintiff in error. But the act is not strictly penal; it is hardly penal at all; it simply imposes a moderate fine, which is to be recovered in a "suit"—that is, a civil action. *Atcheson* v. *Everitt*, 1 Cowp. 382; *Ketland* v. *The Cassius*, 2

Dall. 365; *United States* v. *La Vengeance,* 3 Dall. 297; *The Sarah,* 8 Wheat. 394.

The clause "without the necessity of men going between the ends of the cars" applies to the act of coupling as well as uncoupling. *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Voelker,* 129 Fed. Rep. 522; *Carson* v. *Southern Ry. Co.,* 46 S. E. Rep. 525.

The car was "used in moving interstate traffic," regularly and continuously, as the evidence shows. That phrase of the act does not refer merely to a single trip, nor contemplate that a car shall be actually moving on an interstate journey at the particular moment, but that it shall be ordinarily or customarily employed in that manner, as was the car in question. There is nothing to show that the car was empty; on the contrary, the necessary presumptions are the other way. The statute applies to all cars, whether empty or loaded, and whether temporarily delayed or actually en route, which are "used" in interstate commerce. *Malott* v. *Hood,* 99 Ill. App. 630; *Kelley* v. *Rhoads,* 188 U. S. 1, and cases cited by plaintiff in error.

Mr. Maxwell Evarts, with whom *Mr. Martin L. Clardy* and *Mr. Henry G. Herbel,* were on the brief, for respondent and defendant in error:

The dining car was not an interstate car, while it had been in such use and might be thus used again. When it was not so used it maintained its local character and did not come under the act. The mere intention to make a commodity a subject of interstate commerce does not of itself impress the article with that character. *Norfolk &c. Ry.* v. *Commonwealth,* 93 Virginia, 749, 752; *Coe* v. *Errol,* 116 U. S. 517; *Turpin* v. *Burgess,* 117 U. S. 504, 507; *Morgan Co.* v. *Louisiana,* 118 U. S. 455, 465; *Smith* v. *Alabama,* 124 U. S. 465, 482; *Kidd* v. *Pearson,* 128 U. S. 1, 20; *Pullman Co.* v. *Pennsylvania,* 141 U. S. 18, 25; *Postal Tel. Co.* v. *Adams,* 155 U. S. 688, 698; *Adams Express Co.* v. *Ohio,* 165 U. S. 194; *American Ref.*

Trans. Co. v. *Hall*, 174 U. S. 70; *Diamond Glue Co.* v. *U. S. Glue Co.*, 187 U. S. 611, 616; *Diamond Match Co.* v. *Ontonagon*, 188 U. S. 82; *United States* v. *Boyer*, 85 Fed. Rep. 432; *Cotting* v. *Stock Yards Co.*, 82 Fed. Rep. 839, 844; *S. C.*, 183 U. S. 79; *Chi., St. P. &c. Ry.* v. *Becker*, 35 Fed. Rep. 883; *Union Ref. & Trans. Co.* v. *Lynch*, 18 Utah, 378; *Winkley* v. *Newton*, 67 N. H. 80.

When the commodity has actually started the interstate commerce feature commences. *The Daniel Ball*, 10 Wall. 557, 565.

There is a distinction between the commodity and the vehicle. The character of the vehicle must be determined by the destination of the commodity with which it is burdened; or, if empty, the purpose for which the train, of which it forms a part, is being moved at the time of the alleged injury. In other words, it must either be loaded with interstate freight or actually be a part of a train which is moving on an interstate mission. The mere intention to use an isolated car standing in a railroad yard for that purpose is insufficient to give it an interstate character. There is nothing in the car itself to indicate its character; but, chameleon like, it changes its hue according to the use to which it is put at any particular time. *Railway Gross Receipts Case*, 15 Wall. 284, 294; *Wiggins Ferry Co.* v. *East St. Louis*, 107 U. S. 365, 374. See analogous ruling in *Munn* v. *Illinois*, 94 U. S. 113, 135, as to warehouses.

The statute must be strictly construed. The rule of liberal construction of remedial statutes does not apply. Where a statute *creates* a liability, where none existed before, it must be strictly and literally construed. Sutherland on Stat. Construction, § 371.

There was no duty on the railroad company to equip its engines with automatic couplers under the common law.

When language is clear it needs no construction. *Yerke* v. *United States*, 173 U. S. 439; *Thornley* v. *United States*, 113 U. S. 310, and words are to be construed according to their popular sense. *Millard* v. *Lawrence*, 16 How. 251, 261. See

also *Bryce* v. *Burlington &c. Ry. Co.*, 119 Iowa, 274; *Lake County* v. *Rollins*, 130 U. S. 662, and cases cited on p. 670; *United States* v. *Reese*, 92 U. S. 214, 220.

The engine is not within the statute. A penal statute cannot be construed by equity to extend to cases not within the correct and ordinary meaning of the expressions of the law. *United States* v. *Harris*, 177 U. S. 309; *Sarlls* v. *United States*, 152 U. S. 575; *United States* v. *Sheldon*, 2 Wheat. 119, 122.

The policy of the Government does not necessarily call for a liberal construction of the act. *Hadden* v. *Collector*, 5 Wall. 107, 111; *St. Paul &c. Ry.* v. *Phelps*, 137 U. S. 528, 536.

The amendatory act of 1903, 32 Stat. 943, shows that the act originally did not include engines. Neither the engine nor dining car were at the time instruments of interstate commerce. *The Daniel Ball*, 10 Wall. 557; *Chi., St. P. &c. Ry.* v. *Becker*, 35 Fed. Rep. 883.

The interstate commerce act does not apply. It is a penal statute and fails to reach this case. *United States* v. *Harris*, 177 U. S. 305, 309; *Sarlls* v. *United States*, 152 U. S. 570.

Plaintiff assumed the risk. *Railway* v. *Smithson*, 45 Michigan, 212, 220; *Hodges* v. *Kimball*, 44 C. C. A. 193; *Whitcomb* v. *Oil Co.*, 153 Indiana, 513, 519; *Boland* v. *Railway*, 106 Alabama, 641; *Kohn* v. *McNulta*, 147 U. S. 238.

Plaintiff's contributory negligence was such as to bar this action. *San Antonio Traction Co.* v. *De Rodriquez*, 77 S. W. Rep. 420; *Houston &c. Ry.* v. *Martin*, 21 Tex. Civ. App. 207; *Denver & R. G. Ry. Co.*, v. *Arrighi*, 129 Fed. Rep. 347; *Norfolk &c. Ry.* v. *Emmert*, 83 Virginia, 640, 645; *Brooks* v. *Railway Co.*, 47 Fed. Rep. 687; *So. Ry. Co.* v. *Arnold*, 114 Alabama, 183, 189; *Cleary* v. *Railway Co.*, 66 N. Y. Supp. 568.

As plaintiff admitted he had been furnished with written rules by the company and had read and was familiar with them, his breach thereof precluded him from recovering for his injuries. *Fluhrer* v. *Railway*, 121 Michigan, 212; *Platton* v. *So. Ry.*, 49 C. C. A. 571; *Erie Ry.* v. *Kane*, 55 C. C. A. 129; *K. &c. Ry.* v. *Dye*, 16 C. C. A. 604.

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

This case was brought here on certiorari, and also on writ of error, and will be determined on the merits, without discussing the question of jurisdiction as between the one writ and the other. *Pullman's Car Company* v. *Transportation Company*, 171 U. S. 138, 145.

The plaintiff claimed that he was relieved of assumption of risk under common law rules by the act of Congress of March 2, 1893, 27 Stat. 531, c. 196, entitled "An act to promote the safety of employés and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes."

The issues involved questions deemed of such general importance that the Government was permitted to file brief and be heard at the bar.

The act of 1893 provided:

"That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system." . . .

"SEC. 2. That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

"SEC. 6. That any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the

provisions of this act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States district attorney in the District Court of the United States having jurisdiction in the locality where such violation shall have been committed, and it shall be the duty of such district attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred." . . .

"SEC. 8. That any employé of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provision of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge."

The Circuit Court of Appeals held, in substance, Sanborn, J., delivering the opinion and Lochren, J., concurring, that the locomotive and car were both equipped as required by the act, as the one had a power driving-wheel brake and the other a coupler; that section 2 did not apply to locomotives; that at the time of the accident the dining car was not "used in moving interstate traffic;" and, moreover, that the locomotive, as well as the dining car, was furnished with an automatic coupler so that each was equipped as the statute required if section 2 applied to both. Thayer, J., concurred in the judgment on the latter ground, but was of opinion that locomotives were included by the words "any car" in the second section, and that the dining car was being "used in moving interstate traffic."

We are unable to accept these conclusions, notwithstanding the able opinion of the majority, as they appear to us to be inconsistent with the plain intention of Congress, to defeat the object of the legislation, and to be arrived at by an inadmissible narrowness of construction.

The intention of Congress, declared in the preamble and in

sections one and two of the act, was "to promote the safety of employés and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes," those brakes to be accompanied with "appliances for operating the train-brake system;" and every car to be "equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars," whereby the danger and risk consequent on the existing system was averted as far as possible.

The present case is that of an injured employé, and involves the application of the act in respect of automatic couplers, the preliminary question being whether locomotives are required to be equipped with such couplers. And it is not to be successfully denied that they are so required if the words "any car" of the second section were intended to embrace, and do embrace, locomotives. But it is said that this cannot be so because locomotives were elsewhere in terms required to be equipped with power driving-wheel brakes, and that the rule that the expression of one thing excludes another applies. That, however, is a question of intention, and as there was special reason for requiring locomotives to be equipped with power driving-wheel brakes, if it were also necessary that locomotives should be equipped with automatic couplers, and the word "car" would cover locomotives, then the intention to limit the equipment of locomotives to power driving-wheel brakes, because they were separately mentioned, could not be imputed. Now it was as necessary for the safety of employés in coupling and uncoupling, that locomotives should be equipped with automatic couplers, as it was that freight and passenger and dining cars should be, perhaps more so, as Judge Thayer suggests, "since engines have occasion to make couplings more frequently."

And manifestly the word "car" was used in its generic sense. There is nothing to indicate that any particular kind

of car was meant. Tested by context, subject matter and object, "any car" meant all kinds of cars running on the rails, including locomotives. And this view is supported by the dictionary definitions and by many judicial decisions, some of them having been rendered in construction of this act. *Winkler* v. *Philadelphia & Reading Railway Company*, 53 Atl. Rep. 90; 4 Penn. (Del.) 387; *Fleming* v. *Southern Railway Company*, 131 N. Car. 476; *East St. Louis Connecting Railway Company* v. *O'Hara*, 150 Illinois, 580; *Kansas City &c. Railroad Company* v. *Crocker*, 95 Alabama, 412; *Thomas* v. *Georgia Railroad and Banking Company*, 38 Georgia, 222; *Mayor &c.* v. *Third Ave. R. R. Co.*, 117 N. Y. 404; *Benson* v. *Railway Company*, 75 Minnesota, 163.

The result is that if the locomotive in question was not equipped with automatic couplers, the company failed to comply with the provisions of the act. It appears, however, that this locomotive was in fact equipped with automatic couplers, as well as the dining car, but that the couplers on each, which were of different types, would not couple with each other automatically by impact so as to render it unnecessary for men to go between the cars to couple and uncouple.

Nevertheless, the Circuit Court of Appeals was of opinion that it would be an unwarrantable extension of the terms of the law to hold that where the couplers would couple automatically with couplers of their own kind, the couplers must so couple with couplers of different kinds. But we think that what the act plainly forbade was the use of cars which could not be coupled together automatically by impact, by means of the couplers actually used on the cars to be coupled. The object was to protect the lives and limbs of railroad employés by rendering it unnecessary for a man operating the couplers to go between the ends of the cars, and that object would be defeated, not necessarily by the use of automatic couplers of different kinds, but if those different kinds would not automatically couple with each other. The point was that the

railroad companies should be compelled, respectively, to adopt devices, whatever they were, which would act so far uniformly as to eliminate the danger consequent on men going between the cars.

If the language used were open to construction, we are constrained to say that the construction put upon the act by the Circuit Court of Appeals was altogether too narrow.

This strictness was thought to be required because the common law rule as to the assumption of risk was changed by the act, and because the act was penal.

The dogma as to the strict construction of statutes in derogation of the common law only amounts to the recognition of a presumption against an intention to change existing law, and as there is no doubt of that intention here, the extent of the application of the change demands at least no more rigorous construction than would be applied to penal laws. And, as Chief Justice Parker remarked, conceding that statutes in derogation of the common law are to be construed strictly, "they are also to be construed sensibly, and with a view to the object aimed at by the legislature." *Gibson* v. *Jenney*, 15 Massachusetts, 205.

The primary object of the act was to promote the public welfare by securing the safety of employés and travelers, and it was in that aspect remedial, while for violations a penalty of one hundred dollars, recoverable in a civil action, was provided for, and in that aspect it was penal. But the design to give relief was more dominant than to inflict punishment, and the act might well be held to fall within the rule applicable to statutes to prevent fraud upon the revenue, and for the collection of customs, that rule not requiring absolute strictness of construction. *Taylor* v. *United States*, 3 How. 197; *United States* v. *Stowell*, 133 U. S. 1, 12, and cases cited. And see *Farmers' and Merchants' National Bank* v. *Dearing*, 91 U. S. 29, 35; *Gray* v. *Bennett*, 3 Met. (Mass.) 522.

Moreover, it is settled that "though penal laws are to be construed strictly, yet the intention of the legislature must

govern in the construction of penal as well as other statutes; and they are not to be construed so strictly as to defeat the obvious intention of the legislature." *United States* v. *Lacher*, 134 U. S. 624. In that case we cited and quoted from *United States* v. *Winn*, 3 Sumn. 209, in which Mr. Justice Story, referring to the rule that penal statutes are to be construed strictly, said:

"I agree to that rule in its true and sober sense; and that is, that penal statutes are not to be enlarged by implication, or extended to cases not obviously within their words and purport. But where the words are general, and include various classes of persons, I know of no authority, which would justify the court in restricting them to one class, or in giving them the narrowest interpretation, where the mischief to be redressed by the statute is equally applicable to all of them. And where a word is used in a statute, which has various known significations, I know of no rule, that requires the court to adopt one in preference to another, simply because it is more restrained, if the objects of the statute equally apply to the largest and broadest sense of the word. In short, it appears to me, that the proper course in all these cases, is to search out and follow the true intent of the legislature, and to adopt that sense of the words which harmonizes best with the context, and promotes in the fullest manner, the apparent policy and objects of the legislature."

Tested by these principles, we think the view of the Circuit Court of Appeals, which limits the second section to merely providing automatic couplers, does not give due effect to the words "coupling automatically by impact, and which can be uncoupled without the necessity of men going between the cars," and cannot be sustained.

We dismiss as without merit the suggestion, which has been made, that the words "without the necessity of men going between the ends of the cars," which are the test of compliance with section two, apply only to the act of uncoupling. The phrase literally covers both coupling and uncoupling, and if

read, as it should be, with a comma after the word "uncoupled," this becomes entirely clear. *Chicago, Milwaukee & St. Paul Railway Company* v. *Voelker*, 129 Fed. Rep. 522; *United States* v. *Lacher*, *supra*.

The risk in coupling and uncoupling was the evil sought to be remedied, and that risk was to be obviated by the use of couplers actually coupling automatically. True, no particular design was required, but whatever the devices used they were to be effectively interchangeable. Congress was not paltering in a double sense. And its intention is found "in the language actually used, interpreted according to its fair and obvious meaning." *United States* v. *Harris*, 177 U. S. 305, 309.

That this was the scope of the statute is confirmed by the circumstances surrounding its enactment, as exhibited in public documents to which we are at liberty to refer. *Binns* v. *United States*, 194 U. S. 486, 495; *Holy Trinity Church* v. *United States*, 143 U. S. 457, 463.

President Harrison, in his annual messages of 1889, 1890, 1891 and 1892, earnestly urged upon Congress the necessity of legislation to obviate and reduce the loss of life and the injuries due to the prevailing method of coupling and braking. In his first message he said: "It is competent, I think, for Congress to require uniformity in the construction of cars used in interstate commerce, and the use of improved safety appliances upon such trains. Time will be necessary to make the needed changes, but an earnest and intelligent beginning should be made at once. It is a reproach to our civilization that any class of American workmen should, in the pursuit of a necessary and useful vocation, be subjected to a peril of life and limb as great as that of a soldier in time of war."

And he reiterated his recommendation in succeeding messages, saying in that for 1892: "Statistics furnished by the Interstate Commerce Commission show that during the year ending June 30, 1891, there were forty-seven different styles of car couplers reported to be in use, and that during the same period there were 2,660 employés killed and 26,140 injured.

Nearly 16 per cent of the deaths occurred in the coupling and uncoupling of cars, and over 36 per cent of the injuries had the same origin."

The Senate report of the first session of the Fifty-second Congress (No. 1049), and the House report of the same session (No. 1678), set out the numerous and increasing casualties due to coupling, the demand for protection, and the necessity of automatic couplers, coupling interchangeably. The difficulties in the case were fully expounded and the result reached to require an automatic coupling by impact so as to render it unnecessary for men to go between the cars, while no particular device or type was adopted, the railroad companies being left free to work out the details for themselves, ample time being given for that purpose. The law gave five years, and that was enlarged, by the Interstate Commerce Commission as authorized by law, two years, and subsequently seven months, making seven years and seven months in all.

The diligence of counsel has called our attention to changes made in the bill in the course of its passage, and to the debates in the Senate on the report of its committee. 24 Cong. Rec., pt. 2, pp. 1246, 1273 *et seq.* These demonstrate that the difficulty as to interchangeability was fully in the mind of Congress and was assumed to be met by the language which was used. The essential degree of uniformity was secured by providing that the couplings must couple automatically by impact without the necessity of men going between the ends of the cars.

In the present case the couplings would not work together, Johnson was obliged to go between the cars, and the law was not complied with.

March 2, 1903, 32 Stat. 943, c. 976, an act in amendment of the act of 1893 was approved, which provided, among other things, that the provisions and requirements of the former act "shall be held to apply to common carriers by railroads in the Territories and the District of Columbia and shall apply in all cases, whether or not the couplers brought together are of the

same kind, make, or type;" and "shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce."

This act was to take effect September first, nineteen hundred and three, and nothing in it was to be held or construed to relieve any common carrier "from any of the provisions, powers, duties, liabilities, or requirements" of the act of 1893, all of which should apply except as specifically amended.

As we have no doubt of the meaning of the prior law, the subsequent legislation cannot be regarded as intended to operate to destroy it. Indeed, the latter act is affirmative, and declaratory, and, in effect, only construed and applied the former act. *Bailey* v. *Clark*, 21 Wall. 284; *United States* v. *Freeman*, 3 How. 556; *Cope* v. *Cope*, 137 U. S. 682; *Wetmore* v. *Markoe*, *post*, p. 68. This legislative recognition of the scope of the prior law fortifies and does not weaken the conclusion at which we have arrived.

Another ground on which the decision of the Circuit Court of Appeals was rested remains to be noticed. That court held by a majority that as the dining car was empty and had not actually entered upon its trip, it was not used in moving interstate traffic, and hence was not within the act. The dining car had been constantly used for several years to furnish meals to passengers between San Francisco and Ogden, and for no other purpose. On the day of the accident the eastbound train was so late that it was found that the car could not reach Ogden in time to return on the next westbound train according to intention, and it was therefore dropped off at Promontory to be picked up by that train as it came along that evening.

The presumption is that it was stocked for the return, and as it was not a new car, or a car just from the repair shop, on its way to its field of labor, it was not "an empty," as that term is sometimes used. Besides, whether cars are empty or loaded, the danger to employés is practically the same, and we agree with the observation of District Judge Shiras in *Voelker* v. *Railway Company*, 116 Fed. Rep. 867, that "it can-

not be true that on the eastern trip the provisions of the act of Congress would be binding upon the company, because the cars were loaded, but would not be binding upon the return trip, because the cars are empty."

Counsel urges that the character of the dining car at the time and place of the injury was local only and could not be changed until the car was actually engaged in interstate movement or being put into a train for such use, and *Coe* v. *Errol*, 116 U. S. 517, is cited as supporting that contention. In *Coe* v. *Errol* it was held that certain logs cut in New Hampshire, and hauled to a river in order that they might be transported to Maine, were subject to taxation in the former State before transportation had begun.

The distinction between merchandise which may become an article of interstate commerce, or may not, and an instrument regularly used in moving interstate commerce, which has stopped temporarily in making its trip between two points in different States, renders this and like cases inapplicable.

Confessedly this dining car was under the control of Congress while in the act of making its interstate journey, and in our judgment it was equally so when waiting for the train to be made up for the next trip. It was being regularly used in the movement of interstate traffic and so within the law.

Finally it is argued that Johnson was guilty of such contributory negligence as to defeat recovery, and that, therefore, the judgment should be affirmed. But the Circuit Court of Appeals did not consider this question, nor apparently did the Circuit Court, and we do not feel constrained to inquire whether it could have been open under § 8, or, if so, whether it should have been left to the jury under proper instructions.

The judgment of the Circuit Court of Appeals is reversed; the judgment of the Circuit Court is also reversed, and the cause remanded to that court with instructions to set aside the verdict and award a new trial.

MISSOURI *v.* NEBRASKA.
NEBRASKA *v.* MISSOURI.

IN THE SUPREME COURT OF THE UNITED STATES.

No. 5, Original. Submitted November 28, 1904.—Decided December 19, 1904.

Accretion is the gradual accumulation by alluvial formation and where a boundary river changes its course gradually the parties on either side hold by the same boundary—the center of the channel. Avulsion is the sudden and rapid change in the course and channel of a boundary river. It does not work any change in the boundary, which remains as it was in the center of the old channel although no water may be flowing therein. These principles apply alike whether the rivers be boundaries between private property or between States and Nations.

The boundary line between Missouri and Nebraska in the vicinity of Island Precinct is the center line of the original channel of the Missouri River as it was before the avulsion of 1867 and not the center line of the channel since that time, although no water is now flowing through the original channel.

Nothing in the acts of 1820 and 1836 relating to Missouri or the act admitting Nebraska into the Union indicates an intent on the part of Congress to alter the recognized rules of law fixing the rights of parties where a river changes its course by accretion or by avulsion.

THIS is a case of disputed boundary between two States of the Union.

The suit was commenced by an original bill filed in this court by the State of Missouri against the State of Nebraska. The relief sought by the former State is a decree declaring its right of possession of, and its jurisdiction and sovereignty over, certain territory east and north of the center of the main channel of the Missouri River as it runs between the two States at the present time; that Missouri be quieted in its title thereto; and that the State of Nebraska be forever enjoined and restrained from disturbing Missouri in the full enjoyment and possession of said territory.

The State of Nebraska, after answering, filed a cross bill

asking a decree confirming the possession, jurisdiction and sovereignty of Nebraska over said territory; that the boundary line between that part of Missouri known as Atchison County and that part of Nebraska known as Nemaha County, be ascertained and established, and permanent monuments erected to indicate the location of such line; and that the State of Missouri be enjoined and restrained from disturbing the State of Nebraska in the full enjoyment and possession of said territory.

The commissioners heretofore appointed to take the evidence have filed their report, and it is agreed that their finding of facts is correct. The case is before us upon questions of law arising out of the pleadings, the report of the commissioners, and the stipulation of the parties.

By an act of Congress of March 6, 1820, provision was made for the admission of Missouri into the Union with the following boundary: "Beginning in the middle of the Mississippi River, on the parallel of thirty-six degrees north latitude; thence west, along that parallel of latitude, to the St. Francois River; thence up, and following the course of that river, in the middle of the main channel thereof, to the parallel of latitude thirty-six degrees and thirty minutes; thence west along the same, to a point where the said parallel is intersected by a meridian line passing through the middle of the mouth of the Kansas River, where the same empties into the Missouri River, thence, from the point aforesaid north, along the said meridian line, to the intersection of the parallel of latitude which passes through the rapids of the river Des Moines, making the said line to correspond with the Indian boundary line; thence east, from the point of intersection last aforesaid, along the said parallel of latitude, to the middle of the channel of the main fork of the said river Des Moines; thence down and along the middle of the main channel of the said river Des Moines, to the mouth of the same, where it empties into the Mississippi River; thence, due east, to the middle of the main channel of the Mississippi River; thence down, and following the course

of the Mississippi River, in the middle of the main channel thereof, to the place of beginning: *Provided,* That said State shall ratify the boundaries aforesaid: (*a*) *And provided also,* That the said State shall have concurrent jurisdiction on the river Mississippi, and every other river bordering on the said State, so far as the said rivers shall form a common boundary to the said State, and any other State or States, now or hereafter to be formed and bounded by the same, such rivers to be common to both; and that the river Mississippi, and the navigable rivers and waters leading to the same, shall be common highways, and forever free, as well to the inhabitants of the said State as to other citizens of the United States, without any tax, duty, impost, or toll, therefor, imposed by the said State." 3 Stat. 545.

On January 15, 1831, the State of Missouri, speaking by its Legislature, memorialized Congress to make more certain and definite its northwest boundary. That memorial, among other things, stated: "When this State government was formed, the whole country on the west and north was one continued wilderness, inhabited by none but savages, and but little known to the people or to the Government of the United States. Its geography was unwritten, and none of our citizens possessed an accurate knowledge of its localities, except a few adventurous hunters and Indian traders. The western boundary of the State as indicated by the act of Congress of the sixth of March, eighteen hundred and twenty, and adopted by the Constitution of Missouri, is a 'meridian line passing through the middle of the mouth of the Kansas River, where the same empties into the Missouri River,' and extends from the parallel of latitude of 36 degrees and thirty minutes north, 'to the intersection of the parallel of latitude which passes through the rapids of the river Des Moines.' The part of this line which lies *north of the Missouri River* has never been surveyed and established, and consequently its precise position and extent are unknown. It is believed, however, that it extends about one hundred miles north from the Missouri

River, and almost parallel with the course of the stream, so as to leave *between the line and the river a narrow strip of land*, varying in breadth from fifteen to thirty miles. This small strip of land was acquired by the United States from the Kansas Indians, by the treaty of the third of June, eighteen hundred and twenty-five, and is now unappropriated and at the free disposal of the General Government. . . . These considerations seem to us sufficiently obvious to impress upon the public mind the necessity of interposing, whenever it is possible, some visible boundary and natural barrier between the Indians and the whites. The Missouri River, bending as it does, beyond our northern line, will afford the barrier against all the Indians on the southwest side of that river, by extending the north boundary of this State in a straight line westward, *until it strikes the Missouri, so as to include within this State the small district of country between that line and the river*, which we suppose is not more than sufficient to make two, or at most three, respectable counties. . . . In every view, then, we consider it expedient that the district of country in question should be annexed to and incorporated with the State of Missouri; and to that end we respectfully ask the consent of Congress. . . . With these views of the present condition and future importance of that little section of country, and seeing the impossibility of conveniently attaching it now or hereafter to any other State, your memorialists consider it highly desirable, and indeed necessary, that it should be annexed to and form a part of the State of Missouri. And to the accomplishment of that desirable end we respectfully request the assent of Congress."

A subsequent act, entitled "An act to extend the western boundary of the State of Missouri to the Missouri River," approved June 7, 1836, provided: "That when the Indian title to all the lands lying between the State of Missouri and the Missouri River shall be extinguished, the jurisdiction over said lands shall be hereby ceded to the State of Missouri, and the western boundary of said State shall be then extended *to* the

Missouri River, reserving to the United States the original right of soil in said lands, and of disposing of the same: *Provided*, That this act shall not take effect until the President shall by proclamation, declare that the Indian title to said lands has been extinguished; nor shall it take effect until the State of Missouri shall have assented to the provisions of this act." 5 Stat. 34.

It is alleged in the bill that Congress intended by the act of 1836 to meet the wishes of Missouri as expressed in its memorial; that after the passage of that act the President, by proclamation, declared that the Indian title to the lands covered by that act had been extinguished; and that Missouri duly assented to its provisions.

By an act of Congress approved February 9, 1867, Nebraska was admitted into the Union, with the following boundary: "Commencing at a point formed by the intersection of the western boundary of the State of Missouri with the fortieth degree north latitude; extending thence due west along said fortieth degree north latitude to a point formed by its intersection with the twenty-fifth degree of longitude west from Washington; thence north along said twenty-fifth degree of longitude to a point formed by its intersection with the forty-first degree of north latitude; thence west along said forty-first degree of north latitude to a point formed by its intersection with the twenty-seventh degree of longitude west from Washington; thence north along said twenty-seventh degree of west longitude to a point formed by its intersection with the forty-third degree north latitude; thence east along said forty-third degree of north latitude to the Reya Paha River; thence down the middle of the channel of said river, with its meanderings, to its junction with the Niobrara River; thence down the middle of the channel of said Niobrara River, and following the meanderings thereof, to its junction with the Missouri River; thence down *the middle of the channel* of said Missouri River, and following the meanderings thereof, to the place of beginning." 14 Stat. 391; 13 Stat. 47.

Mr. Edward C. Crow, Attorney General of the State of Missouri, and *Mr. Sam B. Jefferies,* for the State of Missouri:

The only question here involved—that the central channel of Missouri River wherever it may at any time run is the boundary line between Missouri and Nebraska—is one of law. The contention of Missouri is that the central thread of the middle channel of the Missouri River is the dividing line between the States in question, and that this central thread constitutes at all times the proper line of division regardless of where it may run or be located.

The act of Congress, annexing Platte's Purchase to the jurisdiction of Missouri, construed in a practical way and in conformity with the legislative memorial of Missouri, approved June 15, 1831, unquestionably fixes the Missouri River as the boundary and brands it as the perpetual and natural monument without further description or further evidence.

There can be no question but that the Missouri River was designated as a natural monument by both the act of annexation and the memorial requesting the same. Being a natural monument, it must stand as ordained, for natural monuments are objects permanent in character, if they are found upon land as they were placed by nature, such as streams, lakes and ponds. 3 Washburn's Real Property, 5th ed., 435; Tiedeman on Real Property, 2d ed., § 831.

Where a river is made the boundary between jurisdictions, the middle of the river is considered the point or line of demarkation, or, in other words, the term "river" when used to designate a boundary between two jurisdictions, means, in law, the middle of the river. *Stanford* v. *Manin,* 30 Georgia, 355; *Hicks* v. *Coleman,* 85 Am. Dec. 103; *Lowell* v. *Robinson,* 33 Am. Dec. 673; *Hardin* v. *Jordan,* 140 U. S. 380.

It is not the meander line formed by what may be termed the water's margin, but the waters themselves which constitute the real boundary. *Railroad Co.* v. *Schurmer,* 7 Wall. 272; *Jeffries* v. *East Omaha Land Co.,* 134 U. S. 178; *Houck* v. *Yates,* 82 Illinois, 179; *Fuller* v. *Dauphin,* 124 Illinois, 542; *St. Louis*

Bridge Co. v. *People ex rel.*, 125 Illinois, 228; *Butterworth* v. *St. Louis Bridge Co.*, 123 Illinois, 535.

It has been said that a river is composed of the bed, banks and stream. *Eastman* v. *Water Company*, 43 Minnesota, 60. This, however, is not an exact statement of the true meaning of the term. A more apt way of putting it is that a river is composed of a stream of constantly and continuously flowing water, through a natural drainage basin, with the bed and banks as essential incidents to it. It is not the bed and banks which constitute the river, but the natural stream of water. When observed from the standpoint of the reason upon which the legislature of Missouri memorialized Congress to annex Platte's Purchase to Missouri and the act of Congress annexing the same, no other conclusion can be reached but that it was intended to make the stream the boundary line wherever that stream might at any time run.

The channel is the passageway between the banks through which the water of the stream flows. *Benjamin* v. *River Improvement Company*, 42 Michigan, 628.

The term "natural channel" includes not only all channels through which in the existing conditions of the country water naturally flows, but new channels through which it might afterwards flow. *Larrabe* v. *Cloverdale*, 131 California, 96.

The rule is settled that meander lines are not intended as boundaries, but that the body of the water will be regarded as the true boundary. *Jeffries* v. *East Omaha Land Co.*, 134 U. S. 178; *Mitchell* v. *Smith*, 140 U. S. 406; *Hardin* v. *Jordan*, 140 U. S. 371; *Clute* v. *Fisher*, 65 Michigan, 48; *Norwood* v. *Smith*, 59 Wisconsin, 344. This notwithstanding that in certain instances if a boundary river leaves its old channel and forms a new one, within the limits of either of the States which border on it, the old channel will remain the boundary. *Indiana* v. *Kentucky*, 136 U. S. 479; *Missouri* v. *Kentucky*, 11 Wall. 395; *Nebraska* v. *Iowa*, 143 U. S. 359, however, do not control as different principles and facts are involved. In this case

that territory known as Platte's Purchase, was annexed to Missouri by reason of a memorial coming from its legislative department in 1831, wherein certain important and substantial reasons were set out why the Missouri River, north of the mouth of the Kaw, should be fixed forever as an absolute boundary of Missouri. Soon afterwards this territory was annexed to the jurisdiction of the State. Congress had undoubted authority to annex the territory in the manner herein described. There can be no question but that it was the intention of the legislature of Missouri to make the request in the manner herein presented, because it was so shown clearly from the resolution.

As the annexation statute construed in the light of the memorial, shows the plain intention of Congress was to make the Missouri River wherever it might run the absolute boundary of the State, it matters not whether those conditions still exist which were considered in the memorial, and which authorized, warranted and induced Congress to so ordain. The conditions which moved Congress to enact the statute may have passed away. That, however, does not deprive the State of Missouri of the right to demand a strict compliance with the original grant as it was intended when made.

Missouri was admitted into the Union in 1820, long prior to the admission of Nebraska and during a time when all the territory immediately west of the Missouri River belonged to the Federal Government. At the time of its admission there was no practical assurance that the territory now known as Nebraska would ever be admitted into the Union. It belonged to the Federal Government to be disposed of at will, to be held as a territory or afterwards subdivided and admitted into the Union as a State.

By accepting the terms of the memorial annexing Platte's Purchase to the State of Missouri, the Federal Government made an absolute guarantee to the people of Missouri that the stream of water flowing from the Rockies, known as the Missouri River, should forever be its absolute boundary line.

Construed in the light of the memorial and according to the plain words of the statute of annexation, Missouri now claims that fixed and vested rights were obtained thereunder, and that she is entitled to complete jurisdiction and sovereignty over all the territory lying east of the Missouri River as hereinbefore stated, and that it was more important at the time of the annexation that this river be made the absolute boundary for all time to come than to afterward have such boundary changed by reason of sudden variation in the channel of the river. Indeed, had the fact in question been raised long prior to the admission of Nebraska into the Union, and after the annexation statute had been approved, no one would have questioned the right of Missouri to claim and obtain absolute sovereignty over the territory here involved. This principle is made manifest by reason of the terms of the statute construed in the light of the memorial and it fixes a vested privilege and right in the State of Missouri regardless of what might afterwards have been done by the Federal Congress without the consent of this complainant.

The rights and duties with respect to waters depends primarily upon the relations which the opposing parties bear towards each other. Farnham on Waters and Water Rights, 3.

In this controversy, there is no agreement or contractual relations existing between the State of Nebraska and the State of Missouri, so far as the boundary line between the two States is concerned. Both States derive their power and rights in the premises from the Federal Government and Missouri, prior to the admission of Nebraska, being granted and delegated with sovereignty and power over the territory known as Platte's Purchase, and the Missouri River being at the time fixed as the absolute boundary line, is asking that the terms of the grant annexing the northwestern territory to it be strictly carried out. Congress unquestionably had authority to fix the Missouri River as it then and as it might subsequently run as the western boundary. When Nebraska was admitted into the Union, it came with both actual and constructive notice

that its jurisdiction could never extend to the east of the Missouri River south of the boundary line between Iowa and Missouri.

Mr. Frank N. Prout, Attorney General of the State of Nebraska, and *Mr. W. H. Kelligar,* for the State of Nebraska:

Where the course of a river forming the boundary between States is suddenly changed by avulsion, the boundary remains unchanged. The findings of the commissioners and the evidence adduced before them show that the Missouri River between Missouri and Nebraska changed its course in a single day—July 5, 1867—and left a large area of Nebraska land on the east side. This fact and the correctness of the findings of the commissioners are also established by stipulations of the parties.

The change having taken place in a single day, it is perfectly clear that no law applicable to accretion could have operated to transfer the territory in controversy from Nebraska to Missouri. The jurisdiction of those States and the status of the citizens do not fluctuate with every freak of the Missouri River. If they did, a large portion of the Nebraska population might go to bed at night in Nebraska and get up in the morning on the same spot in Missouri.

The rule applicable to the facts presented by the record has been stated by this court, that where a stream, which is a boundary, from any cause suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary; and that the boundary remains as it was, in the center of the old channel, although no water may be flowing therein. *Iowa* v. *Nebraska,* 143 U. S. 361.

The boundary line between States does not change with a change in the channel of a river which had been the boundary. *Missouri* v. *Kentucky,* 11 Wall. 401; *Holbrook* v. *Moore,* 4 Nebraska, 437; *Collins* v. *State,* 3 Tex. Cr. App. 325; *Willey* v. *Lewis,* 28 Wkly. L. B. 104; Act of 1836, 5 Stat. 34.

The act of 1836, 5 Stat. 34, merely extends the boundary

of the State of Missouri to the Missouri River upon extinguishment of the Indian title to the intervening land, and does not purport to change the rule of law that where the course of a river forming a boundary is suddenly changed by avulsion, the boundary remains unchanged. The act furnishes no foundation for complainant's argument that the shifting channel of the Missouri River, wherever it may be, whether changed by accretion or avulsion, is the eternal boundary line between Missouri and Nebraska. If the Missouri River should suddenly cut across the west end of Nebraska, complainant's theory would wipe Nebraska off the map and leave Missouri in possession of a vast empire acquired without regard to the rights of the inhabitants. No such conclusion is deducible from the enactment quoted.

But the argument of complainant seems to be that the act of Congress derived some additional significance from the legislative memorial of Missouri, in pursuance of which the statute was enacted. The memorial amounts to nothing more than an argument in favor of the passage of the act. The intention of Congress is clearly expressed in the enactment and there is no occasion to resort to the memorial, either to ascertain the legislative will or to give effect to the statute.

Had Nebraska never been admitted into the Union, the State of Missouri would not now have jurisdiction of a crime committed on the land in dispute known as Island Precinct.

It is a rule of the courts, both state and Federal, that where the course of a river forming the boundary between States is suddenly changed by avulsion, the boundary remains unchanged.

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

It is undisputed in the case that *prior* to July 5, 1867, the bed and channel of the Missouri River were substantially as they had been continuously from the date of the admission of

the respective States into the Union, only such variations occurring during that entire period as naturally followed in the course of time from one side of the river to the other. But on the day just named, July 5, 1867 (which was after the admission of Nebraska into the Union), within twenty-four hours and during a time of very high water, the river, which had for years passed around what is called McKissick's Island, cut a new channel across and through the narrow neck of land at the west end of Island Precinct (of which McKissick's Island formed a part), about a half mile wide, making for itself a new channel and passing through what was admittedly, at that time, territory of Nebraska. After that change the river ceased to run around McKissick's Island. In the course of a few years, after the new channel was thus made, the old channel dried up and became tillable land, valuable for agricultural purposes, whereby the old bed of the river was vacated about fifteen miles in length. This change in the bed or channel of the river became fixed and permanent; for, at the commencement of this suit it was the same as it was immediately after the change that occurred on the fifth day of July, 1867. The result was that the land between the channel of the river as it was prior to July 5, 1867, and the channel as it was after that date and is now, was thrown on the east side of the Missouri River; whereas, prior to that date it had been on the west side.

The fundamental question in the case is, whether the sudden and permanent change in the course and channel of the river occurring on the fifth day of July, 1867, worked a change in the boundary line between the two States.

The former decisions of this court relating to boundary lines between States seem to make this case easy of solution.

In *New Orleans* v. *United States*, 10 Pet. 662, 717, argued elaborately by eminent lawyers, Mr. Webster among the number, this court said: "The question is well settled at common law, that the person whose land is bounded by a stream of water, which changes its course gradually by alluvial forma-

tions, shall still hold by the same boundary, including the accumulated soil. No other rule can be applied on just principles. Every proprietor whose land is thus bounded is subject to loss, by the same means which may add to his territory; and as he is without remedy for his loss, in this way, he cannot be held accountable for his gain." It was added—what is pertinent to the present case—that "this rule is no less just when applied to public, than to private rights." The subject was under consideration in *Missouri* v. *Kentucky*, 11 Wall. 395, and *Indiana* v. *Kentucky*, 136 U. S. 479. But it again came under consideration in *Nebraska* v. *Iowa*, 143 U. S. 359, 361, 367, 370. In the latter case, the court, after referring to the rule announced in *New Orleans* v. *United States*, and citing prior cases in which that rule had been recognized, said: "It is equally well settled, that where a stream, which is a boundary, from any cause suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary; and that the boundary remains as it was, in the center of the old channel, although no water may be flowing therein. This sudden and rapid change of channel is termed, in the law, avulsion. In Gould on Waters, sec. 159, it is said: 'But if the change is violent and visible, and arises from a known cause, such as a freshet, or a cut through which a new channel is formed, the original thread of the stream continues to mark the limits of the two estates.' 2 Bl. Com. 262; Angell on Water Courses, § 60; *Trustees of Hopkins' Academy* v. *Dickinson*, 9 Cush. 544; *Buttenuth* v. *St. Louis Bridge Co.*, 123 Illinois, 535; *Hagan* v. *Campbell*, 8 Porter (Ala.), 9; *Murry* v. *Sermon*, 1 Hawks (N. C.), 56.

"These propositions, which are universally recognized as correct where the boundaries of private property touch on streams, are in like manner recognized where the boundaries between States or nations are, by prescription or treaty, found in running water. Accretion, no matter to which side it adds ground, leaves the boundary still the center of the channel. Avulsion has no effect on boundary, but leaves it in the center

of the old channel." Again, in the same case, the court, referring to the very full examination of the authorities to be found in one of the opinions of Attorney General Cushing (8 Op. Atty. Gen'l, 175), said: "The result of these authorities puts it beyond doubt that accretion on an ordinary river would leave the boundary between two States the varying center of the channel, and that avulsion would establish a fixed boundary, to wit, the center of the abandoned channel. It is contended, however, that the doctrine of accretion has no application to the Missouri River, on account of the rapid and great changes constantly going on in respect to its banks; but the contrary has already been decided by this court in *Jeffries* v. *Land Company*, 134 U. S. 178, 189." In *Nebraska* v. *Iowa*, it appeared that the Missouri River near the land there in dispute had pursued a course in the nature of an ox-bow, but it suddenly cut through the neck of the bow and made for itself a new channel. The court said: "This does not come within the law of accretion, but that of avulsion. By this selection of a new channel the boundary was not changed, and it remained as it was prior to the avulsion, the center line of the old channel; and that, unless the waters of the river returned to their former bed, became a fixed and unvarying boundary, no matter what might be the changes of the river in its new channel."

Manifestly, these observations cover the present case and make it clear that the boundary line between Missouri and Nebraska in the vicinity of Island Precinct cannot be taken to be the middle of the channel of the Missouri River, as it has been since the avulsion of 1867 and now is, but must be taken to be the middle of the channel of the river as it was prior to such avulsion. We cannot see that there are any facts or circumstances that withdraw the present case from the rule established in former adjudications.

Counsel for Missouri contend that the act admitting Missouri into the Union, the memorial sent by the Legislature of that State to Congress in 1831, and the act of June 7, 1836, with the

proclamation of the President as to the extinguishment of Indian titles to lands between Missouri, as originally bounded, and the Missouri River, show that Congress intended that, so far as the boundary of the State of Missouri was concerned, the middle of the channel of the Missouri River, wherever it may be at any particular time—and regardless of any changes, however caused or however extended, or permanent, suddenly occurring in its course or channel—was to be taken as a perpetual, natural monument fixing the boundary line. We cannot accept this view. We perceive no reason to believe that Congress intended, either by the acts of 1820 and 1836 relating to Missouri or the act admitting Nebraska into the Union, to alter the recognized rules of law which fix the rights of parties where a river changes its course by gradual, insensible accretions, or the rules that obtain in cases where, by what is called avulsion, the course of a river is materially and permanently changed. Missouri does not dispute the fact that when Nebraska was admitted into the Union the body of land described in the present record as Island Precinct was in Nebraska. It is equally clear that those lands did not cease to be within the limits of Nebraska by reason of the avulsion of July 5, 1867.

For the reason stated we adjudge, in respect of the matters involved in this suit, that the middle of the channel of the Missouri River, according to its course as it was prior to the avulsion of July 5, 1867, is the true boundary line between Missouri and Nebraska. Accordingly, the original bill must be dismissed, and a decree entered in favor of the State of Nebraska on its cross bill.

It appears from the record that about the year 1895 the county surveyors of Nemaha County, Nebraska, and Atchison County, Missouri, made surveys of the abandoned bed of the Missouri River, in the locality here in question, ascertained the location of the original banks of the river on either side, and to some extent marked the middle of the old channel. If the two States agree upon these surveys and locations as correctly

marking the original banks of the river and the middle of the old channel, the court will, by decree, give effect to that agreement; or, if either State desires a new survey the court will order one to be made and cause monuments to be placed so as to permanently mark the boundary line between the two States. The disposition of the case by final decree is postponed for forty days, in order that the court may be advised as to the wishes of the parties in respect of these details.

KEELY *v.* MOORE.

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

No. 55. Argued November 9, 1904.—Decided December 19, 1904.

The signature of a resident of the District of Columbia to a will executed abroad was witnessed on the day of execution by two witnesses; on the day following an American vice consul signed, as such and under seal, a certificate that the testator had appeared before him and acknowledged the will and his signature thereto. It did not state that the testator signed in his presence. The law in the District of Columbia required three witnesses in testator's presence, but did not require the testator to sign in presence of witnesses. The will was attacked also on grounds of testator's insanity and undue influence on the testator who had, previous to the execution of the will, been for a short time in an insane asylum. In an action affecting title to real estate there were issues sent to a jury and the title under the will sustained. *Held*, that:

Under the circumstances in this case the jury might properly draw the inference that the vice consul executed the certificates in the ordinary course of business and in presence of the testator.

Although a notary taking an acknowledgment as required by law is not, in the absence of separate signature as such to be regarded as a witness, inasmuch as the certificate in this case was not required by law and was unnecessary, it was, together with the description appended to the vice consul's name, immaterial and could be disregarded as surplusage and the vice consul's signature regarded as that of a witness in his unofficial capacity.

The application of a relative, and the certificates of physicians, for the admission of testator to an insane asylum, from which he had been released apparently in sound condition prior to the execution of the will, were properly excluded both because not sworn to and given in a different proceeding and on a different issue.

There was no error in submitting the question of testator's insanity to the jury with the instruction that if they found that the insanity was permanent in its nature and character the presumptions were that it would continue and the burden was on those holding under the will to satisfy the jury that he was of sound mind when it was executed.

A man may be insane to the extent of being dangerous if set at liberty and yet have sufficient mental capacity to make a will, enter into contracts, transact business and be a witness.

THIS was an action of ejectment brought in the Supreme Court of the District by grantees of the heirs at law of William Thomson against Joseph H. Moore and the firm of Thomas J. Fisher & Company, agents of Mary Cecelia and Georgiana Hawkes Thomson of the county of Kent, England, devisees under the will of William Thomson, to recover possession of an undivided ninety-one one-hundredths of certain real estate in the city of Washington. Upon the trial it was admitted that William Thomson died in Southampton, England, in 1887, seized of the lot in question; that he was born in and was a citizen of the United States, leaving no issue or descendants. Plaintiffs had acquired the title of the heirs at law, and the defendants were in possession of the lot as life tenants under his alleged will.

The validity of the will and the due execution thereof were contested by the plaintiffs for reasons hereinafter indicated in the opinion. The trial resulted in a verdict for the defendants, upon which judgment was entered, and affirmed by the Court of Appeals. 22 D. C. App. 9.

Mr. Hugh T. Taggart and *Mr. C. C. Cole*, with whom *Mr. Leo Simmons* was on the brief, for plaintiffs in error.

Mr. Wilton J. Lambert and *Mr. D. W. Baker*, for defendants in error.

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

The validity of the will was attacked upon three grounds: 1st, that it has not the requisite number of witnesses to pass real estate in this District; 2d, that the testator was of unsound mind; 3d, that undue influence had been exercised by one of the designated executors, and others.

Thomson was a resident of Washington, but at the time of and for some years prior to his death was the American consul at Southampton, England. One John H. Cooksey, a resident merchant at Southamptan, was his vice consul. The will was prepared by Walter R. Lomer, a resident solicitor, and was executed at his office February 24, 1886. By this will he devised the property in controversy to the appellees, Mary Cecelia Thomson and Georgiana Hawkes Thomson, his cousins, of Kent County, England, jointly for their joint lives and to the survivor of them, with remainder to Mary Cunningham Roberts, of London, for life, and remainder in fee to her only son. The will, which was executed in duplicate, was written upon two sheets of paper, to each of which the testator affixed his name. It was witnessed in the usual form by Lomer and by one Linthorne, a clerk in his office, who attached their signatures in the presence of and at the request of the testator, and in the presence of each other. On the day after the execution of the will Thomson again went to the office of his solicitor, Lomer, who wrote a certificate of acknowledgment in the margin of the second and last page of the will, which was signed by Cooksey, the vice consul.

The original will, being of record in the Probate and Admiralty Division of the High Court of Justice in London, could not be produced, but was proved by a certificate and examined copy. The attestation clause and the certificate were as follows:

"Signed and acknowledged by the said William Thom-

son, the testator as and for his last will and testament in the presence of us, both being present at the same time, who at his request in his presence, and in the presence of each other have hereunto subscribed our names as witnesses.

"WALTER R. LOMER,
"*Solicitor, Southampton, Eng.*
"R. ROUPE LINTHORNE,
"*His Articled Clerk.*"

"I hereby certify that William Thomson, consul at Southampton for the United States of America, attended before me this 25th day of February, 1886, and acknowledged the foregoing paper-writing contained in two sheets of paper as his last will and testament and that the signature 'Wm. Thomson' at the foot thereof is in the proper handwriting of the said William Thomson.

[SEAL U. S. CONSUL] "JOHN H. COOKSEY,
"*Vice Consul United States of America.*"

The execution of the will was proved by the two subscribing witnesses, Lomer and Linthorne, and the certificate by proof of the death of Cooksey, and the genuineness of his signature. This was proper. *Clarke's Lessee* v. *Courtney*, 5 Pet. 319; *Stebbins* v. *Duncan*, 108 U. S. 32. At this time there was in force in this District the fifth section of the act of 29 Charles II., chapter 3, which had been adopted in Maryland in 1798, and carried into this District as section 4, chapter 70, of the compiled Statutes of 1894. It provided as follows: "All devises and bequests of any lands or tenements, devisable by law, shall be in writing, and signed by the party so devising the same, or by some other person in his presence, and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they shall be utterly void and of none effect."

The object of the certificate in question is not entirely clear, though from the fact that Thomson took the will away with

him after its execution, and stated that he would attend before the consul general at London and obtain the requisite certificate, it would seem that he thought the certificate was necessary to the proof of the will in another country. He did not go to London, however, but called again at Mr. Lomer's office, with the request that he prepare the requisite certificate, which he afterwards procured Mr. Cooksey to sign. The certificate was not offered as proof that the will was a copy of the original, since it was annexed to the original, and we can consider it only as proof as to what it contains. It certifies, in substance, that the testator attended before Cooksey upon the day following the date of the will, acknowledged it to be his last will and testament and that the signature is genuine. Whether he intended to certify that Thomson acknowledged his signature to be genuine, or that he, Cooksey, certified that it was genuine, is somewhat uncertain; but if the words "Vice Consul of the United States of America," which are merely superfluous, were omitted, there would be no failure to comply with the statute, unless in the omission to certify that Cooksey, the certifying officer, "attested and subscribed in the presence of the said devisor." But as it appears that Thomson, not knowing when he would be in London, took the certificate to the vice consul, and that the latter signed it, the jury might properly draw the conclusion that it was signed in the testator's presence. This would be the usual course of business, and the presumption is that Cooksey conformed to it and to his duty as a certifying officer.

The certificate was probably prepared under the belief that wills, like deeds, made in a foreign country must be executed and acknowledged before some foreign official, or "before any (some) secretary of legation or consular officer of the United States," (Rev. Stat. section 1750; Compiled Statutes D. C. chapter 58, section 6); but as such certificate was unofficial and contributes nothing as such to the validity of the will, it can only be looked upon as the affirmation of an ordinary witness to the facts therein stated. No particular form of attestation was

necessary, as appears to be the case in England and in several States of the United States, and if the certificate of Cooksey had been written at the foot of the will and signed by himself and by the two witnesses, Lomer and Linthorne, it would have been a sufficient attestation. How, then, can it be regarded as insufficient when an attestation in one form is signed by two witnesses and an attestation in another form by a third? Bearing in mind that the certificate, if given any force at all, must be considered an attestation, we do not think that the fact that it may have been written and signed under a mistaken impression as to its necessity and purpose, vitiates it as an attestation. What use was intended to be made of it is immaterial, if it were useless for any purpose as an official certificate. The facts certified are appropriate to the attestation of the instrument, and, if true, we see no reason for holding it to be invalid as an attestation, because it was signed under the impression that it was necessary for some possible purpose as a certificate.

The case of *Adams* v. *Norris*, 23 How. 353, is much in point. This was an action of ejectment for a parcel of land in California. Plaintiffs claimed through the heirs at law of one Grimes; defendants, through the devisees in his will. The law required three witnesses to the validity of the will. Two of the witnesses signed in the usual manner, but above their signatures and beneath that of the testator was written "Before me, in the absence of the two alcaldes, Roberto T. Ridley, Sindico." The sindico was counted among the witnesses, the court saying: "We comprise among the witnesses to the will, Ridley, the sindico. It does not appear that a sindico was charged with any function in the preparation or execution of testaments by the law or custom of California. Nor is it clear that the sindico in the present instance expected to give any sanction to the instrument by his official character. He attests the execution of the will, and we cannot perceive why the description of himself, which he affixes to his signature, should detract from the efficacy of that attestation." As it did not

appear that the sindico or the two alcaldes were charged with any special duties, it was practically held that the certificate of acknowledgment, and the official character of the sindico, might be disregarded, and the signature treated as an attestation.

In the case of *Clarke* v. *Turton*, 11 Ves. Jr. 240, the will was executed abroad. It appears that three witnesses were required, apparently under the same act of Charles II as in this case. The third signature was, as in this case, that of the vice consul, whose attestation was considered necessary to the validity of the act. The case is insufficiently reported, but the court held that the attestation was a memorandum of the vice consul, to operate as a certificate, "a separate act in his public character, and sealed with his official seal; and therefore it could not be said he subscribed as a witness." The question upon that point was sent to law, but it does not appear what disposition was made of it. It appears that the certificate was an official act, and treated as necessary, but the report fails to show what it contained, and in the absence of such showing the case is of little value.

The applicability, and to some extent the authority of this case, is somewhat weakened by that of *Griffiths* v. *Griffiths*, L. R. 2 P. & D. 300. The will was signed by the testator in the presence of two witnesses, who signed their names in his presence—one opposite the word "Executors" and the other opposite the word "Witness." There was no attestation clause to the will. The deceased intended one of the witnesses to be his executor, and asked him to sign his name *in that character*. Lord Penzance held that such person did not sign the will exclusively as executor, but that he also intended by his signature to affirm that the deceased executed the will in his presence, and that consequently the will was valid. Somewhat to the same effect is *Pollock* v. *Glassell*, 2 Gratt. 439.

Conceding the general rule to be that witnesses must intend to attest the will *as witnesses*, the inference is strong that Cooksey did so in this case, as he certifies to the genuineness of the signature of Thomson and to the acknowledg-

ment of the will in his presence; and these are what would have been required by the law of this District had the instrument been a deed. It is argued that Cooksey did not intend to attest the will, but merely to sign the certificate; but the certificate of what? Only the fact that the will was acknowledged in his presence and that the signature was genuine. This is precisely the object of an attestation, and as an attestation we think it must be regarded. He may have supposed his official certificate of acknowledgment necessary to the execution of a will in a foreign country, but as he did certify personally to such acknowledgment the addition of his official title adds nothing to and takes nothing from the weight of his attestation. We must conclude that he intended to certify exactly what he did certify, and we are giving it exactly the effect he intended to give it.

If the certificate were an official act and material as a separate acknowledgment of the execution of the will, as in the acknowledgment of a deed, the case would be different, since it has never been supposed that a notary, who takes an acknowledgment of a deed, could be counted as a witness to the deed without a separate signature. But here the certificate was a wholly unofficial act, and we see no objection to disregarding the words "Vice Consul of the United States," and treating it as an acknowledgment of the execution before a competent witness. The acknowledgment of a will is really a feature of the attestation. The statute did not require that the devisor should sign the will in the presence of the witness, but that the witness should sign in the presence of the testator.

2. The evidence of Thomson's insanity was quite unsatisfactory. It appears that during the autumn or early winter of 1885 he was seized with an acute mania, and on December 15 was committed to a private insane asylum as a lunatic, upon the certificate of two physicians, and at the request of a cousin named James E. Cunningham, a merchant of London, who appears to have taken temporary management of his affairs. He remained in the asylum about six weeks, and

on February 1, 1886, somewhat more than three weeks before he executed his will, was discharged as probably cured—in reality granted a leave of absence on probation. The belief in his cure being justified by his subsequent conduct, a formal order of discharge was entered on the record of the asylum on June 26, 1886. Lomer and Linthorne, the witnesses who were present at the execution of the will, and Septimus Cooksey, the son of the vice consul, all testified to the mental capacity of the testator at that time.

In this connection exception was taken to the exclusion of the application of James E. Cunningham for the admission of Thomson to the insane asylum, and of the certificate of the two physicians as to his insanity. These were properly excluded, not only because they were unsworn testimony, but because they were given in a different proceeding and upon a different issue. Thomson may have been insane to the extent of being dangerous if set at liberty, and yet may have had sufficient mental capacity to make a will, to enter into contracts, transact business and be a witness. In the case of *Leggate* v. *Clark*, 111 Massachusetts, 308, the admission of similar testimony was treated as error. In addition to this, however, these certificates were both dated December 14, 1885, more than two months before the will was made, and are by no means inconsistent with the other testimony that he was released from the asylum as cured February 1, 1886, and that three weeks after that, when he executed the will, he appeared to be of sound and disposing mind and memory.

In addition to the proof of his commitment to the asylum, and of his undoubted insanity prior and for some time subsequent thereto, there was slight evidence of insane acts during the month of February, though there was no opinion expressed by any one that he was incapable of making a valid deed or contract. The whole testimony regarding his insanity was duly submitted to the jury, who were instructed that if they found his insanity to be permanent in its nature and character, the presumptions were that it would continue, and the

burden was upon the defendant to satisfy the jury by a preponderance of testimony that he was at the time of executing the will of sound mind. There was no error in this instruction.

There were also a large number of exceptions taken to the admission or exclusion of testimony and to the charge of the court, but to consider them in detail would subserve no useful purpose. We have examined them carefully, and have come to the conclusion that there was no ruling of the court of which the plaintiffs were entitled to complain. The evidence of insanity was very slight, and there was no legal testimony to show that the will was executed under the pressure of an undue influence.

The judgment of the Court of Appeals is, therefore,

Affirmed.

HUNT v. SPRINGFIELD FIRE AND MARINE INSURANCE COMPANY.

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

No. 65. Argued December 1, 2, 1904.—Decided December 19, 1904.

A policy of insurance provided that it should be void if the interest of the insured was other than the unconditional and sole ownership or if the property were encumbered by a chattel mortgage. It was in fact subject to certain trust deeds which the insured claimed after loss were different instruments in law. *Held*, that:

A deed of trust and a chattel mortgage with power of sale are practically one and the same instrument as understood in the District of Columbia.

The rule that in case of attempted forfeiture if the policy be fairly susceptible of two constructions the one will be adopted which is more favorable to the insured was inapplicable to this case.

The contract of an insurance company is a personal one with the assured and it is not bound to accept any other person to whom the latter may transfer the property.

THIS was an action to recover on a policy of insurance upon household furniture and ornaments.

Defense: That it was provided that the policy should be

void if the interest of the insured was other than the unconditional and sole ownership of the property insured, or if the "said property should be or become encumbered by a chattel mortgage," when in fact it was subject, at the time the policy was written, to three trust deeds to secure the payment of various sums of money. Plaintiff demurred to the pleas setting up this defense. The court overruled the demurrer, entered judgment for the defendant, which was affirmed by the Court of Appeals. 20 D. C. App. 48.

Mr. D. W. Baker and *Mr. John C. Gittings* for plaintiff in error:

If the policy is so drawn as to require interpretation and to be fairly susceptible of two different constructions, the one will be adopted which is most favorable to the insured. *Thompson* v. *Insurance Company*, 136 U. S. 296; *Knickerbocker Life Ins. Co.* v. *Norton*, 96 U. S. 246; *Kansas City Bank* v. *Fire Insurance Co.*, 95 U. S. 673; *Continental Ins. Co.* v. *Vanlue*, 126 Indiana, 410; *McMaster* v. *New York Life Ins. Co.*, 183 U. S. 26, 40.

As to difference between a mortgage and a deed of trust, see *Charles* v. *Clagett*, 3 Maryland, 82; *Bank of Commerce* v. *Lannahan*, 45 Maryland, 396, 407; *Stanhope* v. *Dodge*, 52 Maryland, 490; *Harrison* v. *Annapolis & Elkridge R. R. Co.*, 50 Maryland, 490.

Mr. Andrew B. Duvall for defendant in error.

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

The sole question presented by the record in this case is whether the provision in the policy for the unconditional ownership of the property by the plaintiff, and for the non-existence of any chattel mortgage thereon, was broken by certain trust deeds to secure the payment of money in each case.

Plaintiff relies upon the familiar principle of law that the

conditions of a policy of insurance, prepared as they are by the company, and virtually thrust upon the insured, frequently without his knowledge, must be construed strictly, and while the legal effect of a chattel mortgage and of a deed of trust to secure the payment of money may be practically the same, they are in law different instruments; and that a condition against one is not broken by the existence of the other. We recognize the rule laid down by this court in *Thompson* v. *Phenix Insurance Company*, 136 U. S. 287, that in case of attempted forfeiture, if the policy be fairly susceptible of two constructions, the one will be adopted which is more favorable to the insured. This rule was reiterated in *McMaster* v. *New York Insurance Company*, 183 U. S. 25, but we cannot recognize it as applicable to this case.

A deed of trust and chattel mortgage with power of sale are practically one and the same instrument, as understood in this District. In the language of Mr. Justice Morris, in speaking of mortgages of real estate in *Middleton* v. *Parke*, 3 D. C. App. 149:

"The deed of trust is the only form of mortgage that has been in general use in the District of Columbia for many years. The common law mortgage is practically unknown with us; and every one understands that, when a mortgage of real estate here is spoken of, the deed of trust is what is intended. . . . The deed of trust is here used as the equivalent of a mortgage; and so the term is universally used by the community. Indeed, while a mortgage is not necessarily perhaps a deed of trust, a deed of trust to secure the loan of money is necessarily a mortgage."

It was said by this court in *Shillaber* v. *Robinson*, 97 U. S. 68, 78, that "if there is a power of sale, whether in the creditor or in some third person to whom the conveyance is made for that purpose, it is still in effect a mortgage, though in form a deed of trust, and may be foreclosed by sale in pursuance of the terms in which the power is conferred, or by suit in chancery."

The legal effect of the two instruments has been recognized as practically the same in several cases in this and other courts. *Platt* v. *Union Pacific R. R. Co.*, 99 U. S. 48, 57; *Palmer* v. *Gurnsey*, 7 Wend. 248; *Eaton* v. *Whiting*, 3 Pick. 484; *Wheeler & Wilson Mfg. Co.* v. *Howard*, 28 Fed. Rep. 741; *Bartlett* v. *Teah*, 1 McCrary, 176; *Southern Pacific R. R. Co.* v. *Doyle*, 11 Fed. Rep. 253; *McLane* v. *Paschal*, 47 Texas, 365.

There may be cases under particular statutes recognizing a difference between them in reference to the application of the recording laws, as appears to be the case in Maryland, *Charles* v. *Clagett*, 3 Maryland, 82, but in their essential features and in their methods of enforcement they are practically identical. Both are transfers conditioned upon the payment of a sum of money; both are enforceable in the same manner, and the difference between them is one of name rather than substance. The provision in the policy is one for the protection of the insurer, who is entitled, if he insists upon it in his questions, to be apprised of any fact which qualifies or limits the interest of the insured in the property, and would naturally tend to diminish the precautions he might take against its destruction by fire.

In passing upon the identity of the two instruments in this case we may properly refer to the further provision of the policy that the interest of the insured must be an unconditional and sole ownership. While the breach of this condition is not specifically urged in the briefs, we may treat it as explanatory of the other condition against the existence of chattel mortgage. The company evidently intended by this provision to protect itself against conditional transfers of every kind. The contract of the company is a personal one with the insured and it is not bound to accept any other person to whom the latter may transfer the property.

The conditions of the policy in this case were broken by the trust deeds, and the judgment of the court below is, therefore,

Affirmed.

TEXAS & PACIFIC RAILWAY COMPANY *v.* SWEARINGEN.

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

No. 48. Submitted November 3, 1904.—Decided December 19, 1904.

An employé is entitled to assume that his employer has used due care to provide reasonably safe appliances for the doing of his work. Knowledge of the increased hazard resulting from the negligent location in dangerous proximity to a railroad track of a structure will not be imputed to an employé, using ordinary diligence to avoid it if properly located, because he was aware of its existence and general location. It is for the jury to determine from all the evidence whether he had actual knowledge of the danger.

THE facts are stated in the opinion.

Mr. John F. Dillon, Mr. D. D. Duncan and *Mr. T. J. Freeman* for plaintiff in error:

In every case before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any evidence upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed. *Improvement Co.* v. *Munson,* 14 Wall. 448; *Commissioners &c.* v. *Clark,* 94 U. S. 278, 284; *Pleasants* v. *Fant,* 22 Wall. 120; *Randall* v. *B. & O. Ry. Co.,* 109 U. S. 482; *Railway Co.* v. *Converse,* 139 U. S. 469; *Schofield* v. *C., M. & St. P. Ry. Co.,* 114 U. S. 615; *Steamship Co.* v. *Merchant,* 133 U. S. 375.

When a servant enters into the employment of another he assumes all the risks ordinarily incident to the business. He is presumed to have contracted in reference to all the hazards and risks ordinarily incident to the employment; consequently he cannot recover for injuries resulting to him therefrom.

The servant takes the risks of the master's mode of con-

ducting his business, though a safer one might be followed, if the servant fully knows the risk and continues to work.

There are risks and dangers incident to most employments, those risks the parties have in view when engagements for services are made, and in consideration of which the rate of compensation is fixed. In all engagements of this character the servant assumes those risks that are incident to the service, and as between himself and the master he is supposed to have contracted on those terms, and if an injury is sustained by the servant in that service, it is regarded as an accident, and the misfortune must rest on him. Woods' Master & Servant, 2d ed. § 326; 3 Woods' Railway Law, § 370, p. 1452; 14 Am. & Eng. Ency. of Law, 843, 845; *Tex. & Pac. Ry. Co.* v. *Minnick*, 57 Fed. Rep. 362; *Tuttle* v. *Railway*, 122 U. S. 189; *Randall* v. *Railway*, 109 U. S. 478; *H. & T. C. Ry. Co.* v. *Conrad*, 62 Texas, 627; *Woodworth* v. *St. P., M. & M. Ry. Co.*, 18 Fed. Rep. 282; *Mo. Pac. Ry. Co.* v. *Summers*, 71 Texas, 700; *Green* v. *Cross & Eddy, Receivers*, 79 Texas, 130; *Naylor* v. *Railway Co.*, 5 Am. & Eng. R. R. Cases, 406; *Wonder* v. *Baltimore Ry. Co.*, 32 Maryland, 411; *Crilly* v. *Texas & Pac. Ry. Co.*, 53 Am. & Eng. R. R. Cases, 104; *Kohn* v. *McNulty, Receiver*, 147 U. S. 238.

When the proof establishes a usage or custom, the presumption is that the employé contracted with regard to said usage or custom, and if he seeks to avoid its force and effect, the burden is upon him to show that its existence had been concealed from him by the company, and that he did not know of same, nor could have known of same, by the use of ordinary diligence. *Watson* v. *Railway Co.*, 58 Texas, 438; *St. Louis & S. W.* v. *Spivey*, 73 S. W. Rep. 973.

It is the duty of the master to advise the servant, or to inform him, of the dangers incident to the employment, if the servant is ignorant of them. If the dangers are obvious and patent, and the servant advises himself, of course the duty of being advised by the master would not be imposed. *Gulf, Colo. & S. Fé Ry. Co.* v. *Darby*, 57 S. W. Rep. 446.

Mr. Leigh Clark for defendant in error, cited *Cent. Trust Co.* v. *E. T. V. & G. Ry. Co.*, 73 Fed. Rep. 661; *Tex. & Pac. Ry. Co.* v. *Archibald*, 170 U. S. 674; *George* v. *Clark*, 85 Fed. Rep. 607; *Gulf, Colo. & S. Fé Ry. Co.* v. *Darby*, 67 S. W. Rep. (Texas) 446; *G., H. & S. A. Ry. Co.* v. *Mortson*, 71 S. W. Rep. (Texas) 707; *Grand Trunk Ry. Co.* v. *Ives*, 144 U. S. 408, 417; *Gardner* v. *Mich. Cent. Ry. Co.*, 150 U. S. 349, 361; *Richmond & D. Ry. Co.* v. *Powers*, 149 U. S. 44; *Mo. Pac. Ry. Co.* v. *Everett*, 161 U. S. 451.

Mr. Justice White delivered the opinion of the court.

This suit was commenced in a state court by W. W. Swearingen, the defendant in error, and, on the application of the defendant, the Texas and Pacific Railway Company, was removed to the Circuit Court of the United States as one arising under the laws of the United States, because the railway company was chartered under an act of Congress.

The action was to recover damages for personal injuries sustained by reason of the alleged negligence of the defendant company, in whose service at the time of the injury the plaintiff was employed as a switchman. The negligence alleged on the part of the company was the existence, in close proximity to a switch track, of a scale box, by striking against which the plaintiff was injured whilst doing duty as a switchman. In addition to a general denial the railway company specially pleaded that the scale box in question was at a safe distance from the track on which the plaintiff was hurt when working and, moreover, that the plaintiff had assumed the risk, if any, arising from the situation of the scale box, and had in any event been guilty of contributory negligence. There was a verdict and judgment for the plaintiff, and an affirmance of such judgment by the Court of Appeals. 122 Fed. Rep. 193.

The assignments of error are based, first, on a ruling of the trial court in rejecting evidence; second, on the refusal to direct a verdict; and, third, on an exception taken to the charge

given to the jury. To pass upon them requires an appreciation of the proof, and, therefore, before coming to consider the assignments, we summarize the testimony.

The accident occurred after dark on the evening of February 7, 1902, in the switch yard at El Paso. It was shown that in that yard there were several tracks. One track, No. 1, ran over the bed of the scales in question. On the right of this scale there was what was called a scale box, which rose to about the height of six feet, and was about five feet wide and eighteen inches deep. On the other side of this structure there was a track described as track No. 2, and beyond this, to the right, were two other tracks, known respectively as track No. 3 and track No. 4. The space between a ladder on the side of a freight car when moving on track No. 2 and the scale box in question was shown by the evidence to be only $19\frac{1}{2}$ inches.

The plaintiff testified concerning the accident as follows:

"I was hurt on the evening of the 7th of February, 1902, while working as a switchman after dark, at about 6 o'clock and 45 minutes.

"I was a day switchman, but we worked until after dark.

"My duties as a switchman were to assist in the moving, placing and switching of cars, coupling and uncoupling them, and making up trains, and generally to obey the order of Yardmaster Moore, under whom we were working, and my duties also required me to ride on the cars while they were being moved.

"On this night we were making up a transfer to take to the Southern Pacific Railway, and the cars we had to get were on No. 2 track. My station was with the engine, called 'following the engine.' I worked up near the engine.

"The engine was at the west end of the yard, west of track No. 2, with me with it, and it backed down east into No. 2 track, with me riding on the footboard at the east end of the engine, to get these cars, and we passed the scale box, although I did not see it, and reaching the cars I coupled the engine to them, and not getting a signal from the yardmaster, who was still

farther east of me, as was also the other switchman, Williams, I walked east down the string of cars about two car lengths, and getting the signal I passed the same to the engineer, and the engine and cars started up again going west so as to go out on another track, and as the cars started I got up on a box car to ride down past the switch at the west end of track No. 2, so as to throw the switch and let the train on another track.

"There is a ladder on the side of a box car, and a step called a stirrup under the ladder under the bottom of the car, and I was holding on to the ladder with my hands (illustrating by holding his hands above his head as if climbing a ladder), and my lantern was hanging on my right arm, and I was looking back east for a signal from the yardmaster, as it is my duty to do. I do not know whether he wanted to give one or not, but it is my duty to be on the lookout, although I do not have to look in his direction all the time, when my right shoulder struck the scale box, and I fell down between the scale box and the cars, and I was dragged and badly injured. We had probably eight or ten cars at the time, and I was riding properly and hanging out a little from the car, which is proper, and I was on the north side of the car, which is also proper, so as to signal the engineer."

The employé who built the scales testified as follows:

"It is my business to know how much a car passing on a side track will clear the scale box, and these tracks at this place are standard gauge apart, and the scale box is standard, and as I had to put the scale box there to facilitate business and for convenience, I had no more room because the lever of the scale is a certain length to get the fulcrum. The tracks are standard, and are not farther apart, because there is no more room to put them farther apart.

* * * * * * * *

"The distance that I put this scale box from track No. 2 is standard, and is considered a safe and proper distance in putting in scales where the tracks are standard guage apart.

* * * * * * * *

"I am bound to put my scales in according to the length of the lever, and if tracks are already there and are standard distance apart I have a uniform and standard distance from the tracks.

"We have side tracks at most places on each side of the scales. The tracks in this yard are standard guage apart, and where ground is scarce we have to economize in space, but where ground is plenty the tracks can be farther apart."

The evidence for the company also showed that the scales in question had been erected a number of years prior to the happening of the accident and after tracks Nos. 1 and 2 were built. The superintendent of terminals of the defendant company testified that "south of track No. 4 there is a space left for four or five more tracks." The same witness also stated that the customary position of a switchman while riding on a car and ladder "is to swing out from the car with his body," and that "a well-developed man cannot safely pass by the scale box on track No. 2, while riding on a side of a car on the ladder, if he hangs out from the car."

There was evidence that at other yards than the one in question the distances from the side of a standard box car to adjoining scale boxes varied from sixteen inches to one hundred and sixty-eight inches.

Testimony was introduced tending to show that the plaintiff, before he was hurt, knew of the proximity of the scale box to track No. 2. Concerning his employment and knowledge of the location of the scales, plaintiff testified that he had made one trip as extra brakeman in the service of the railway company in January, 1900; that in December, 1901, as brakeman, he made about one trip between El Paso and Toyah; that he had worked in the El Paso yards, as extra switchman, two nights and three days in January, 1902, and went to work there regularly as switchman on February 1, 1902. He denied any recollection of ever having worked on track No. 2 during his employment in January, 1902, and, referring to his employment in the early days of February, 1902, plaintiff says:

"During the seven days I worked for defendant we never used this No. 2 track at the west end, or near the scales, and I never saw a car on track No. 2, opposite the scales, and never had my attention called to the distance between the track and scale box. I never measured or approximated the distance to it. Nothing ever occurred to attract my attention to it.

* * * * * * * *

"I knew we had to pass the scale box at the time I was hurt, so as to get to the switch beyond, but I was not thinking about it, and I did not see it when we passed it going in after these cars.

"The switch engine had a headlight lighted at both ends, and I was on the footboard at the rear of the engine, which put me in front while we were backing into track No. 2 after the cars, but the headlights were not very clean or bright.

"There was nothing to hide the scale box from my view; it was perfectly open and apparent."

Plaintiff further testified:

"I knew the location of the scale before I was hurt. I knew it was between tracks Nos. 1 and 2, but I did not know anything with reference to its proximity to track No. 2, and did not know it was dangerously close to track No. 2.

"At the time I was hurt I had no knowledge of the distance between the scale box and No. 2 track.

"I set cars on the scale on track No. 1 to be weighed, but I would be on the north side of the cars on track No. 1, and as the scale box is on the south side I could not see it. I had nothing to do with the scale box and had no business around it.

"I first learned the exact distance between the scale box and the nearest rail of track No. 2 a few days ago, when I went down and measured it at your (referring to plaintiff's attorney) recommendation.

"I was never warned about the danger of getting knocked off of cars by this scale box, and at the time I was hurt I

was attending to my work, and thinking about my duties, and looking for a signal from the yardmaster, and was not thinking about the box. I did not see it immediately prior to the time I struck it.

"The scale box was at the same place, when I struck it, as it was when I first went to work for defendant."

The evidence was closed by the offer on behalf of the company of portions of a written application by plaintiff for employment as brakeman, dated February 22, 1900. After stating that the plaintiff identified the application, the bill of exceptions recites as follows:

"Defendant then offered in evidence the following portions of said application, consisting of questions and the answers thereto written by the plaintiff, for the purpose of showing that plaintiff had notice of the location of said track scale box, and that he was in danger of being knocked off of a car when passing the same:

"Question. 'Do you make this application for employment in train service, realizing the hazardous nature of such employment, understanding that it is necessary in operating this railway for the company to have overhead and truss bridges at certain points on the line; also coal chutes, track scale boxes, water tanks, coal houses, platforms, sheds, roofs and other overhead and side structures, and that in performance of the duties for which you are employed you are liable to receive injuries by being knocked off the side or top of cars, unless you use due care to avoid injury thereby?'

"Answer. 'Yes.'

"Question. 'Do you agree to acquaint yourself with the location of all overhead and truss bridges, as well as the location of all other structures along the line of the road?'

"Answer. 'Yes.'

"Question. 'Do you understand that no officer or employé of this company is authorized to request or require you to use defective tracks, cars, machinery or appliances of any kind, and that when you do so you assume all risk of injury therefrom?'

"Answer. 'Yes.'

"Question. 'Do you understand that this company desires to employ only experienced men in the service, and does not undertake to educate inexperienced men?'

"Answer. 'Yes.'

"Counsel for plaintiff objected to the said testimony for the reason that it was irrelevant and immaterial, and that plaintiff had made this application and entered the employ of defendant, and afterwards resigned, and again entered the employ of the defendant some two years later, without making another application, and also because it was an effort on the part of defendant to limit its liability for its own negligence, and void as against public policy, and because the particular location of this track scale box is not given; and the court having sustained plaintiff's objections and excluded said testimony, the defendant then and there excepted to the action of the court in excluding said evidence, and tenders this, its bill of exceptions, which is allowed, signed and sealed by the court."

The first assignment of error assails the affirmance by the Court of Appeals of the action of the trial court in refusing to receive in evidence the matter just referred to.

These excerpts were offered in evidence, as stated in the bill of exceptions, "for the purpose of showing that plaintiff had notice of the location of said track scale box, and that he was in danger of being knocked off a car when passing the same."

The application was made in February, 1900, and was for employment, not as switchman, but as brakeman. The employment of the plaintiff with the defendant company following the application was in December, 1901, when the plaintiff as a brakeman made about a dozen trips between El Paso and a place called Toyah. His subsequent employment as switchman commenced but a short time before the happening in February, 1902, of the accident complained of.

We think the trial court rightly excluded the offered evidence. In the first place, the defendant had testified that

before the accident he had knowledge of the existence of the scale box. In the next place, while undoubtedly the statements in the application tended to show that the plaintiff was aware of the generally hazardous nature of the employment and the necessity of the exercise of care in working with and about the instrumentalities employed by the company in the operation of its railroad, the recognition of these facts by the plaintiff and his agreement to acquaint himself with the location of bridges and other structures on the line of the road did not tend to establish notice, communicated to the plaintiff, that the defendant company had not exercised due care in placing scales or scale boxes on its tracks, or that the company had by its negligence increased the ordinary hazards to be expected from the use of such structures, and that by the exercise of ordinary care on his part plaintiff could not escape injury. The evidence was, therefore, immaterial in the light of the issue upon which the jury had to pass.

At the close of all the evidence the defendant company requested the court to charge the jury to return a verdict for the defendant, and to the overruling of such motion the defendant company duly excepted. The second assignment alleges error in the affirmance by the Court of Appeals of the action of the trial court denying this motion.

The right to have the jury instructed to find for the company was based upon the following contentions:

"*a*. Because the undisputed evidence established that said track scale box erected in the defendant's yard, and under the circumstances in a reasonably safe place, and at a reasonably safe distance and location from track No. 2, on which track plaintiff was riding at the time he was injured.

"*b*. Because plaintiff testified he knew of the location of the track scale box and the location of track No. 2, with reference to said track scale box, on which track No. 2 he was riding at the time he was hurt, and because the undisputed evidence shows that the track scale box and the danger of the same was open and obvious to the view of plaintiff, and that neither

the track scale box nor the dangers thereof were hidden or latent, and plaintiff was presumed to know the danger and assumed the risks thereof.

"*c.* Because the uncontroverted testimony established the fact that plaintiff knew of the location of the track scale box, and location of said track No. 2, with reference to said track scale box, on which track he was riding at the time he was hurt, and that the track scale box, and the dangers of the same, were open and obvious to the view of plaintiff, and not hidden or latent, and plaintiff was presumed to know the danger and assumed the risk."

The motion was properly overruled. So far from it being the fact, as asserted, that the evidence established indisputably the existence of the grounds upon which the motion was based, the record shows that there was evidence tending to establish that the track scale box was not erected in a reasonably safe place, and that, although the plaintiff knew that the scale box was situated adjacent to track No. 2, he did not know that it was so near that it could not be passed, in the performance of his duties as a switchman, without danger. This is apparent when it is borne in mind that the plaintiff testified, in substance, that prior to the accident he had not closely inspected the scale box or taken measurements of the distance from the box to the north rail of track No. 2, and that he did not do more than cursorily observe the structure from a distance, and that he was unaware of the nearness of the scale box to the north rail of track No. 2.

Prima facie, the location of scales where the tracks were only the standard distance apart, and where a space of less than two feet was left for the movements of a switchman between the side of a freight car and the scale box, encumbered, as he would be in the night time, with a lantern employed for the purpose of signalling, did not incontestably establish the performance by the defendant company of the duty imposed upon it to use due care to provide a reasonably safe place for the use of the switchmen in its employ. And so far from the

proof making it certain that the necessity of the situation required the erection of the structure between tracks Nos. 1 and 2 as existing, there was proof that the railway company owned unoccupied ground, intended for other tracks, to the south of track No. 4, justifying the inference that the distance between tracks Nos. 1 and 2 might have been increased, and the employment of the scales thus rendered less hazardous to switchmen, or that the scales might have been removed to a safer location.

It was, therefore, properly a question for the determination of the jury whether or not the scales were maintained in a reasonably safe place, and if not, whether the plaintiff had notice thereof. The Court of Appeals was of opinion, and rightly we think, that the dangerous contiguity of the scale box to track No. 2, and the extra hazard to switchmen resulting therefrom, was not so open and obvious on other than a close inspection, as to justify taking from the jury the determination of the question whether there had been an assumption of the risk. The plaintiff was entitled to assume that the defendant company had used due care to provide a reasonably safe place for the doing by him of the work for which he had been employed, and as the fact that the defendant company might not have performed such duty in respect to the scale box in question was not so patent as to be readily observable, the court could not declare, in view of the testimony of the plaintiff as to his actual want of knowledge of the danger, that he had assumed the hazard incident to the actual situation. *Choctaw, O. & G. R. R.* v. *McDade,* 191 U. S. 64, 68.

The remaining assignment of error questions the correctness of the following portion of the charge to the jury:

"The defendant claims that the plaintiff knew of the existence and location of the scale box with which he came in contact, and that by continuing in the work, with such knowledge, he assumed all risks incident to and arising out of his employment. Upon this point you are instructed that if you believe

from the testimony that prior to the plaintiff's injuries he knew of the existence and location of the scale box, and of the danger incident to the discharge of his duties while passing the same on a moving train, if danger there was; or, if knowing of the location of the structure, the danger to the employés while in the usual discharge of their duties was apparent, that is open to observation, then you are instructed that the plaintiff, by continuing in the employment of the defendant without complaint, assumed such risks, and he would not, therefore, be entitled to recover. In this connection you are further instructed that the mere fact that the plaintiff knew of the existence and location of the scale box would not, as a matter of law, charge him with knowledge of the danger, if such danger there was, due to its proximity to the north rail of track No. 2, and whether he knew of the danger is a question of fact for you to determine from a consideration of all the facts and circumstances in evidence."

The grounds of the objection to the charge being thus stated:

"Because the proof showed that plaintiff knew of the location of the track scale box, and of track No. 2, on which he was riding at the time he was hurt, in reference to a scale box, and that the same and the location thereof was open and obvious to plaintiff's view, and being an experienced brakeman, he was charged with notice that riding on the cars as he did was dangerous, and he assumed the risks thereof, and the court should have so charged the jury."

This assignment but reiterates contentions made in connection with the assignment based on the alleged error in overruling the motion for judgment. As we have already decided that knowledge of the increased hazard resulting from the dangerous proximity of the scale box to the north rail of track No. 2 could not be imputed to the plaintiff simply because he was aware of the existence and general location of the scale box, it was for the jury to determine, from a consideration of all the facts and circumstances in evidence, whether plaintiff had actual knowledge of the danger.

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

Affirmed.

LEE *v.* ROBINSON.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

No. 8. Argued December 6, 7, 1904.—Decided December 19, 1904.

Article IX, § 10, of the constitution of South Carolina of 1868, forbidding, except as specially authorized in the constitution, the issue of scrip or other evidence of state indebtedness except for the redemption of existing indebtedness of the State, forbade the issue of scrip under an act passed in 1872 to take up the State's guaranty of railroad bonds under an act passed in 1868 subsequent to the ratification of the constitution, notwithstanding that acts had been passed in 1852 and 1854 authorizing such guaranty, it appearing that the guaranty had not actually been endorsed on the bonds prior to the ratification of the constitution and that the act of 1868 was not an adjustment of an old debt but the granting of new aid to the railroad and the authorizing of an original issue of bonds.

THE facts are stated in the opinion.

Mr. William H. Lyles for plaintiff in error.

Mr. D. W. Robinson for defendant in error.

Mr. William Elliott, Jr., by leave of the court, filed a brief as *amicus curiæ*.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action to recover land, brought by Robinson, the defendant in error, a citizen and resident of North Carolina, against Lee, a citizen and resident of South Carolina, on the ground that Robinson had purchased the land at a tax sale.

The value of the land is alleged and found to be more than $2,000. The defense is that a tender was made of the amount of the taxes before the sale. This tender included, as a part of it, revenue bond scrip of the State of South Carolina for five dollars, purporting on its face to be receivable in payment of taxes, and the question is whether the tender was good, or, more precisely, whether the bond scrip was receivable for taxes under the Constitution of the United States and the constitution and laws of South Carolina. The Circuit Court held the tender bad, on the double ground that the issue of the scrip was in contravention of the constitution of the State and that the scrip was a bill of credit within the prohibition of Article 1, Section 10, of the Constitution of the United States. 122 Fed. Rep. 1012. Judgment was given for the plaintiff, Robinson, and this writ of error was brought, setting up that the contract rights of the defendant under the Constitution of the United States were impaired by the laws hereafter mentioned which excluded the reception of the scrip for the tax.

Counsel other than those representing the parties was permitted to file a brief as *amicus curiæ*, and urged that this was a collusive suit. But the Circuit Court held that it was not, 122 Fed. Rep. 1010, and we accept the finding for the purposes of disposing of the case.

The revenue bond scrip was issued under an act of March 2, 1872, entitled "An act to relieve the State of South Carolina of all liability for its guaranty of the bonds of the Blue Ridge Railroad Company, by providing for the securing and destruction of the same." This act purported to authorize the issue to the amount of $1,800,000, "which revenue bond scrip shall be signed by the state treasurer, and shall express that the sum mentioned therein is due by the State of South Carolina to the bearer thereof, and that the same will be received in payment of taxes and all other dues to the State, except special tax levied to pay interest on the public debt." But the Supreme Court of the State held that the scrip constituted bills of credit within the prohibition of the Constitution of the

United States, Article 1, Section 10. *State ex rel. Shives* v. *Comptroller General,* 4 S. Car. 185. The pledge of the State's credit and the provisions for the redemption of the scrip were repealed by the Legislature, and under the fiscal laws of the State the scrip had not been receivable for taxes since 1873.

We are of opinion that the issue of the scrip was forbidden by the constitution of the State. When the scrip was issued, the constitution of South Carolina, ratified on April 16, 1868, in Article IX, Section 10, provided as follows: "No scrip, certificate or other evidence of state indebtedness shall be issued except for the redemption of stocks, bonds, or other evidence of indebtedness previously issued, or for such debts as are expressly authorized in this constitution." There was also a further provision that "any debt contracted by the State shall be by loan on state bonds, of amounts not less than fifty dollars each, on interest payable within twenty years after the final passage of the law authorizing such debt."

The guaranty from which the scrip was to relieve the State was a guaranty of bonds of the Blue Ridge Railroad Company, which was endorsed upon them by authority of an act approved September 15, 1868. The State long had favored this road, and had held its stock. It had authorized the guaranty of bonds in 1852, and again in 1854 repealing the former act. But the act of 1868 recited that the Comptroller General of the State had not endorsed any of the bonds issued under the act of 1854, and that the conditions imposed upon such endorsement had become impossible and injudicious. So it might be assumed from the face of the statute of 1868 that there was no outstanding liability represented by the guaranty under that statute, and we see no ground for doubt that the guaranty must be considered as a new contract made for the first time, in substance as well as form, after the Constitution of 1868 went into effect.

The guaranty under the act of 1868 cannot be put under the head of "such debts as are expressly authorized in this Constitution," since it was not in the form required for debts

contracted under the constitution of 1868. We are of opinion that it equally little satisfies the other exception in Article IX, Section 10, quoted above, of a contract made for the redemption of an "evidence of indebtedness previously issued." Whether the word "previously" refers to the date of the constitution or to the date of issuing the guaranty, the guaranty of 1868 is not and does not purport to be made for the redemption of a previous evidence of debt.

It is argued that, whether there was a liability or not, the acts before 1868 having purported to pledge the credit of the State to secure the bonds of the railroad company, as they did, there was color of liability, and the act of 1868, or at any rate the act of 1872, authorizing the bond scrip, was the adjustment of a claim against the State under Article IX, Section 4, of the state constitution. But the act of 1868 did not purport to be an adjustment. On the contrary, it purported, as we have said, to give new aid to the railroad and to authorize an original issue. The act of 1872, again, dealt only with the supposed liability under the act of 1868, and provided for the satisfaction of that. If that liability did not exist the statute no more could ratify it than it could call it into being. The liability for which scrip could be issued was required by the constitution to be one existing before the issue was made. Moreover, the act of 1872 did not purport to be an adjustment of a matter in dispute or an adjustment in any sense. It simply assumed that there was an outstanding liability, and provided for the satisfaction of it. The question is not whether payment of the bond scrip would be valid, but whether the bond scrip was issued under the conditions which the state constitution imposed.

Judgment affirmed.

WETMORE *v.* MARKOE.

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

No. 56. Argued November 9, 10, 1904.—Decided December 19, 1904.

A husband owes the duty of supporting his wife and children not because of contractual relations with the wife but because of the policy of the law which will enforce the duty if necessary and the bankruptcy act was not intended to be a means of avoiding this obligation.

Arrears of alimony awarded to a wife against her husband for the support of herself and their minor children, under a final decree of absolute divorce, is not a provable debt barred by a discharge in bankruptcy, nor does the fact that there is no reservation in the decree of the right to alter or modify it deprive the debt of its character of being for the support of the bankrupt's wife and children.

The amendment of February 5, 1903, excepting decrees of alimony from the discharge in bankruptcy was not new legislation creating a presumption that such decrees were not excepted prior thereto, but was merely declaratory of the true meaning and sense of the statute as originally enacted.

On June 12, 1890, an action for divorce and alimony was begun by Annette B. W. Wetmore, wife of the plaintiff in error, in the Supreme Court of the State of New York, and on April 1, 1892, at special term, the plaintiff in error was found guilty of adultery as charged in the complaint, and a divorce was granted upon that ground to the defendant in error. The divorce was absolute, and awarded to the wife the custody and care of the three minor children of the marriage, and also, as alimony, the sum of $3,000 per annum so long as she should live, to be paid in quarterly instalments of $750 each on the first day of the months of July, October, January and April of each year. There was also granted to the wife the sum of $3,000 annually, being $1,000 for the education and maintenance of each of the three minor children, to be paid in quarterly instalments, until such children should arrive at the age of twenty-one years respectively. Plaintiff in error was also re-

quired to give security for the payment of the alimony awarded. The decree did not reserve any right of subsequent modification or amendment. On January 13, 1899, there was due to the wife from the plaintiff in error, for arrears in alimony and allowance under the decree, the sum of $19,221.60. Upon that day, upon application to the District Court of the United States for the Eastern District of Pennsylvania, the plaintiff in error was adjudicated a bankrupt. The defendant in error made no proof of her claim for alimony in the bankrupt proceedings. On June 21, 1900, the plaintiff in error was granted a discharge from all debts and claims provable under the bankruptcy act. On December 12, 1901, plaintiff in error sued out a writ in the Supreme Court of the State of New York for an order enjoining and restraining all proceedings on behalf of the defendant in error for the collection of the arrears of alimony and allowance aforesaid. This application was denied, upon the ground, as it appears from the memorandum of the judge who rendered the decision, that the arrears of alimony were not discharged in bankruptcy. From the order denying the application an appeal was taken by the plaintiff in error to the Appellate Division of the Supreme Court of the State of New York, where the order below was affirmed. 72 App. Div. N. Y. 620. The plaintiff in error thereupon appealed to the Court of Appeals of the State of New York, and on June 27, 1902, the appeal was dismissed for want of jurisdiction, without any judgment of affirmance or reversal upon the merits. 171 N. Y. 690. A writ of error was sued out seeking in this court a reversal of the judgment of the Supreme Court of the State of New York.

Mr. William A. Keener for plaintiff in error:

Under the statutes and decisions of the State of New York, the claim of the defendant in error for alimony and allowance was a fixed liability, evidenced by a judgment. The decree of divorce of April 1, 1892, containing no provision by virtue of which it may be modified, altered or amended, became an absolute obligation, beyond the power or control of either the

courts or the legislature to modify. *Walker* v. *Walker*, 155 N. Y. 77; *Livingston* v. *Livingston*, 173 N. Y. 377; § 1759 N. Y. Code of Civ. Pro., as it read in 1892.

So absolute is it that it is not affected by the marriage of the wife. *Shepherd* v. *Shepherd*, 1 Hun, 240; *S. C.*, affirmed 58 N. Y. 644. It is an obligation collectible by the levying of an execution. N. Y. Code Civ. Pro. § 1240; *Miller* v. *Miller*, 7 Hun, 208. She is regarded as a judgment creditor. *Wetmore* v. *Wetmore*, 149 N. Y. 520.

The arrears of alimony which accrued prior to January 13, 1899, were a provable debt within the provisions of the United States Bankruptcy Act, and were released by the discharge in bankruptcy granted to the plaintiff in error. *Re Houston*, 94 Fed. Rep. 119; *Re Van Orden*, 96 Fed. Rep. 86.

The cases on brief of defendant in error can be distinguished.

The remedy of plaintiff in error was properly sought in the court in which the judgment was entered. *Moore* v. *Upton*, 50 N. Y. 593; *Palmer* v. *Hussey*, 119 U. S. 96.

The Appellate Division of the Supreme Court is the highest court of the State of New York in which a decision could be had by the plaintiff in error. *Bacon* v. *Texas*, 163 U. S. 207; *Mo. Kan. & Tex.* v. *Elliott*, 184 U. S. 530.

The alimony awarded to the defendant in error was not given as compensation for a willful and malicious injury to her person or property. An action for divorce is not an action of tort. *Mangles* v. *Mangles*, 6 Mo. App. 481; *Erkenbrach* v. *Erkenbrach*, 96 N. Y. 456, 463; *Matter of Ensign*, 103 N. Y. 289.

Mr. Flamen B. Candler, with whom *Mr. William Jay* and *Mr. Robert W. Candler* were on the brief, for defendant in error:

Neither the claim for alimony nor for maintenance and education of the infant children was a debt provable in bankruptcy, and the discharge in bankruptcy did not relieve the plaintiff in error from payment of arrears of alimony or arrears for the maintenance and education of the infant children. *Audubon* v. *Shufeldt*, 181 U. S. 575; *Dunbar* v. *Dunbar*, 190

U. S. 340; *In re Nowell*, 99 Fed. Rep. 931; *In re Shepard*, 97 Fed. Rep. 187; *In re Anderson*, 97 Fed. Rep. 321; *Turner* v. *Turner*, 108 Fed. Rep. 785; *In re Lachemeyer*, 1 Nat. Bk. Rep. 270; *In re Garrett*, 11 Bk. Rep. 493; *Matter of Smith*, 3 Am. Bk. Rep. 68; *Maisner* v. *Maisner*, 62 App. Div. N. Y. 286; *Young* v. *Young*, 35 Misc. N. Y. 335; *Buckle* v. *Grell*, 65 N. Y. Supp. 522; Bishop on Marriage and Divorce, § 837; *Tinker* v. *Colwell*, 193 U. S. 473.

Under the law of New York alimony provided for by a decree of divorce is not regarded as a debt, or a fixed liability within the meaning of the Bankrupt Act, but as a legal determination of the duty owing from husband to wife. *Romaine* v. *Chauncey*, 129 N. Y. 566; *Wetmore* v. *Wetmore*, 79 Hun (N. Y.), 268; *S. C.*, affirmed 149 N. Y. 520; *Maisner* v. *Maisner*, 62 App. Div. N. Y. 286; Code Civ. Pro. N. Y. §§ 1759, 1772, 1773, 2286.

If the effect of a decree containing provisions for alimony and for support and maintenance of children is to be regarded as making the husband and father debtor to the wife and children for such amounts, even then the discharge in bankruptcy would not release the plaintiff in error from such obligation. *Colwell* v. *Tinker*, 169 N. Y. 531; 2 Bishop on Mar. & Div. 220; 15 Am. & Eng. Ency. of Law, 2d ed., 857.

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

It is conceded in argument by counsel for the plaintiff in error that this case would be within the decision of this court in *Audubon* v. *Shufeldt*, 181 U. S. 575, if the judgment for alimony had been rendered in a court having control over the decree with power to amend or alter the same. It is insisted, however, that there being in this case no reservation of the right to change or modify the decree, it has become an absolute judgment beyond the power of the court to alter or amend, and is therefore discharged by the bankruptcy proceedings.

Walker v. *Walker*, 155 N. Y. 77; *Livingtson* v. *Livingston*, 173 N. Y. 377. It may be admitted to be the effect of these decisions of the New York Court of Appeals that, in the absence of any reservation of the right to modify or amend, the judgment for alimony becomes absolute. The question presented for decision, in view of this state of the law, is, has the decree become a fixed liability evidenced by a judgment and therefore provable against the estate of the bankrupt, within the protection of the discharge in bankruptcy? Section 63 of the act of 1898 provides:

"SEC. 63. Debts which may be proved.—

"*a*. Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest."

It is not contended that this section includes instalments of alimony becoming due after the adjudication, but the contention is that prior instalments have become an existing liability evidenced by the judgment and therefore a provable debt. While this section enumerates under separate paragraphs the kind and character of claims to be proved and allowed in bankruptcy, the classification is only a means of describing "debts" of the bankrupt which may be proved and allowed against his estate.

The precise question, therefore, is, is such a judgment as the one here under consideration a *debt* within the meaning of the act? The mere fact that a judgment has been rendered does not prevent the court from looking into the proceedings with a view of determining the nature of the liability which has been reduced to judgment. *Boynton* v. *Ball*, 121 U. S. 457, 466. The question presented is not altogether new in this court. In the case of *Audubon* v. *Shufeldt*, *supra*, Mr. Justice Gray, delivering the opinion of the court, said:

"Alimony does not arise from any business transaction, but from the relation of marriage. It is not founded on contract, express or implied, but on the natural and legal duty of the husband to support the wife. The general obligation to support is made specific by the decree of the court of appropriate jurisdiction. Generally speaking, alimony may be altered by the court at any time, as the circumstances of the parties may require. The decree of a court of one State, indeed, for the present payment of a definite sum of money as alimony, is a record which is entitled to full faith and credit in another State, and may, therefore, be there enforced by suit. *Barber* v. *Barber*, (1858) 21 How. 382; *Lynde* v. *Lynde*, (1901) 181 U. S. 183. But its obligation in that respect does not affect its nature. In other respects, alimony cannot ordinarily be enforced by action at law, but only by application to the court which granted it, and subject to the discretion of that court. Permanent alimony is regarded rather as a portion of the husband's estate to which the wife is equitably entitled, than as strictly a debt; alimony from time to time may be regarded as a portion of his current income or earnings; and the considerations which affect either can be better weighed by the court having jurisdiction over the relation of husband and wife, than by a court of a different jurisdiction."

In the same opinion Mr. Justice Gray quoted from *Barclay* v. *Barclay*, 184 Illinois, 375, in which case it was adjudged that alimony could not be regarded as a debt owing from husband to wife, which might be discharged by an order in bankruptcy, whether the alimony accrued before or after the proceedings in bankruptcy:

"The liability to pay alimony is not founded upon a contract, but is a penalty imposed for a failure to perform a duty. It is not to be enforced by an action at law in the State where the decree is entered, but is to be enforced by such proceedings as the chancellor may determine and adopt for its enforcement. As heretofore shown, it may be enforced by imprisonment for contempt, without violating the constitutional provision pro-

hibiting imprisonment for debt. The decree for alimony may be changed from time to time by the chancellor, and there may be such circumstances as would authorize the chancellor to even change the amount to be paid by the husband, where he is in arrears in payments required under the decree. Hence such alimony cannot be regarded as a debt owing from the husband to the wife, and not being so, cannot be discharged by an order of the bankruptcy court."

It is true that in the cases referred to the decrees were rendered in courts having continuing control over them, with power to alter or amend them upon application, but this fact does not change the essential character of the liability nor determine whether a claim for alimony is in its nature contractual so as to make it a debt. The court having power to look behind the judgment, to determine the nature and extent of the liability, the obligation enforced is still of the same character notwithstanding the judgment. We think the reasoning of the *Audubon* case recognizes the doctrine that a decree awarding alimony to the wife or children, or both, is not a debt which has been put in the form of a judgment, but is rather a legal means of enforcing the obligation of the husband and father to support and maintain his wife and children. He owes this duty, not because of any contractual obligation or as a debt due from him to the wife, but because of the policy of the law which imposes the obligation upon the husband. The law interferes when the husband neglects or refuses to discharge this duty and enforces it against him by means of legal proceedings.

It is true that in the State of New York at the time this decree was rendered there was no power to modify or alter the decree for alimony and allowance in the absence of special reservation. But this does not change the grounds upon which the courts of the State proceeded in awarding the alimony and allowances. In the case of *Romaine* v. *Chauncey*, 129 N. Y. 566, it was held that alimony was awarded, not in the payment of a debt, but in the performance of the general duty of the

husband to support the wife. This case was quoted with approval by Mr. Justice Gray in *Audubon* v. *Shufeldt, supra.*

In *Walker* v. *Walker*, 155 N. Y. 77, and *Livingston* v. *Livingston*, 173 N. Y. 377, the effect of the holdings is that a judgment for alimony, in the absence of reservation, is a fixed and unalterable determination of the amount to be contributed to the wife's support after the decree, and is beyond the power of the court to change even under the authority of subsequent legislation. These cases do not modify the grounds upon which alimony is awarded, and recognize that an alimony decree is a provision for the support of the wife, settled and determined by the judgment of the court.

In the case of *Dunbar* v. *Dunbar*, decided by this court at the October term, 1902, 190 U. S. 340, it was held that a contract made after divorce between husband and wife, by which the former agreed to pay the latter a certain sum of money annually for her support during her life, or so long as she remained unmarried, and also to pay a certain sum of money to her annually for the support of the minor children of the marriage, whose custody was awarded to the mother, was not discharged by a subsequent proceeding and discharge in bankruptcy. It was further held that the sum agreed to be paid for the support of the minor children was but a recognition of the liability of the father for their support, and that the fact that the annual installments were made payable to the wife made no difference in the character of the obligation. Of this feature of the contract the court, speaking by Mr. Justice Peckham, said:

"In relation to that part of the husband's contract to pay for the support of his minor children until they respectively became of age, we also think that it was not of a nature to be proved in bankruptcy. At common law, a father is bound to support his legitimate children, and the obligation continues during their minority. We may assume this obligation to exist in all the States. In this case the decree of the court provided that the children should remain in the custody of

the wife, and the contract to contribute a certain sum yearly for the support of each child during his minority was simply a contract to do that which the law obliged him to do; that is, to support his minor children. The contract was a recognition of such liability on his part. We think it was not the intention of Congress, in passing a bankruptcy act, to provide for the release of the father from his obligation to support his children by his discharge in bankruptcy, and if not, then we see no reason why his contract to do that which the law obliged him to do should be discharged in that way. As his discharge would not in any event terminate his obligation to support his children during their minority, we see no reason why his written contract acknowledging such obligation and agreeing to pay a certain sum (which may be presumed to have been a reasonable one) in fulfillment thereof should be discharged. It is true his promise is to pay to the mother, but on this branch of the contract it is for the purpose of supporting his two minor children, and he simply makes her his agent for that purpose."

We think this language is equally applicable to the present case in that aspect of the decree which provides for the support of the minor children. The obligation continues after the discharge in bankruptcy as well as before, and is no more than the duty devolved by the law upon the husband to support his children, and is not a debt in any just sense.

It is urged that the amendment of the law made by the act of February 5, 1903, excepting from the operation of a discharge in bankruptcy a decree for alimony due or to become due, or for the maintenance and support of the wife and minor children, is a legislative recognition of the fact that, prior to the passage of the amendment, judgments for alimony would be discharged. In *Dunbar* v. *Dunbar*, 190 U. S. 340, cited *supra*, it was said that this amendment, while it did not apply to prior cases, may be referred to for the purpose of showing the legislative trend in the direction of not discharging an obligation of the bankrupt for the support and maintenance of wife and children. The amendment may also have been passed

with a view to settling the law upon this subject and to put at rest the controversies which had arisen from the conflicting decisions of the courts, both State and Federal, upon this question. Indeed, in view of the construction of the act in this court in *Audubon* v. *Shufeldt*, *supra*, it may be said to be merely declaratory of the true meaning and sense of the statute. *United States* v. *Freeman*, 3 How. 556; *Bailey* v. *Clark*, 21 Wall. 284, 288; *Cope* v. *Cope*, 137 U. S. 682, 688. The bankruptcy law should receive such an interpretation as will effectuate its beneficent purposes and not make it an instrument to deprive dependent wife and children of the support and maintenance due them from the husband and father, which it has ever been the purpose of the law to enforce. Systems of bankruptcy are designed to relieve the honest debtor from the weight of indebtedness which has become oppressive and to permit him to have a fresh start in business or commercial life, freed from the obligation and responsibilities which may have resulted from business misfortunes. Unless positively required by direct enactment the courts should not presume a design upon the part of Congress in relieving the unfortunate debtor to make the law a means of avoiding enforcement of the obligation, moral and legal, devolved upon the husband to support his wife and to maintain and educate his children. While it is true in this case the obligation has become fixed by an unalterable decree, so far as the amount to be contributed by the husband for the support is concerned, looking beneath the judgment for the foundation upon which it rests we find it was not decreed for any debt of the bankrupt, but was only a means designed by the law for carrying into effect and making available to the wife and children the right which the law gives them as against the husband and father.

We find no error in the judgment of the Supreme Court of the State of New York, and the same is

Affirmed.

HARDING *v.* ILLINOIS.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 61. Submitted November 10, 1904. Decided December 19, 1904.

This court has no general power to review or correct the decisions of the highest state court and in cases of this kind exercises a statutory jurisdiction to protect alleged violations, in state decisions, of certain rights arising under Federal authority; and if the question is not properly reserved in the state court the deficiency cannot be supplied in either the petition for rehearing after judgment or the assignment of errors in this court, or by the certification of the briefs which are not a part of the record by the clerk of the state Supreme Court.

This court will not reverse the judgment of a state court holding an alleged Federal constitutional objection waived, where the record discloses that no authority was cited or argument advanced in its support and it is clear that the decision was based upon other than Federal grounds and the constitutional question was not decided.

THE facts are stated in the opinion.

Mr. William H. Barnum for plaintiff in error:

The prohibitions of the Fourteenth Amendment refer to all the instrumentalities of the State, to its judicial as well as to its executive and legislative authorities. *Chicago, Burlington & Quincy R. R. Co.* v. *Chicago*, 166 U. S. 226, 233; *Ex parte Virginia*, 100 U. S. 339, 346; *Yick Wo* v. *Hopkins*, 118 U. S. 356.

It is sufficient if it appears from the record that a right claimed under the Federal Constitution was specially set up or claimed in the state court in such manner as to bring it to the attention of the court. The right may be asserted by pleadings, or on motion to set aside verdict and grant a new trial, stating, as grounds therefor, that the several rulings of the court in excluding proper evidence for the defendant, the statute under which the proceedings were instituted, the verdict and the judgment based upon it were all contrary to the

constitutional provisions of the Fourteenth Amendment and when the trial court overruled the motion for new trial, on such grounds and entered judgment, it necessarily held adversely to the claims of Federal rights designated in said stated grounds. *Chicago, Burlington & Quincy R. R. Co.* v. *Chicago*, 166 U. S. 231.

Due process of law implies the right of the person affected, not only to be present before the tribunal which pronounces judgment, but also to be heard by testimony in proof of any fact which would be a protection to him and his property, and to have the right of controverting, by proof, every material fact which bears on the question of right in the matter involved. The law of the land requires an opportunity for trial; and there can be no trial if only one party is suffered to produce his proofs. Cooley Const. Lim. 368, 369; *Zeigler* v. *South &c. Ala. Ry. Co.*, 58 Alabama, 594; *Calhoun* v. *Fletcher*, 63 Alabama, 574; *State* v. *Billings*, 55 Minnesota, 475; *Hovey* v. *Elliott*, 167 U. S. 414; *Windsor* v. *McVeigh*, 93 U. S. 274; *McVeigh* v. *United States*, 11 Wall. 267.

Plaintiff in error is deprived of his property without due process of law by the judgment in this case, because he was denied the right to prove by evidence offered in rebuttal that he never reacquired, owned, was interested in, or possessed of, the property involved after he conveyed it away by the deed of June, 1896.

As there was no averment in the declaration, nor any evidence whatever that plaintiff in error owned the property in any year from 1879 to 1896, or that it was assessed in his name during any one of those seventeen years, and as it was proved by the record that forfeitures covering those years make up all of the judgment affirmed, except about $125 of taxes of 1890, not due when this suit was begun, the entry and affirmance of the judgment without pleadings or proofs are severally denials of due process of law whereby plaintiff in error is deprived of his property in violation of the several provisions of the Fourteenth Amendment.

Any act of the legislature or action of the courts which arbitrarily takes away the property of A and gives it to B, or makes one person liable for the debts or acts of another, deprives him of due process of law. *Camp* v. *Rogers*, 44 Connecticut, 291; *Loan Association* v. *Topeka*, 20 Wall. 663; *C., B. & Q. R. R. Co.* v. *Chicago*, 166 U. S. 237.

The only persons personally liable under section 230 for taxes assessed from 1879 to 1896, were those owning the property in those several years at the times of such assessments. *Biggins* v. *The People*, 96 Illinois, 381; *The People* v. *Winkelman*, 95 Illinois, 412; *Greenwood* v. *Town of La Salle*, 137 Illinois, 230; § 230, ch. 120, Rev. Stat. Illinois, 3 Starr & Curtis Stat., 3501, 3502; §§ 58 and 59 of same chapter, 3 Starr & Curtis Stat. 3425, 3426.

The judgment therefore makes the plaintiff in error liable for the debts and neglects of other persons. The rights of plaintiff in error under the provisions of the Fourteenth Amendment are violated by the judgment as entered and affirmed, and by § 230, as construed, administered and enforced thereby.

The action of the state court in basing its decision, opinion and judgment upon an issue and point in no way raised or hinted at in the pleadings or the proof or in the contentions of the parties, namely, that the general deed of June 10, 1896, was colorable and dishonest, deprived plaintiff in error of all right and opportunity to be heard in pleadings and proof on such issue and was a taking of his property without due process of law in violation of his constitutional rights.

This action of the state court, while at the same time ignoring or sanctioning the rejection by the trial court of the repeated offers of plaintiff in error to prove upon the trial that he had not reacquired any right, title, interest or possession of the property after making the deed and holding him liable for taxes assessed against the same and forfeitures thereon during the years 1897–1900, when he is shown to have had no interest in the lot, was a deprivation without due process of

law of his rights secured to him by the Fourteenth Amendment.

As the making and delivery of the deed were duly proved and undisputed, and its validity and effect as a conveyance were upheld by the trial court, and as no issue was presented relating to its character or effect, the decision of the state court adjudging that the deed was merely colorable, not made for an honest purpose and invalid and inoperative as a conveyance of title, was and is a taking of property without due process of law.

The deed to the Chicago Real Estate, Loan & Trust Company carried to the grantee all title and interest of plaintiff in error in or to the lot. *Frey* v. *Clifford*, 44 California, 335; *Pettigrew* v. *Dobblaur*, 63 California, 396; *Field* v. *Huston*, 21 Maine, 8; *Bird* v. *Bird*, 40 Maine, 398; *Fitzgerald* v. *Libby*, 142 Massachusetts, 235; 7 N. E. Rep. 917; *Harmon* v. *James*, 15 Mississippi (7 Smedes & M.), 111; 45 Am. Dec. 296; *First National Bank* v. *Hughes*, 10 Mo. App. 7; *Brown* v. *Warren*, 16 Nevada, 228; *Brown* v. *Wood*, 6 Rich. Eq. 155; *Sally* v. *Gunter*, 13 Rich. Law, 72; *Harvey* v. *Edens*, 69 Texas, 420; *Smith* v. *Westall*, 76 Texas, 509; *Brigham* v. *Thompson*, 12 Tex. Civ. App. 562; *Barnes* v. *Bartlett*, 47 Indiana, 98; *Patterson* v. *Snell*, 67 Maine, 559; *Stewart* v. *Cage*, 59 Mississippi, 558; *Barton's Lessee* v. *Morris' Heirs*, 15 Ohio, 408.

The Supreme Court of Illinois erred in its opinion and judgment that the point in relation to the constitutionality of the statute had been waived by plaintiff in error, and was clearly mistaken as to the supposed facts recited in its opinion as tending to prove ownership in defendant subsequent to the date of the deed. The items in the tax warrant for 1897 on this lot were not charged to defendant and merged into a judgment. No judgment is shown by the record either against the lot or against him as owner. He did not appear and object to the tax as owner and it was error and denial of due process of law to refuse, as the trial court did, to allow him and his witnesses to prove that he did not.

Mr. Robert S. Iles for defendant in error.

Mr. Justice Day delivered the opinion of the court.

This case was submitted on briefs, together with motion to dismiss or affirm. In support of the motion to dismiss the position taken is that no Federal question was properly raised in the state court, and therefore none is reviewable here.

The case was commenced in the Circuit Court of Cook County, Illinois, to recover taxes for the years 1897, 1898, 1899 and 1900, on a block of land in the Elston Addition to the city of Chicago. At the trial a jury was waived and, upon hearing, a judgment was rendered in favor of the plaintiff for the sum of $2,123.05. An inspection of the record shows that the principal controversy was over the effect of a deed made by Harding, the plaintiff in error, to the Chicago Real Estate Loan and Trust Company, dated June 10, 1896, and recorded July 2 of the same year, which conveyed, for the consideration of five dollars, "all interest in the following described real estate to wit: Any and all lands, of every kind and description, claimed or owned by me in the State of Illinois, and all lots and lands, of every description, in the city of Chicago, in which I have any right, title or interest whatsoever, situated in the State of Illinois," etc. It was the contention of the State that this deed was too general in its terms to convey specific property, and was therefore insufficient notice to the taxing officer of Cook County that the ownership of the property had changed. The trial court admitted this deed in evidence subject to this objection. Upon appeal to the Supreme Court of Illinois, of this deed and other evidence in the case that court said:

"Conceding that the deed, if it stood alone, would overcome the *prima facie* case made by the plaintiff, the tax records of Cook County for the year 1898, offered in evidence by the People, tended to prove ownership in the defendant. The items in the tax warrant for the year 1897 on this property were charged to him and merged into a judgment. He ap-

peared in the county court and objected to the validity of the tax, but the judgment was rendered against him as owner. This was subsequent to the date of the deed. His remedy as to that tax, if levied unjustly against him, was by appeal. *Biggins* v. *People*, 106 Illinois, 270. As to that tax he clearly could not, in this proceeding, attack the validity of the former judgment. Moreover, after the date of the deed he received the rents accruing from the property and deposited the money so received to his personal account. Notwithstanding the attempted explanation of that transaction, we think the weight of the evidence is that he continued, after the pretended conveyance, to deal with the premises as his own.

"In the light of all the evidence in the case it is very clear that the conveyance of June 10, 1896, was merely colorable, and not executed with the honest purpose of conveying the absolute ownership of the property to the grantee." 202 Illinois, 122.

Much of the elaborate brief of the counsel for plaintiff in error is devoted to a discussion of alleged errors of the Supreme Court of Illinois in deciding questions which it is alleged were not properly made or in failing to give due weight to matters of evidence in the record. This court has no general power to review or correct the decisions of the highest state court, and in cases of this character exercises a statutory jurisdiction to protect alleged violations, in state decisions, of certain rights arising under Federal authority. *Central Land Co.* v. *Laidley*, 159 U. S. 103; *Marchant* v. *Pennsylvania R. R. Co.*, 153 U. S. 380.

The proceeding was brought under section 230, chapter 120, 3 Starr & Cur. Stat. of Illinois, 3501. This section provides:

"In any such suit or trial for forfeited taxes, the fact that real estate or personal property is assessed to a person, firm or corporation, shall be *prima facie* evidence that such person, firm or corporation was the owner thereof, and liable for the taxes for the year or years for which the assessment was made. and such fact may be proved by the introduction in evidence

of the proper assessment book or roll, or other competent proof."

It is the contention of the plaintiff in error in this court that this statute is unconstitutional, permitting assessment of those who may not be the owners of the property assessed, and consequently a violation of the protection guaranteed by the Fourteenth Amendment to the Constitution of the United States. The adverse holding in the state court upon this proposition is the decision upon a Federal right which, it is asserted, gives jurisdiction to review the judgment in this court. The motion to dismiss raises the question whether this objection was properly reserved in the state court. Upon the constitutionality of this act the Supreme Court of Illinois said:

"It is also said that the foregoing section of the statute, under which the action is brought, is unconstitutional, but no authorities are cited or argument advanced in support of that assertion. The point, if it can be so considered, has therefore been waived."

In the petition for allowance of a writ of error, and the assignment of errors in this court, it is alleged that the Supreme Court of the State erred in holding that the constitutional objection had been waived. And the plaintiff in error appears to have put upon file here without leave the briefs and petition for rehearing below, in which it is insisted there is sufficient to show that the constitutional objection was not abandoned. But neither the petition for a rehearing or petition for writ of error in the state court after judgment, or assignments of error in this court, can supply deficiencies in the record of the state court, if any exist. *Simmerman* v. *Nebraska*, 116 U. S. 54. Nor does the certification of the briefs by the clerk of the state supreme court, which are no part of the record, help the matter. *Zadig* v. *Baldwin*, 166 U. S. 485. We are to try the case upon the duly certified record, legally made in the state court, and upon which its decision rests. *Powell* v. *Brunswick County*, 150 U. S. 433, 439.

An examination of the record discloses that the assignment

of errors in the Supreme Court of Illinois does not directly raise the point under consideration. It is referred to in the following language of the assignment of errors:

"The finding and judgment of the court were erroneous for the several reasons stated in the points filed in support of the motion to set aside the finding and grant a new trial."

If we may look to the motion filed in the trial court we find some thirty points assigned as grounds for a new trial. Those which may have application to Federal constitutional questions are found in paragraphs 26 and 27, which are:

"26. The statute under which this action is prosecuted is contrary to the Constitution of the United States.

"27. This proceeding under said statute is a taking of property without due process of law and otherwise unconstitutional."

The assertion that a judgment rests upon an unconstitutional state statute, the validity of which has been drawn in question and sustained, presents one of a class of cases which may be reviewed here. In the analysis of section 709 of the Revised Statutes of the United States, in *Columbia Water Power Co.* v. *Columbia Street Railway &c. Co.*, 172 U. S. 475, 488, it was pointed out that cases of the character of the one now under consideration come within the second class of those provided for in the section: "Where is drawn in question the validity of a statute of, or an authority exercised under, any State on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity."

It has been frequently held that in cases coming within this class less particularity is required in asserting the Federal right than in cases in the third class, wherein a right, title, privilege or immunity is claimed under the United States, and the decision is against such right, title, privilege or immunity. In the latter class the statute requires such right or privilege to be "specially set up and claimed." Under the second class it may be said to be the result of the rulings in this court that if

the Federal question appears in the record in the state court and was decided, or the decision thereof was necessarily involved in the case, the fact that it was not specially set up will not preclude the right of review here. *Columbia Water Power Co.* v. *Columbia Street Railway &c. Co.*, 172 U. S. 475, and cases cited on p. 488. Nevertheless, it is equally well settled that the right of review, dependent upon the adverse decision of a Federal question, exists only in those cases wherein a decision of the question involved was brought in some proper manner to the attention of the court and decided, or it appears that the judgment rendered could not have been given without deciding it. *Fowler* v. *Lamson*, 164 U. S. 252; *Clarke* v. *McDade*, 165 U. S. 168, 172. In one of the latest utterances of this court upon the question under consideration, *Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238, 248, Mr. Justice White, delivering the opinion of the court, said:

"It is well settled that this court, on error to a state court, cannot consider an alleged Federal question, when it appears that the Federal right thus relied upon had not been by adequate specification called to the attention of the state court and had not been by it considered, not being necessarily involved in the determination of the cause. *Green Bay & Miss. Canal Co.* v. *Patten Paper Co.*, 172 U. S. 52, 67; *Oxley Stave Co.* v. *Butler Co.*, 166 U. S. 648, 654, 655, and cases cited. Now, the only possible support to the claim that a Federal question on the subject under consideration was raised below, was the general statement in the answer to which we have already adverted, that 'this proceeding is in violation of the Constitution of the United States.' Nowhere does it appear that at any time was any specification made as to the particular clause of the Constitution relied upon to establish that the granting of relief by *quo warranto* would be repugnant to that Constitution, nor is there anything in the record which could give rise even to a remote inference that the mind of the state court was directed to or considered this question. On the contrary, it is apparent from the record that such a contention was not

raised in the state court. Thus, although at the request of the defendant below, the plaintiff in error here, the state court certified as to the existence of the Federal questions which had been called to its attention and which it had decided, no reference was made in the certificate to the claim of Federal right we are now considering."

The only authority called to the attention of this court by counsel for plaintiff in error as supporting the view that a Federal question was properly raised in this case is *Chicago, Burlington & Quincy R. R. Co.* v. *Chicago*, 166 U. S. 226, in which case it was contended that a statute of the State of Illinois, under which condemnation proceedings were had, was in violation of the Fourteenth Amendment to the Constitution of the United States. In that case it was distinctly asserted, in the motion for a new trial in the trial court, that the statute and rulings of the court and the verdict and judgment based thereon were contrary to the Fourteenth Amendment, declaring that no State should deprive any person of life, liberty or property without due process of law nor deny to any person within its limits the equal protection of the laws. In the assignment of errors in the Supreme Court of the State it was distinctly reasserted that these Federal rights had been denied by the proceedings in the trial court, and it was held in this court that while the Supreme Court of Illinois did not in its opinion expressly refer to the Federal constitutional rights asserted, the same were necessarily included in the judgment of the court and therefore the case was reviewable here. But how stands the present case? It is distinctly stated by the Supreme Court of Illinois (whose judgment is alone reviewable here), in the passage above quoted from its opinion, that no authorities were cited nor argument advanced in support of the assertion that the statute was unconstitutional, and that the point, if it could otherwise be considered, was deemed to be waived. If we look to the motion for a new trial, referred to in general terms in the assignment of errors when the case was taken to the Supreme Court of Illinois, we find the only

reference to a Federal constitutional question to be in paragraphs 26 and 27, above quoted from the motion for new trial in the court of original jurisdiction. Paragraph 26 simply states that the statute is contrary to the Constitution of the United States, without calling attention to the provision of that instrument whose protection is denied to the plaintiff in error, and is clearly insufficient. *Farney* v. *Towle*, 1 Black, 350. Paragraph 27 alleges that the statute takes the property without due process of law, and is therefore unconstitutional. If this vague objection (§ 27) may be taken as asserting a claim of right under the Federal Constitution, yet in the Supreme Court of Illinois, so far as the record discloses, there was neither authority cited nor argument advanced in support of the constitutional objection. There is nothing to prevent a party from waiving a Federal right of this character if he chooses to do so, either in express terms or as a necessary implication from his manner of proceeding in the cause. It is clear from the opinion cited that the state court based its decision upon other than Federal grounds and did not decide the constitutional question sought to be made here.

If the question was necessarily decided, notwithstanding the failure or refusal of the state court to expressly and in terms pass upon the matter, the case might be brought here. But in this case the state court expressly disclaims decision of the constitutional question, because it was not presented by proper proceedings. Our view of this record is that in so holding the state court did not err to the prejudice of the plaintiff in error.

Writ of error dismissed.

COURTNEY *v.* PRADT.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

No. 93. Argued December 9, 1904.—Decided January 3, 1905.

Under § 5 of the judiciary act of March 3, 1891, the question of jurisdiction to be certified is the jurisdiction of the Circuit Court as a court of the United States and not in respect of its general authority as a judicial tribunal.

The certificate of the lower court is an absolute prerequisite to the exercise of power here unless the record clearly and unequivocally shows that the court sends up for consideration the single and definite question of its jurisdiction as a court of the United States.

When a case has been removed into the Circuit Court of the United States on the ground of diversity of citizenship, that court is entitled to pass on all questions arising, including the question of jurisdiction over the subject matter in the state courts or the sufficiency of mesne process to authorize the recovery of personal judgment.

The right to remove for diversity of citizenship, as given by a constitutional act of Congress, cannot be taken away or abridged by state statutes and the case being removed the Circuit Court has power to so deal with the controversy that the party will lose nothing by his choice of tribunals.

MERRIT B. ATWATER, a citizen of Wisconsin, and William C. Atwater, a citizen of Illinois, were partners, and in 1898 Merrit B. died testate, having appointed Louis A. Pradt, likewise a citizen of Wisconsin, his executor. The will was duly admitted to probate in Wisconsin, and Pradt duly qualified as executor, and has been and is acting as such. William C. Atwater was one of the legatees under the will.

The Atwater Land and Lumber Company was a corporation of Wisconsin, engaged in buying, owning, holding and selling real estate in Kentucky, and Merrit B. Atwater, at the time of his death, owned stock in that corporation, on which a dividend was declared August 30, 1901, which amounted to $4,757.37. W. C. Atwater was not a stockholder at the time of the declaration of the dividend, and had not been since 1893.

Courtney, a citizen of Kentucky, brought suit in the Circuit Court of Powell County, Kentucky, against Pradt, executor, and William C. Atwater, and procured a general order of attachment, under which the sheriff summoned the company to answer as garnishee by delivery of a copy of the attachment to the person designated by the company as its agent upon whom process could be executed, as required by the statutes of Kentucky in that behalf. There was no personal service on Pradt, executor, or on William C. Atwater, but a warning order was entered pursuant to statute.

Pradt, as executor, and William C. Atwater, filed their petition and bond in the state court for the removal of the cause to the Circuit Court of the United States for the Eastern District of Kentucky on the ground of diversity of citizenship, and it was removed accordingly. Pradt, executor, and William C. Atwater, entering their appearance in the Circuit Court for that purpose only, moved the court to dismiss the case "for want of jurisdiction to try same." On the same day, Pradt, executor, filed a special demurrer, assigning as causes, *inter alia*, that the court had no jurisdiction of the person, or of the subject matter. And on that day plaintiff moved to remand, no reasons being given. The Circuit Court overruled the motion to remand, sustained the motion to dismiss and the demurrer, and entered judgment dismissing the suit for want of jurisdiction. Two opinions were delivered, because further argument was permitted, and both are in the record. No certificate of the question of jurisdiction was applied for or granted; but an appeal was allowed to this court, which was argued in due course, together with a motion to dismiss.

Mr. William Bullitt Dixon and *Mr. Alexander Pope Humphrey* for appellant.

Mr. Neal Brown and *Mr. Louis A. Pradt,* with whom *Mr. Edwin C. Brandenburg* and *Mr. R. D. Hill* were on the brief, for appellees.

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

It appears from the opinions of the Circuit Court, to which we properly may refer, *Loeb* v. *Trustees*, 179 U. S. 472, that the court held that the state court had no jurisdiction so far as William C. Atwater was concerned unless it had jurisdiction as against the foreign executor of his deceased partner; that the suit must be treated as if against the foreign executor alone; and that it could not be maintained against the foreign executor in the state court, nor in the Federal court. And further that the court was not bound to remand the case that the state court might determine that question.

The appeal was taken directly to this court, and cannot be maintained unless the case comes within the first of the classes named in section five of the judiciary act of March 3, 1891, which gives an appeal or writ of error direct "in any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision."

It is settled that the question of jurisdiction thus to be certified is the jurisdiction of the Circuit Court as a court of the United States, and not in respect of its general authority as a judicial tribunal. *Blythe* v. *Hinckley*, 173 U. S. 501; *Mexican Central Railway Company* v. *Eckman*, 187 U. S. 429; *Louisville Trust Company* v. *Knott*, 191 U. S. 225; *Bache* v. *Hunt*, 193 U. S. 523.

And the general rule is that the certificate is an absolute prerequisite to the exercise of jurisdiction here. *Maynard* v. *Hecht*, 151 U. S. 324. Although we have recognized exceptions to this rule when the explicit terms of the decree, or even of the order allowing the appeal, might properly be considered as equivalent to the formal certificate. *Huntington* v. *Laidley*, 176 U. S. 668; *Arkansas* v. *Schlierholz*, 179 U. S. 598.

But, as said by Mr. Justice Gray in *Huntington* v. *Laidley*,

"the record must distinctly and unequivocally show that the court below sends up for consideration a single and definite question of jurisdiction," that is, of the jurisdiction of the court as a court of the United States.

No such state of case is exhibited by this record. There is no certificate nor any equivalent therefor. No single and definite issue as to the jurisdiction of the Circuit Court as a Federal court is presented.

The case was dismissed for want of jurisdiction over it, as a suit against a foreign executor, in the courts of Kentucky. The court had power to so adjudicate. When a case has been removed into the Circuit Court on the ground of diversity of citizenship, that court is entitled to pass on all questions arising, including the question of jurisdiction over the subject matter in the state courts; or the sufficiency of the service of mesne process to authorize the recovery of personal judgment. *Goldey* v. *Morning News,* 156 U. S. 518; *Wabash Western Railway Company* v. *Brow,* 164 U. S. 271; *De Lima* v. *Bidwell,* 182 U. S. 1; *Conley* v. *Mathieson Alkali Works,* 190 U. S. 406. It is true that in this case a motion to remand was made, but there was nothing to indicate that it rested on the contention that there was a lack of jurisdiction in the Federal courts as contradistinguished from the state courts. It did not in terms put in issue the power of the Circuit Court as a court of the United States to hear and determine the case, and we cannot be called on to say that there may not have been other grounds for the motion, or to attempt to eliminate every other ground for the purpose of bringing the case within the first clause of section five.

We do not regard the objection now urged that the suit was in equity, and as such not cognizable by the Circuit Court, as open to consideration on this record by direct appeal, but if it were, it is unavailing on the question of power.

The principal action was an action at law. If under existing statutes of Kentucky the process of attachment or garnishment against non-residents was equitable in form, as is con-

tended, this could not cut off the right of removal where diversity of citizenship existed. The right to remove given by a constitutional act of Congress cannot be taken away or abridged by state statutes, and the case being removed, the Circuit Court had power to so deal with the controversy that the party could lose nothing by his choice of tribunals. *Cowley* v. *Northern Pacific Railroad Company*, 159 U. S. 569. In our opinion the appeal was improvidently prosecuted directly to this court, and it must, therefore, be

Dismissed.

SMALLEY *v.* LAUGENOUR.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 97. Submitted November 28, 1904.—Decided January 3, 1905.

The rights of a bankrupt to exempt property are those given by the statutes of the States, and if such exempt property is not subject to levy and sale under those statutes, it cannot be made to respond under the Federal bankrupt act.

A creditor may contest the bankrupt's claim to exemption in the bankruptcy court, or may invoke the supervision and revision of the Circuit Court of Appeals, but, failing to do that, cannot, unless the order setting the bankrupt's exemption apart be absolutely void, question its validity in another proceeding in the state court.

Nor can the judgment of the state court following the order of the bankruptcy court and giving effect to the exemption be reviewed by this court on writ of error under § 709, Rev. Stat., on the ground that plaintiff in error was denied a title, right, privilege or immunity, under the Constitution or authority of the United States specially set up or claimed in the state court.

THIS was an action of ejectment commenced in the Superior Court of Lincoln County, Washington, by A. F. Smalley and F. McLellan against George F. Laugenour and Jane Laugenour (with two others, who subsequently ceased to be parties) to recover possession of certain real estate situated in that county.

The action was tried by the court without a jury, which filed findings of fact and conclusions of law, and rendered judgment for plaintiffs, whereupon defendants Laugenour carried the case by appeal to the Supreme Court of Washington. The judgment was there reversed and the cause remanded with directions to enter judgment for appellants, defendants below. 30 Washington, 307. This writ of error was then brought.

The facts were stated by that court in brief as follows:

"The appellants are husband and wife, and acquired the land in controversy as early as the year 1885. On March 16, 1895, the respondents and one L. J. Hutchings, as partners, recovered a judgment in the Superior Court of Lincoln County on a community debt against the appellant, Geo. F. Laugenour, for the sum of $363.45. On April 12, 1899, execution was issued on the judgment and levied on the land mentioned, under which, after due advertisement, it was sold at public auction to the respondents for the sum of $532.15, being the amount then due on the judgment. Thereafter the sale was confirmed by the court, and, after the time for redemption had expired, a sheriff's deed was executed and delivered to the purchasers, which they caused to be recorded. On May 10, 1899,—three days before the execution sale took place,—the appellant, Geo. F. Laugenour, filed in the United States District Court for the District of Washington his voluntary petition in bankruptcy, in the schedule to which he listed the land in controversy, claiming the same as exempt under the bankruptcy act. On May 11, 1899, the referee in bankruptcy, to whom the proceedings had been referred, adjudged the petitioner a bankrupt, and thereupon gave to the creditors of the bankrupt, shown in the schedule attached to the petition, among whom were the respondents, the formal notice required by the bankruptcy act, notifying them of the adjudication of bankruptcy, of the time and place fixed for the first meeting of the creditors, that they might attend at such meeting, prove their claims, examine the bankrupt, and transact such other business as should properly come before the

meeting. None of the creditors appeared at the time fixed for the meeting, viz., June 5, 1899, and no trustee was elected or appointed; the referee finding that no necessity existed therefor. On August 9, 1899, the bankruptcy court entered an order discharging the bankrupt from all debts and claims made provable against the bankrupt's estate; and on August 12 'regularly made an order in said bankruptcy proceedings setting aside to said bankrupt as exempt under the act of Congress relating to bankruptcy, the real estate hereinbefore described, and awarding said real estate to the said bankrupt.' The court further found that since the execution sale the appellants had been in possession of the real estate, claiming to be the owners of the same; and for several years last past had resided in Spokane County, Washington, and that the real property, during the time, had been occupied by the defendant, Harry Gilliland, as their tenant. On the facts so found it ruled that the respondents were the owners and entitled to the possession of the premises, and entered judgment accordingly."

Mr. C. S. Voorhees, Mr. Reese H. Voorhees, Mr. H. A. P. Myers and *Mr. W. T. Warren* for plaintiffs in error.

Mr. W. C. Keegin, Mr. Herman D. Williams and *Mr. James A. Williams* for defendants in error.

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

The state Supreme Court, after calling attention to the statute of the State permitting a head of a family to select from his or her real property a homestead of limited value, and exempting it from the liens of general judgments and from execution or forced sale thereunder, Ballinger's Code, § 5214 *et seq.*, and to previous rulings of the court that the selection might be made at any time before sale, *Wiss* v. *Stewart*, 16 Washington, 376, and that an execution sale thereof after such selection was ineffectual to pass title to the purchaser, *Wiss* v.

Stewart; Asher v. *Sekofsky*, 10 Washington, 379, said: "If, therefore, the property in question was exempt from execution at the time the sale was made under the execution issued on the respondents' judgment, the respondents acquired no title thereto by their purchase at the execution sale, and consequently have no title on which they can maintain the present action."

And the court held that the order of the District Judge of the United States for the District of Washington, sitting in bankruptcy, awarding the property to Laugenour as property exempt from the claims of his creditors, and which related back to the time of the filing of the petition in bankruptcy, which was prior to the date of the attempted sale, was a judgment conclusive as between the parties that the property was so exempt at that date.

The state court was of opinion that Laugenour and his wife might have pleaded and proved facts showing that the property was exempt from execution at the time of the sale, making the issue directly in the state court, but, as they chose to rely on the principle of *res judicata*, that is, on the adjudication by the bankruptcy court, having jurisdiction of person and estate, in a proceeding in bankruptcy in which the judgment of Smalley and McLellan was provable, the court gave due force and effect to that adjudication.

The jurisdiction of this court to review the final judgments and decrees of a state court rests on section 709 of the Revised Statutes, and in this instance must be derived from the third division of that section, if it exist at all. And on the face of this record we cannot find that plaintiffs in error specially set up or claimed any title, right, privilege or immunity under the Constitution, or any statute of or authority exercised under the United States, which was decided against by the state court. What seems to be complained of is that the state Supreme Court accepted the judgment of the Federal bankruptcy court as having been rendered in the exercise of the jurisdiction with which it was vested.

Plaintiffs in error were notified of the proceedings in bankruptcy, as provided by the bankruptcy act, and, if they had desired to contest the claim to exemption, they might have done so, or could have invoked the supervision and revision of the order by the Circuit Court of Appeals, but they did not do that, and could not question its validity in the state courts, unless, indeed, it were absolutely void, which is not and could not be pretended.

The bankruptcy court is expressly vested with jurisdiction "to determine all claims of bankrupts to their exemptions." § 2, cl. 11. Where there is a trustee he sets apart the exemptions, and reports thereon to the court, § 47, cl. 11; where no trustee has been appointed, under general order XV, the court acts in the first instance.

Section 6 of the bankruptcy act provided: "This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the State wherein they had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition."

The rights of a bankrupt to property as exempt are those given him by the state statutes, and if such exempt property is not subject to levy and sale under those statutes, then it cannot be made to respond under the act of Congress.

In one of the parargaphs of the reply of plaintiffs in error (plaintiffs in the court of original jurisdiction) to the answer of defendants it was asserted that on the day their judgment was recovered Laugenour and his wife were the owners of the real estate in question, and the judgment became a lien thereon, and that "said lien, which culminated in the aforesaid sale of real estate to plaintiffs, was obtained and created pursuant to said suit, and more than four months prior to the filing of the alleged petition in bankruptcy;" and it is argued that this amounted to a special assertion of an immunity under the bankruptcy act. But immunity from what? Nothing more, at the best, than immunity from the discharge in bankruptcy;

not from the exemptions authorized by the state statute. And so Fullerton, J., speaking for the state Supreme Court, said: "Lastly, it is said that the order of the court setting apart the property as exempt does not purport to, nor does it in law, affect existing liens upon the property set apart as exempt, and, unless the liens thereon be such as the law avoids of its own force, such liens may be enforced in the state court against and to the extent of the property affected by the lien, notwithstanding the order setting it apart as exempt, and the discharge of the debt in bankruptcy. In cases of liens which can exist independent of the question whether or not the property is exempt, undoubtedly the rule here invoked would be applicable; but the lien of a general judgment is not such a lien. It is a lien upon real property, only, which is not exempt. Hence if this property was exempt at the time of the filing of the petition in bankruptcy, the judgment under which it was sold was not a lien thereon, and to assume that the judgment was a lien is to assume that it was not exempt,—the very question at issue."

We are not able to perceive that the state Supreme Court denied in any way a right of plaintiffs in error specially set up or claimed under the Constitution or laws of the United States. All that was determined, and all that the state court was called on to determine, was the question of exemption under the state statutes. Its acceptance of the judgment of the Federal court in that regard does not bring the case within section 709.

Writ of error dismissed.

COMSTOCK *v.* EAGLETON.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

No. 105. Submitted December 15, 1904.—Decided January 3, 1905.

Under § 9, act of May 2, 1890, 26 Stat. 81, c. 182, final judgments of the Supreme Court of the Territory of Oklahoma in actions at law can only be revised by this court as are judgments of the Circuit Courts of the United States in similar actions—by writ of error and not by appeal.

THE facts are stated in the opinion.

Mr. C. J. Wrightsman, Mr. E. L. Fulton, Mr. Andrew Wilson and *Mr. Noel W. Barksdale* for plaintiff in error.

There was no appearance or brief for defendant in error.

THE CHIEF JUSTICE: This was an action brought by Comstock against Eagleton in the District Court of Pawnee County, Oklahoma, to recover damages for false imprisonment in the sum of $5,317.50.

The petition was demurred to on the ground that it did not state facts sufficient to constitute a cause of action, the demurrer was sustained, and the petition dismissed with costs. The case was then carried to the Supreme Court of Oklahoma on error, and the judgment affirmed. 11 Oklahoma, 487.

From the judgment of affirmance this appeal was allowed and prosecuted to this court.

By section 9 of the "Act to provide a temporary government for the Territory of Oklahoma," approved May 2, 1890, 26 Stat. 81, c. 182, it was provided that "where the value of the property or the amount in controversy" exceeded five thousand dollars, "writs of error and appeals from the final decisions of said Supreme Court shall be allowed and may be

taken to the Supreme Court of the United States in the same manner and under the same regulations as from the Circuit Courts of the United States."

Final judgments of the Circuit Courts of the United States in actions at law can only be revised on writs of error. *Deland* v. *Platte County*, 155 U. S. 221; *Met. Railroad Company* v. *District of Columbia*, 195 U. S. 322; *Bevins* v. *Ramsey*, 11 How. 185; *Sarchet* v. *United States*, 12 Pet. 143.

Appeal dismissed.

SCOTT *v.* CAREW.

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

No. 52. Argued November 7, 8, 1904.—Decided January 3, 1905.

Unless an intent to the contrary is clearly manifest by its terms, a statute providing generally for the disposal of public lands is inapplicable to lands taken possession of and occupied by the Government for a special purpose.

A prior appropriation is always presumed to except land from the scope of a subsequent grant although no reference may be made in the latter to the former.

The establishment of a military post under proper orders on public lands amounts to an appropriation of the land for military purposes and withdraws the property occupied from the effect of general laws subsequently passed for the disposal of public lands, and no right of an individual settler attaches to or hangs over the land to interfere with the action of the Government in regard thereto.

One who wrongfully settled on public land and was dispossessed by proper authority so that the land might be used for a military post acquired by such settlement no priority of right in the matter of purchase or homestead entry when the post was abandoned and the land opened to private purchase.

On December 31, 1900, the plaintiffs, who are now appellants, filed their bill of complaint in the Circuit Court of the

United States for the Southern District of Florida, praying that the defendants, holding the legal title to a tract of land under patent from the United States, be decreed to hold that title in trust for them. A demurrer to the bill was sustained and a decree of dismissal entered. This was affirmed by the Circuit Court of Appeals for the Fifth Circuit, and from that affirmance this appeal was taken.

The averments in the bill are: The plaintiffs are the sole descendants and heirs at law of Robert J. Hackley, who died in 1845. In November, 1823, Hackley, then over twenty-one years of age, and the head of a family, settled upon and cultivated the tract in controversy. At that time the surrounding country was a dense wilderness and he the only settler. He erected on the tract a substantial dwelling and other buildings. In 1824 Colonel Brooke, with a detachment of United States troops, was sent to this portion of Florida, located a camp or cantonment on this tract, dispossessed Hackley, and took possession of the house and land so occupied and cultivated by him. The Secretary of the Interior, in the contest proceedings hereinafter referred to, in an opinion which is attached to the bill as an exhibit, found that this action was taken by order of the War Department. United States troops continued to occupy the camp or cantonment until December 10, 1830, when by an executive order of the President the Fort Brooke military reservation was established, containing sixteen square miles of land and embracing the tract in controversy. Thereafter this military reservation was reduced from time to time by executive orders, until on June 1, 1878, only the tract in controversy, commonly known as the "Reduced Fort Brooke military reservation," remained. On January 4, 1883, it was relinquished, and transferred by the Secretary of War to the Interior Department. Hackley, after his removal from the tract, remained a resident of Florida up to the time of his death. On March 3, 1823, Congress passed an act authorizing the President to establish a land office in each of the districts of East and West Florida as soon as in his

opinion there was a sufficient quantity of public land suryeved to justify it. Under this act and by an executive order in 1828 a land office was established at St. Augustine, in the district in which this land was situate. At the time this office was established the hostility of the Indian tribes was such as to render communication between it and that portion of Florida where Hackley resided practically impossible. But in the year 1835, although the public surveys had not been extended into this part of Florida, Hackley filed with the register of the land office evidence designating the particular tract which had been settled upon, inhabited and cultivated by him as aforesaid, and claimed the right of preëmption and purchase thereof under and by virtue of the act of Congress of April 22, 1826. By change of the boundary lines of the land districts of Florida the land subsequently came within the jurisdiction of the land office at Newnansville, Florida, whereupon on November 27, 1843, Hackley secured from the register of the land office at St. Augustine a copy of the evidence formerly filed in that office, and filed it with a notice of his claim with the register of the office at Newnansville. On September 26, 1887, the administrator of the estate of Hackley filed in the local land office a supplemental notice of the claim of the legal representatives of Hackley to the right of preëmption in the purchase of the tract. Other parties made application to the Land Department for an entry of said lands, contest proceedings were had, which were terminated by a decision of the Secretary of the Interior adverse to the claim of the plaintiffs, and a patent was issued to Edmund S. Carew, under whom the defendants claim.

The following statutes are relied upon by the parties: Act of Congress, March 3, 1807, 2 Stat. 445, section 1 of which provides:

"That if any person or persons shall, after the passing of this act, take possession of, or make a settlement on any lands ceded or secured to the United States, by any treaty made with a foreign nation, or by a cession from any State to the

United States, which lands shall not have been previously sold, ceded, or leased by the United States, or the claim to which lands, by such person or persons, shall not have been previously recognized and confirmed by the United States; or if any person or persons shall cause such lands to be thus occupied, taken possession of, or settled; or shall survey, or attempt to survey, or cause to be surveyed, any such lands; or designate any boundaries thereon, by marking trees, or otherwise, until thereto duly authorized by law; such offender or offenders, shall forfeit all his or their right, title, and claim, if any he hath, or they have, of whatsoever nature or kind the same shall or may be, to the lands aforesaid, which he or they shall have taken possession of, or settled, or cause to be occupied, taken possession of, or settled, or which he or they shall have surveyed, or attempt to survey, or cause to be surveyed, or the boundaries thereof he or they shall have designated, or cause to be designated, by marking trees or otherwise. And it shall moreover be lawful for the President of the United States, to direct the marshal, or officer acting as marshal, in the manner hereinafter directed, and also to take such other measures, and to employ such military force as he may judge necessary and proper, to remove from lands ceded, or secured to the United States, by treaty, or cession as aforesaid, any person or persons who shall hereafter take possession of the same, or make, or attempt to make a settlement thereon, until thereunto authorized by law. And every right, title, or claim, forfeited under this act, shall be taken and deemed to be vested in the United States, without any other or further proceedings."

The other sections have no application to this case.

On February 5, 1813, 2 Stat. 797, the following act was passed:

"That every person, or legal representative of every person, who has actually inhabited and cultivated a tract of land lying in either of the districts established for the sale of public lands, in the Illinois Territory, which tract is not rightfully claimed

by any other person, and who shall not have removed from said Territory; every such person and his legal representatives shall be entitled to a preference in becoming the purchaser from the United States of such tract of land at private sale, at the same price and on the same terms and conditions in every respect, as are or may be provided by law for the sale of other lands sold at private sale in said Territory, at the time of making such purchase: *Provided*, that no more than one-quarter section of land shall be sold to any one individual, in virtue of this act; and the same shall be bounded by the sectional and divisional lines run, or to be run, under the direction of the surveyor general for the division of the public lands: *Provided also*, that no lands reserved from sale by former acts, or lands which have been directed to be sold in town lots, and out lots, shall be sold under this act.

"SEC. 2. *And be it further enacted*, That every person claiming a preference in becoming the purchaser of a tract of land, in virtue of this act, shall make known his claim, by delivering a notice in writing to the register of the land office, for the district in which the land may lie, wherein he shall particularly designate the quarter section he claims; which notice the register shall file in his office, on receiving twenty-five cents from the person delivering the same. And in every case where it shall appear to the satisfaction of the register and receiver of public monies of the land office, that any person, who has delivered his notice of claim, is entitled, according to the provisions of this act, to a preference in becoming the purchaser of a quarter section of land, such person so entitled shall have a right to enter the same, with the register of the land office, on producing his receipt from the receiver of public monies for at least one-twentieth part of the purchase money, as in case of other public lands sold at private sale: *Provided*, that all lands to be sold under this act shall be entered with the register, at least two weeks before the time of the commencement of the public sales, in the district wherein the land lies: and every person having a right of preference in becoming the

purchaser of a tract of land, who shall fail so to make his entry with the register, within the time prescribed, his right shall be forfeited, and the land by him claimed shall be offered at public sale, with the other public lands in the district to which it belongs."

And on April 22, 1826, 4 Stat. 154, Congress passed another act, the first section of which reads as follows:

"That every person, or the legal representatives of any person, who, being either the head of a family, or twenty-one years of age, did, on or before the first day of January, in the year one thousand eight hundred and twenty-five, actually inhabit and cultivate a tract of land situated in the Territory of Florida, which tract is not rightfully claimed by any other person, and who shall not have removed from the said Territory, shall be entitled to the right of preëmption in the purchase thereof, under the same terms, restrictions, conditions, provisions and regulations, in every respect, as are directed by the act, entitled 'An act giving the right of preëmption, in the purchase of lands, to certain settlers in the Illinois Territory,' passed February the fifth, one thousand eight hundred and thirteen: *Provided,* That no person shall be entitled to the provisions of this section, who claims any tract of land in said Territory, by virtue of a confirmation of the commissioners, or by virtue of any act of Congress."

Mr. Henry W. Anderson and *Mr. Francis P. Fleming,* with whom *Mr. William H. Lamar, Mr. George H. Lamar, Mr. Francis P. Fleming, Jr., Mr. Beverley B. Mumford, Mr. Eppa Hunton, Jr.,* and *Mr. E. Randolph Williams* were on the brief, for appellants:

Hackley or his legal representatives acquired a right to, or interest in, the land in controversy, by virtue of his settlement thereon and cultivation thereof in 1823, 1824, and their subsequent acts.

In the construction and interpretation of statutes the courts must so construe the law as to effect the object designated by

the Legislature, and to this end its provisions must be examined in the light of surrounding circumstances at the time of their enactment and of preceding history. *Sieman's Adm'r* v. *Sellers*, 123 U. S. 276, 285; *In re Ross*, 140 U. S. 453, 475; *Ross* v. *Borland*, 1 Peters, 654; *Edwards* v. *Darby*, 12 Wheat. 210; *Gibbons* v. *Ogden*, 9 Wheat. 1.

The statutes involved were passed more than seventy-five years ago, when the conditions and circumstances were entirely different from those now existing, or such as have existed for many years past. It is essential, therefore, to review the history and development of the public land system and the legislation bearing thereon. *Smith* v. *Townsend*, 148 U. S. 490; and see Chap. VIII, The History of the Public Domain, Donaldson, 1881.

From the earliest times the relief and protection of the first settlers has been a controlling consideration with every department of the Government; that first the protection and afterwards the encouragement of *bona fide* settlements for the purpose of making a home has been regarded as a most important consideration in the disposition of the public lands—a consideration which finally led to the practical abandonment of the system of sales and the enactment of the preëmption and homestead laws.

Hackley comes within the terms of the act of April 22, 1826. The act is plain in its terms and the court must give it effect. Sutherland, § 234; *United States* v. *Hartwell*, 6 Wall. 395; *United States* v. *Wiltberger*, 5 Wheat. 95. Congress has always protected the early settlers. *Lamb* v. *Davenport*, 18 Wall. 307; *Lytle* v. *Arkansas*, 9 How. 334; *Wynn* v. *Morris*, 16 Arkansas, 414.

The act amounted to a grant *in presenti* to the settler within its terms which could be defeated by the failure to perform conditions subsequent. *United States* v. *Fitzgerald*, 15 Pet. 418; *Barnard* v. *Ashley*, 18 How. 43; *Brown* v. *Clements*, 3 How. 666; *Hall* v. *Pipin*, 24 How. 132; *Bryan* v. *Forsythe*, 19 How. 334; *Morrow* v. *Whitney*, 95 U. S. 551; *Caronditch* v. *St.*

Louis, 1 Black, 179; *Glasgow* v. *Hortiz*, 1 Black, 595; *Savignac* v. *Garrison*, 18 How. 132.

The act of March 3, 1807, does not affect complainants' rights. It did not under the contemporaneous construction of the various preëmption acts by the executive departments of the Government to which the court will give controlling weight. *United States* v. *Philbrick*, 120 U. S. 52, 59; *Hahn* v. *United States*, 107 U. S. 405; *Brown* v. *United States*, 113 U. S. 571; *United States* v. *Darby*, 12 Wheat. 206; *United States* v. *Moore*, 95 U. S. 760; 2 Pub. Land Law Inst. & Orders, 272, 422; Cong. Deb. for 1825, 1826, pp. 1422–1436.

The act of 1826 did not require that Hackley should be in possession when the act was passed or January 1, 1826, but only that he should have—as he had—cultivated it prior to January 1, 1825. The courts will not read a condition into an act which it does not contain. *Newhall* v. *Sanger*, 92 U. S. 765; *Glasgow* v. *Hortiz*, 1 Black, 595; *Ryan* v. *Carter*, 93 U. S. 78; *United States* v. *Dixon*, 15 Pet. 141; *Minds* v. *United States*, 15 Pet. 423; *United States* v. *Arredondo*, 5 Pet. 691. Nor make exceptions which the Legislature did not insert in the act. *French* v. *Spencer*, 21 How. 228; *Yturbide* v. *United States*, 22 How. 290; *Ross* v. *Duval*, 13 Pet. 45.

The act of 1826 was wholly retroactive and covered settlements on unsurveyed lands. *Moore* v. *Robbins*, 96 U. S. 530 536, distinguishing *Atherton* v. *Fowler*, 96 U. S. 513.

Hackley's ejectment from his settlement by military forces of the United States, and the establishment of a camp thereon, prior to the passage of the act of 1826, did not prevent him from acquiring a right of preëmption in the purchase of the lands.

The temporary occupation of this tract of land by the troops of the United States in 1826, did not constitute a *claim* to the land at all; and even if it had been claimed, it would not have been within the terms of the act, since it was not a claim by "any other person."

The legal effect of such occupation, if any, is purely a question of law, as to which the courts are in no way bound by the

finding of the Interior Department. *Lee* v. *Johnson*, 116 U. S. 48; *Johnson* v. *Towsley*, 13 Wall. 72; *Johnson* v. *United States*, 2 C. Cl. 391.

There was no order by competent authority nor was the reservation made with such solemnity and publicity as will forever set apart the lands so reserved, so that they cannot be disposed of other than by act of Congress. *Wolsey* v. *Chapman*, 101 U. S. 755; *United States* v. *Tichnor*, 12 Fed. Rep. 421.

The presumption which holds in the case of the Secretary of War, that he is acting as the mouthpiece of the President, does not apply in the case of orders issued by subordinate officers. *Wilcox* v. *Jackson*, 13 Wall. 498; *United States* v. *Stone*, 2 Wall. 537; *Missouri &c. Ry. Co.* v. *Roberts*, 152 U. S. 119; *Wilcox* v. *McConnell*, 13 Pet. 498; 19 Am. & Eng. Ency. of Law, 1st ed., 441; *United States* v. *Fitzgerald*, 15 Pet. 407.

For distinction between mere "occupation" and reservation of public lands, see *Morrow* v. *Whitney*, 95 U. S. 551.

The occupation by the troops could have had no other effect than possibly to delay Hackley's right and did not render the act of 1826 inapplicable to these lands. On the termination of the occupation he was entitled to perfect his interests. *Ham* v. *Missouri*, 18 How. 126; *Beecher* v. *Wetherby*, 95 U. S. 517; *State of Michigan*, 8 L. D. 308; *State of Louisiana*, 17 L. D. 440; *State of Wisconsin*, 19 L. D. 518; *United States* v. *Thomas*, 151 U. S. 577; *Stockbridge* and *Menesee Indians* v. *Wisconsin*, 25 L. D. 17; *State of Florida*, 25 L. D. 117.

The right to perfect the title passed to Hackley's heirs. *Buxton* v. *Traver*, 130 U. S. 232, distinguished.

Mr. Edward R. Gunby, *Mr. Wm. Wade Hampton* and *Mr. Horatio Bisbee* for appellees.

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

The vital question in this case is whether Hackley could claim the benefit of the act of 1826, in reference to the tract in

controversy. Prior to that act he was wrongfully in possession of the tract, and could have been summarily removed by order of the President. (Act of March 3, 1807.) His dispossession was by authority of law. It was done in the exercise of the power vested in the President as Commander-in-Chief of the Army, the order of the War Department being presumed to be that of the President. The occupation of the tract by the United States troops was rightful, being an occupation of property of the Government by direction of the proper officer, and that rightful occupation continued until the act was passed. It is unnecessary to rest the case upon the clause in the act of 1826, "which tract is not rightfully claimed by any other person," although that is not without significance, or to discuss the question whether the United States can be considered another person. A more substantial reason is to be found in the rule that whenever a statute is passed containing a general provision for the disposal of public lands, it is, unless an intent to the contrary is clearly manifest by its terms, to be held inapplicable to lands which for some special public purpose have been in accordance with law taken full possession of by and are in the actual occupation of the Government. Where particular tracts have been taken possession of by rightful orders of an executive department, to be used for some public purpose, Congress in legislating will be presumed to have intended no interference with such possession nor a sale or disposal of the property to private individuals. Such has been the rule obtaining in the Land Department, as well as in the courts. An early case was *Wilcox* v. *Jackson*, 13 Pet. 498. That case rested upon a claim of right of preëmption under the act of June 19, 1834, 4 Stat. 678, which revived an act passed May 29, 1830, 4 Stat. 420, containing these provisions:

"That no entry or sale of any land shall be made, under the provisions of this act, which shall have been reserved for the use of the United States, or either of the several States in which any of the public lands may be situated," or "which is reserved from sale by act of Congress, or by order of the President, or

which may have been appropriated, for any purpose whatsoever."

It appeared that at the request of the Secretary of War the Commissioner of the General Land Office had marked upon the official map of that department the tract in controversy as reserved for military purposes, and directed it to be withheld from sale. The court held that this action was that of the President, saying (p. 513):

"Now, although the immediate agent, in requiring this reservation, was the Secretary of War, yet we feel justified in presuming, that it was done by the approbation and direction of the President. The President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties. Both military posts and Indian Affairs, including agencies, belong to the War Department. Hence, we consider the act of the War Department, in requiring this reservation to be made, as being in legal contemplation the act of the President; and, consequently, that the reservation thus made was, in legal effect, a reservation made by order of the President, within the terms of the act of Congress."

And going beyond the special language of the act in respect to the sale of lands, the court observed:

"But we go further, and say, that whensoever a tract of land shall have been once legally appropriated to any purpose, from that moment, the land thus appropriated becomes severed from the mass of public lands; and that no subsequent law, or proclamation, or sale, would be construed to embrace it, or to operate upon it; although no reservation were made of it.

"The very act which we are now considering will furnish an illustration of this proposition. Thus, in that act, there is expressly reserved from sale the land, within that district, which had been granted to individuals, and the State of Illinois. Now, suppose this reservation had not been made, either in the law, proclamation or sale, could it be conceived that, if that land were sold at auction, the title of the purchaser would

avail against the individuals or State to whom the previous grants had been made? If, as we suppose, this question must be answered in the negative, the same principle will apply to any land which, by authority of law, shall have been severed from the general mass."

In *Leavenworth &c. R. R. Company* v. *United States*, 92 U. S. 733, 745, the doctrine announced in *Wilcox* v. *Jackson*, *supra*, was reaffirmed, the court, quoting the first paragraph in the last quotation, added "it may be urged that it was not necessary in deciding that case to pass upon the question; but, however this may be, the principle asserted is sound and reasonable, and we accept it as a rule of construction." In that case it was held that a grant of public land in aid of a railroad did not apply to lands included within an Indian reservation, and that it was immaterial that the reservation was afterwards set aside and the lands had become a part of the public lands of the nation. *Newhall* v. *Sanger*, 92 U. S. 761, ruled that lands within the boundaries of an alleged Mexican or Spanish grant which was *sub judice* at the time the Secretary of the Interior ordered a withdrawal of lands along the route of the road, were not embraced by a grant to a railroad company, and it was said in the opinion (p. 763) "the words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws."

In *Shively* v. *Bowlby*, 152 U. S. 1, it was held that while Congress has power to grant lands below high-water mark in navigable waters, yet the fact that the public surveys are made to terminate on the banks or shores of those waters, indicates that such lands are not subject to entry and sale under the general land laws, but so far as they are situated in a Territory are reserved for the use and control of the future State. This doctrine was reaffirmed in *Mann* v. *Tacoma Land Company*, 153 U. S. 273. Many authorities might be cited to the proposition that a prior appropriation is always understood to except lands from the scope of a subsequent grant, although no refer-

ence is made in the latter to the former. See *Lake Superior &c. Company* v. *Cunningham*, 155 U. S. 354, 373.

There is nothing in *United States* v. *Fitzgerald*, 15 Pet. 407, to conflict with the foregoing views. It merely decided that an officer of the United States (in that case an inspector of customs) was not deprived by any act of Congress of the benefit of the preëmption laws, and the fact that he was put in possession of a tract of land by the collector of customs, who had received no instructions to that effect from the Treasury Department, was not an appropriation to the uses of the Government. It is true a letter from the Acting Commissioner of the General Land Office to the register at New Orleans, stating that the Secretary of the Treasury had directed that the tract be reserved from sale for the use of the custom house at New Orleans, and requesting the register to note upon his plats that it was so reserved from sale, was in evidence, but this was written two years after the inspector had entered and paid for the land. Of course, such attempted reservation could have no effect upon a title acquired by the entryman prior thereto. Nor is there any conflict in *United States* v. *Tichenor*, 12 Fed. Rep. 415. There it appeared that the commanding officer of United States troops in Oregon ordered that a military reservation be established on the tract in controversy. In obedience thereto a lieutenant erected some buildings thereon for the use of the soldiers. It was held by the Circuit Court that such action constituted no appropriation of the land so as to exempt it from the operation of the general land laws. But the ground of the decision was that the general commanding was acting without any direction from the President or the War Department, the court saying (p. 423):

"It may be admitted, as suggested in *Wilcox* v. *Jackson*, 13 Pet. 513, that if the order directing the reservation to be made had been issued by the Secretary of War,—the head of the department through whom the President would speak and act upon the subject,—in the absence of evidence to the contrary, it would be presumed that he acted by the direction

of the President. But neither General Hitchcock nor Lieutenant Wyman had any authority to designate or establish a reservation at Port Orford for any purpose. It is not alleged that they were acting in the premises under the authority of the President; and there is no presumption of law that they were."

Again, it is urged that the establishment of this camp or cantonment was a mere temporary matter, and not to be considered as in the nature of a reservation or appropriation, and we are referred to orders and other papers found in the records of the War Department, copies of which appear in the brief of appellants' counsel. Those orders, if we are permitted to consider them on this demurrer, make distinctly against the contentions of counsel. We quote from that issued from the Adjutant General's office:

"Order 70.

"Brevet Col. Brooke, with four companies of the Fourth Infantry, will proceed with as little delay as practicable to Tampa Bay, East Florida, where he will establish a military post. He will select a position with a view to the health and in reference to the Florida Indians about to be removed to that vicinity agreeable to the late treaty. Upon this point he will consult Col. Gadsden, the commissioner employed in locating the Indians. . . .

"The permanent headquarters of the Fourth Infantry will remain at Cantonment Clinch, and, should Col. Clinch have rejoined his regiment, on the receipt of this order he will be charged with the duty of preparing Col. Brooke's command for the expedition to Tampa.

"By order of Major Gen. Brown.

"E. KIRBY, *Aid-de-Camp.*"

It will be seen that the direction is to "establish a military post." It was for this "post" that the tract in controversy was taken, and the statement in the report of Colonel Brooke, as one of the reasons for its selection, that some two miles in

the rear of the place a ridge of piney lands commences, to which the troops could retire with their tents on the slightest manifestation of disease, does not alter the fact that this tract was selected for the "post." The further fact that permanent headquarters of the Fourth Infantry were to remain at Cantonment Clinch, is entirely consistent with the direction to Colonel Brooke to proceed with four companies to Tampa Bay and there establish this military post. The judgment of the War Department, whose action is presumed to be the action of the President, was that, having reference to the Florida Indians who were about to be removed to that vicinity, it was important to have a military post established. Its permanence would depend largely on the developments of the future. It remained a military post for half a century, and a very large tract was in 1830 set apart for a surrounding reservation. True, it has since been all abandoned, but although it may have been within the contemplation of the authorities that a time would come when the necessity for this military post would cease, it was none the less for the time being a post established by the proper department of the Government. It was until the post was abandoned an appropriation of the land for military purposes. Quite a number of reservations and posts in our Western territory once established have afterwards been abandoned, but while so appropriated they are excepted from the operation of the public land laws, and no right of an individual settler attaches to or hangs over the land to interfere with such action as the Government may thereafter see fit to take in respect to it. No cloud can be cast upon the title of the Government—nothing done by an individual to embarrass it in the future disposition of the land.

Without considering, therefore, the question of laches or limitation we are of opinion that the decision of the Court of Appeals was correct, and it is

Affirmed.

FIRST NATIONAL BANK OF JACKSBORO *v.* LASATER.

ERROR TO THE COURT OF CIVIL APPEALS OF THE SECOND SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

No. 73. Submitted December 6, 1904.—Decided January 3, 1905.

The payment referred to in § 5198, Rev. Stat. is an actual payment and not a further promise to pay and the mere discharge of the maker of a note by his giving his own note in renewal thereof will not uphold a recovery against the bank on account of usurious interest in the former note.

While a trustee in bankruptcy is not bound to accept property of an onerous or unprofitable character, and in case he declines to take it the bankrupt may assert title thereto, he is entitled to be informed of the property and have a reasonable time to elect whether he will accept it or not.

If a claim owned by a bankrupt is of value his creditors are entitled to it, and he cannot, by withholding knowledge of its existence from the trustee, after obtaining a discharge of his debts, immediately assert title to and collect the claim for his own benefit.

THIS case is here on error to the Court of Civil Appeals of the Second Supreme Judicial District of the State of Texas. It was an action brought in the District Court of Jack County by J. L. Lasater to recover from the First National Bank of Jacksboro twice a sum claimed to have been paid as usurious interest.

The material facts are as follows: J. L. Lasater and W. M. Maggard, as partners, borrowed of the bank $4,000, and executed their joint note with A. M. Lasater as surety. They also mortgaged cattle as further security. Subsequently Maggard sold all his interest in the mortgaged property to J. L. Lasater, the latter assuming all liabilities and renewing the note with the same surety. Thereafter A. M. Lasater, the surety, bought all the mortgaged cattle and, as part of the consideration, agreed to assume and pay off the note. In pursuance of this agreement he took up the note of J. L. Lasater and gave his own note therefor. This last note A. M. Lasater paid in full to the bank. After all these transactions, and on November 19, 1900, J. L. Lasater filed his petition in bank-

ruptcy in the District Court of the United States. On January 7, 1901, he was discharged of his debts, and on June 11, 1901, the trustee was also discharged of his trust. The bankrupt returned no assets to the trustee and did not tell him or the creditors about this claim for usury.

On July 26, 1901, he brought this action, under the authority of section 5198, Revised Statutes, United States, to recover twice the amount of the interest paid to the bank. The Court of Appeals found that part of the interest was paid more than two years prior to the commencement of the action, and held that no recovery could be had as to that, but, reversing the District Court, entered a judgment in favor of the plaintiff for double the amount of the balance of the interest, on the ground that usury entered into it all.

Section 5198, Revised Statutes, provides:

"The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same; provided such action is commenced within two years from the time the usurious transaction occurred."

Mr. J. W. Nichol, Mr. Thomas D. Sporer and *Mr. E. W. Nicholson* for plaintiff in error:

A bankrupt cannot hold an asset of any kind or sort or any chose in action and conceal it from his creditors and trustee and elect after he had been divested of his title to resume the ownership of it, sue for it, and recover it, and then when his creditors would demand what was their own fly his discharge in bankruptcy in their faces.

Here is an instance of a man concealing a claim, which if valid under the facts—and we believe it is not—of right belonged to his creditors, getting a discharge, and being free from all his debts, immediately upon a release from all liabilities bringing a suit to recover what was not his own. He is not in a postion to claim benefits until he has purged himself from all fraud. *Herndon* v. *Davenport*, 7 Texas, 462; *Jones* v. *Byron*, 57 Texas, 43; *Connor* v. *Express Co.*, 42 Georgia, 37.

Under § 70 of the Bankrupt Act of 1898 this claim passed to the trustee. *Monongahela Bank* v. *Overholt*, 96 Pennsylvania, 327; *National Bank* v. *Trimble*, 40 Ohio St. 629; *Clark* v. *Clark*, 17 How. 315; *Rand* v. *Iowa Central*, Am. Bank. Rep., Sept. 1904, 164; *Sessions* v. *Romadke*, 145 U. S. 29; *Sparham* v. *Yerkes*, 142 U. S. 7; *Dushane* v. *Beall*, 161 U. S. 513, distinguished.

Courts never look with leniency on the concealment of assets and will not allow them to be retained when the right to their ownership was questioned. *In re Paine*, 127 Fed. Rep. 246; *In re Morrison*, 127 Fed. Rep. 186; *Re Fiergenbaum*, 121 Fed. Rep. 69; *Fowler* v. *Jenks*, 95 N. W. Rep. 887.

The almost uniform rule is that having been once divested by bankruptcy proceedings concealed assets do not revest after discharge. *Sernby* v. *Norman*, 91 Mo. App. 517, citing *Malone* v. *Martin*, 5 S. W. Rep. 909; *Pickens* v. *Dent*, 106 Fed. Rep. 653; *Vandyke* v. *Shyrer*, 98 Indiana, 126; *Boyd* v. *Adams*, 82 Indiana, 294; *Seaton* v. *Hinsman*, 50 Iowa, 395; *Dessau* v. *Johnson*, 66 How. Prac. 5; *Atwood* v. *Thomas*, 60 Mississippi, 162; *Peters* v. *Wallace*, 4 S. W. Rep. 914; *Foraast* v. *Hyman*, 28 N. E. Rep. 801; *contra Frazier* v. *Desha's Admr.*, 40 S. W. Rep. 678.

There was no appearance or brief filed for defendant in error.

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

The mere discharge by A. M. Lasater of the note executed

by himself and J. L. Lasater, by giving his own note in renewal thereof, would not uphold a recovery from the bank on account of usurious interest in the former note. *Brown* v. *Marion National Bank*, 169 U. S. 416. The payment contemplated by the statute is an actual payment, and not a further promise to pay, and was not made until the bank, in June, 1901, received its money. Prior to the renewal by A. M. Lasater, in October, 1900, there were only two or three small cash payments on the indebtedness.

We shall not stop to inquire whether J. L. Lasater can avail himself of the final payment made by A. M. Lasater. The Court of Appeals held that he could, reaching this conclusion on the authority of cases like *Hough* v. *Horsey*, 36 Maryland, 184; *Richardson* v. *Baker*, 52 Vermont, 617, to the effect that the grantee of mortgaged property, who in consideration of the purchase agrees to pay off the mortgage, cannot raise the question of usury, that being a personal right of the original debtor.

The Court of Appeals also held that the claim for usurious interest was one which survived the death of the person in whom the right of action was vested, and under the laws of Texas a part of his estate, and consequently one that could be sold and bought like any other chose in action. If so, that claim passed to the trustee in bankruptcy under section 70 of the bankrupt law, which, in describing the property passing to the trustee, names "property which prior to filing of the petition he could by any means have transferred."

The question then presented is whether this right of action having once passed to the trustee in bankruptcy was retransferred to J. L. Lasater upon the termination of the bankruptcy proceedings, he having returned no assets to his trustee, and having failed to notify him or the creditors of this claim for usury, and beginning this action within less than two months after the final discharge of the trustee. We have held that trustees in bankruptcy are not bound to accept property of an onerous or unprofitable character, and that they have a

reasonable time in which to elect whether they will accept or not. If they decline to take the property the bankrupt can assert title thereto. *American File Company* v. *Garrett,* 110 U. S. 288, 295; *Sparhawk* v. *Yerkes,* 142 U. S. 1; *Sessions* v. *Romadka,* 145 U. S. 29; *Dushane* v. *Beall,* 161 U. S. 513. But that doctrine can have no application when the trustee is ignorant of the existence of the property and has had no opportunity to make an election. It cannot be that a bankrupt, by omitting to schedule and withholding from his trustee all knowledge of certain property, can, after his estate in bankruptcy has been finally closed up, immediately thereafter assert title to the property on the ground that the trustee had never taken any action in respect to it. If the claim was of value (as certainly this claim was according to the judgment below) it was something to which the creditors were entitled, and this bankrupt could not, by withholding knowledge of its existence, obtain a release from his debts and still assert title to the property.

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

BUTTE CITY WATER COMPANY *v.* BAKER.

ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

No. 109. Argued December 16, 1904.—Decided January 3, 1905.

While the disposal of the public lands is made through the exercise of legislative power entrusted to Congress by the Constitution, yet Congress prescribing the main and substantial conditions thereof may rightfully entrust to local legislatures the determination of those minor matters as to such disposal which amount to mere regulations.

Regulations made by the local legislatures in regard to the location of min-

ing claims which are not in conflict with the Constitution and laws of the United States are not invalid as an exercise of a power which cannot be delegated by Congress and such regulations must be complied with in order to perfect title and ownership under the mining laws of the United States.

Even if doubts exist were the matter wholly *res integra*, and although consequences may not determine a decision, this court will pause before declaring invalid legislation long since enacted, and the validity whereof has been upheld by state courts and recognized by this court, and on the faith of which property rights have been built up and countless titles rest which would be unsettled by an adverse decision.

The regulations contained in § 3612 of the Montana Code are not invalid as being too stringent and therefore in conflict with the liberal purpose manifested by Congress in its legislation respecting mining claims.

THE facts are stated in the opinion.

Mr. L. Orvis Evans, with whom *Mr. W. W. Dixon* was on the brief, for plaintiff in error:

Congress cannot delegate to a State the authority to legislate upon the sufficiency of records of location of mining claims, that being one of the steps in the disposition of public lands. *Mares* v. *Dillon*, 75 Pac. Rep. 963.

Congress is vested with authority to regulate the disposal of the public lands. Sec. 3, Art. IV, Const. U. S.; *Pollard* v. *Hagan*, 3 How. 224; *De Lima* v. *Bidwell*, 182 U. S. 197; *Jourdan* v. *Barrett*, 4 How. 169, 185; *Russell* v. *Lowth*, 18 Am. Rep. 389; *United States* v. *Hughes*, 11 How. 552, 568; *United States* v. *Gratiot*, 14 Pet. 526, 537; *United States* v. *Fitzgerald*, 15 Pet. 407, 421; 2 Story on Const. § 1328; 2 Tucker on Const. 605.

Not only is the power of disposition in Congress, but the States have no authority whatever in the matter. *Irvine* v. *Marshall*, 20 How. 558; *Wilcox* v. *Jackson*, 13 Pet. 498; *Gibson* v. *Choteau*, 13 Wall. 92, 104; *Seymour* v. *Sanders*, 3 Dill. 437; *Russell* v. *Lowth*, 21 Minnesota, 167; *Miller* v. *Little*, 47 California, 348; *Van Brocklin* v. *Anderson*, 117 U. S. 151, 167; *Cross* v. *Harrison*, 16 How. 164; *Headley* v. *Coffman*, 56 N. W. Rep. 701; *Chapman* v. *Quinn*, 56 California, 266, 292; *Kissell* v. *St. Louis*, 18 How. 19.

Congress has no right to delegate that power. The Constitution does not give it the authority to delegate it. A legislative body has no power of delegation in the matter of making laws. Cooley Const. Lim., 6th ed., 137; *Field* v. *Clark*, 143 U. S. 649; *Wayman* v. *Southard*, 10 Wheat. 48; *Re Rahrer*, 140 U. S. 545.

Congress never has delegated, or attempted to delegate, to the State, the authority claimed to have been exercised.

If Congress did delegate the authority to the State, the act of the State, the agent, becomes the act of the National Government, the principal, and is to be finally construed by this court.

Submitted by *Mr. Robert B. Smith* and *Mr. J. E. Healy* for defendant in error:

So long have state and local regulations been recognized, either expressly or by implication in this court, that they have become a rule of property under which mining titles have been perfected and under which rights have grown up.

The statutes of the United States, §§ 2322, 2323, 2324, Rev. Stat., give full recognition to local and state rules and regulations, seemingly recognizing that under mining laws everywhere such local rules have ever existed where mining has been carried on. Lindley on Mines, 2d ed. §§ 1 to 25; *O'Donnell* v. *Glenn*, 19 Pac. Rep. 305; *Baker* v. *Water Company*, 72 Pac. Rep. 617; *Jackson* v. *Roby*, 109 U. S. 440; *Erhardt* v. *Boaro*, 113 U. S. 527; *Shoshone Mining Co.* v. *Rutter*, 177 U. S. 505; *Telluride Co.* v. *Railway Co.*, 175 U. S. 639; *De Lamar Co.* v. *Nesbitte*, 177 U. S. 524; *Speed* v. *MacCarthy*, 181 U. S. 275; *Blackburn* v. *Portland Mining Co.*, 175 U. S. 571.

The act of Montana of July 1, 1895, was modeled after the Colorado law in the main, and was not adopted in Montana very long before it was copied in Nevada. *Sisson* v. *Sommers*, 55 Pac. Rep. 829; *Purdum* v. *Laddin*, 59 Pac. Rep. 153.

MR. JUSTICE BREWER delivered the opinion of the court.

This was an action of ejectment brought in the District Court of Silver Bow County, Montana. The dispute was between two locations of the same mining ground. The defendant's location was adjudged invalid by the trial court, and its decision was affirmed by the Supreme Court of the State, on the ground of a failure to comply with certain Montana statutes. 28 Montana, 222. These statutes contained regulations concerning the location of mining claims in addition to those prescribed by Congressional legislation, and the question is as to the validity of those additional requirements.

Section 2319, Rev. Stat., provides that "All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."

Section 2322 gives to the locators the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, "so long as they comply with the laws of the United States, and with State, Territorial, and local regulations not in conflict with the laws of the United States governing their possessory title."

Section 2324 contains this grant of authority:

"SEC. 2324. The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can

be readily traced. All records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim."

Section 2332 makes the statute of limitations for mining claims of a State applicable for certain purposes to mining claims under the Government.

Section 2338 reads as follows:

"As a condition of sale, in the absence of necessary legislation by Congress, the local legislature of any State or Territory may provide rules for working mines, involving easements, drainage, and other necessary means to their complete development; and those conditions shall be fully expressed in the patent."

Section 2339 contains this clause:

"Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same."

In 1893 Congress passed an act (28 Stat. 6) relieving from the necessity of the annual labor for that year, "so that no mining claim which has been regularly located and recorded as required by the local laws and mining regulations shall be subject to forfeiture for non-performance of the annual assessment for the year eighteen hundred and ninety-three," and a similar statute was enacted in 1894 in respect to the annual labor for that year. 28 Stat. 114.

While in the above sections there is not that direct grant of authority to the State to legislate respecting locations as there is to miners to make regulations, yet there is a clear recognition of such legislation. All these statutory provisions, except the last two sections referred to, were embodied in the legislation of 1872, and have been in force ever since.

Acting upon the belief that they were fully authorized, nearly all, if not all, the States in the mining regions have passed statutes prescribing additional regulations in respect to the location of mining claims, some having been in force for more than a score of years.

This court has in many cases recognized the validity of such state legislation. In *Belk* v. *Meagher*, 104 U. S. 279, 284, Chief Justice Waite, speaking for the court, declared that "a location is not made by taking possession alone, but by working on the ground, recording, and doing whatever else is required for that purpose by the acts of Congress and the local laws and regulations."

In *Erhardt* v. *Boaro*, 113 U. S. 527, it appeared that there were no mining regulations prescribed by the miners of the district, and it was said by Mr. Justice Field (p. 536):

"We are therefore left entirely to the laws of the United States and the laws of Colorado on the subject. And the laws of the United States do not prescribe any time in which the excavations necessary to enable the locator to prepare and record a certificate shall be made. That is left to the legislation of the State, which, as we have stated, prescribes sixty days for the excavations upon the vein from the date of discovery, and thirty days afterwards for the preparation of the certificate and filing it for record. In the judgment of the legislature of that State this was reasonable time."

Kendall v. *San Juan Mining Company*, 144 U. S. 658, turned on the question of compliance by the locator with a regulation prescribed by the statutes of Colorado concerning the record of locations, and the decision was that a failure to comply rendered the attempted location invalid. In *Shoshone Mining Company* v. *Rutter*, 177 U. S. 505, it was held that a suit brought in support of an adverse claim was not one of which a Federal court necessarily had jurisdiction, because, as said (p. 508):

"In a given case the right of possession may not involve any question under the Constitution or laws of the United

States, but simply a determination of local rules and customs, or state statutes, or even only a mere matter of fact."

Other cases containing similar recognition might also be cited.

The validity of such state legislation has been affirmed by the Supreme Courts of several States. See in addition to the present case *Wolfley* v. *Lebanon Mining Co.*, 4 Colorado, 112; *O'Donnell* v. *Glenn*, 8 Montana, 248; *Metcalf* v. *Prescott*, 10 Montana, 283, 293; *Purdum* v. *Laddin*, 23 Montana, 387; *Sisson* v. *Sommers*, 24 Nevada, 379; *Copper Globe Mining Co.* v. *Allman*, 23 Utah, 410; *Northmore* v. *Simmons*, 97 Fed. Rep. 386.

In 1 Lindley on Mines, 2d ed., sec. 249, the author says:

"State statutes in reference to mining rights upon the public domain must, therefore, be construed in subordination to the laws of Congress, as they are more in the nature of regulations under these laws than independent legislation.

"State and territorial legislation, therefore, must be entirely consistent with the Federal laws, otherwise it is of no effect. The right to supplement Federal legislation conceded to the State may not be arbitrarily exercised; nor has the State the privilege of imposing conditions so onerous as to be repugnant to the liberal spirit of the Congressional laws. On the other hand, the State may not by its legislation dispense with the performance of the conditions imposed by the national law, nor relieve the locator from the obligation of performing in good faith those acts which are declared by it to be essential to the maintenance and perpetuation of the estate acquired by location. Within these limits the State may legislate."

What is the ground upon which the validity of these supplementary regulations prescribed by a State is challenged? It is insisted that the disposal of the public lands is an act of legislative power, and that it is not within the competency of a legislature to delegate to another body the exercise of its power; that Congress alone has the right to dispose of the public lands, and cannot transfer its authority to any state legislature or other body. The authority of Congress over the

public lands is granted by section 3, article IV, of the Constitution, which provides that "the Congress shall have power to dispose of and make all needful rules and regulations respecting the Territory or other property belonging to the United States." In other words, Congress is the body to which is given the power to determine the conditions upon which the public lands shall be disposed of. The Nation is an owner, and has made Congress the principal agent to dispose of its property. Is it inconceivable that Congress, having regard to the interests of this owner, shall, after prescribing the main and substantial conditions of disposal, believe that those interests will be subserved if minor and subordinate regulations are entrusted to the inhabitants of the mining district or State in which the particular lands are situated? While the disposition of these lands is provided for by Congressional legislation, such legislation savors somewhat of mere rules prescribed by an owner of property for its disposal. It is not of a legislative character in the highest sense of the term, and as an owner may delegate to his principal agent the right to employ subordinates, giving to them a limited discretion, so it would seem that Congress might rightfully entrust to the local legislature the determination of minor matters respecting the disposal of these lands.

Further, section 2324 distinctly grants to the miners of each mining district the power to make regulations, and the validity of this grant has been expressly affirmed by this court. In *Jackson* v. *Roby*, 109 U. S. 440, 441, we said:

"The act of Congress of 1866 gave the sanction of law to these rules of miners, so far as they were not in conflict with the laws of the United States. 14 Stat. 251, c. 262, sec. 1. Subsequent legislation specified with greater particularity the modes of location and appropriation and extent of each mining claim, recognizing, however, the essential features of the rules framed by miners, and among others that which required work on the claim for its development as a condition of its continued ownership."

See also *Erhardt* v. *Boaro, supra,* in which (p. 535) is this declaration:

"And although since 1866 Congress has to some extent legislated on the subject, prescribing the limits of location and appropriation and the extent of mining ground which one may thus acquire, miners are still permitted, in their respective districts, to make rules and regulations not in conflict with the laws of the United States or of the State or Territory in which the districts are situated, governing the location, manner of recording, and amount of work necessary to hold possession of a claim."

Now, if Congress has power to delegate to a body of miners the making of additional regulations respecting location, it cannot be doubted that it has equal power to delegate similar authority to a state legislature.

Finally, it must be observed that this legislation was enacted by Congress more than thirty years ago. It has been acted upon as valid through all the mining regions of the country. Property rights have been built up on the faith of it. To now strike it down would unsettle countless titles and work manifold injury to the great mining interests of the Far West. While, of course, consequences may not determine a decision, yet in a doubtful case the court may well pause before thereby it unsettles interests so many and so vast—interests which have been built up on the faith not merely of Congressional action, but also of judicial decisions of many state courts sustaining it, and of a frequent recognition of its validity by this court. Whatever doubts might exist if this matter was wholly *res integra,* we have no hesitation in holding that the question must be considered as settled by prior adjudications and cannot now be reopened.

The Montana statute (Montana Codes Annotated, sec. 3612) among other supplementary regulations, provided that the declaratory statement filed in the office of the clerk of the county in which the lode or claim is situated must contain "the dimensions and location of the discovery shaft, or its

equivalent, sunk upon lode or placer claims," and "the location and description of each corner, with the markings thereon." A failure to comply with these regulations was the ground upon which the Supreme Court of Montana held the location invalid. It is contended that these provisions are too stringent, and conflict with the liberal purpose manifested by Congress in its legislation respecting mining claims. We do not think that they are open to this objection. They certainly do not conflict with the letter of any Congressional statute; on the contrary, are rather suggested by sec. 2324. It may well be that the state legislature, in its desire to guard against false testimony in respect to a location, deemed it important that full particulars in respect to the discovery shaft and the corner posts should be at the very beginning placed of record. Even if there were no danger of false testimony, it was not unreasonable to guard against the resurrection of incomplete locations when by subsequent explorations mining claims of great value have been uncovered.

We see no error in the rulings of the Supreme Court of Montana, and its judgment is

Affirmed.

CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY *v.* McGUIRE.

ERROR TO THE APPELLATE COURT OF THE STATE OF INDIANA.

No. 69. Argued December 2, 5, 1904.—Decided January 3, 1905.

Where certain facts from which a Federal question might arise were argued in the state court, but their Federal character was not indicated, they cannot be made the basis of a writ of error.

Where a petition to transfer the case to the Supreme Court of the State, which contains a mere suggestion of the violation of a Federal right without any reference to the Constitution of the United States, is denied without opinion, this court may infer that the petition was denied because the constitutional point was not made in the courts below, and if it was considered, the burden to show it is on the plaintiff in error.

It is too late to set up a Federal question for the first time in the petition for writ of error to this court.

Because plaintiff in error relied solely for title upon a decree of foreclosure and sale in a Federal court it does not necessarily follow that a Federal question was set up and decided adversely, no statute, state or Federal, or authority thereunder, being called in question.

THIS was a suit in the nature of a bill in equity instituted in the Circuit Court for Pulaski County, by the railroad company, to quiet its title to certain land, and for an injunction. The case was tried before a jury and a verdict returned for the defendants, under instruction of the court.

Both parties claimed title through the Louisville, New Albany and Chicago Railway Company—plaintiff in error, which was also plaintiff below, through certain mortgages given by the New Albany Company in 1886, 1890 and 1894, which were foreclosed in the United States Circuit Court, and through which foreclosure and subsequent sale its title became vested—defendants, through a judgment recovered by McGuire September 24, 1896, in the Circuit Court of White County, against the New Albany Company for $2,416.30, upon which an execution was issued October 16, 1897, to the sheriff of Pulaski County, and a levy made upon the real estate in dispute. A sale was made November 13, 1897, to the defendant Hathaway, to whom a deed was executed by the sheriff November 23, 1898.

It was insisted by the plaintiff railroad company that the property in controversy was a part of the ground appurtenant to its station at Francesville, Indiana, and that the foreclosure and sale of the property of the New Albany road, through which it obtained its title, carried with it the title to the premises in dispute. The judgment of McGuire was obtained after the execution of the mortgages through which the plaintiff claimed its title. Defendants insisted that the disputed property was not embraced within the mortgages under the after-acquired property clause inserted therein, because entirely foreign to the operation of the railroad, and therefore could not have been embraced within the foreclosure and sale.

The Appellate Court of Indiana sustained their contention, held that the trial court was right in instructing the jury to return a verdict for the appellees, and affirmed its judgment. 31 Ind. App. 110. The Supreme Court denied a petition for review.

Mr. Harry R. Kurrie, with whom *Mr. E. C. Field* and *Mr. G. W. Kretzinger* were on the brief, for plaintiff in error, cited and distinguished in support of jurisdiction *Howard* v. *Fleming,* 191 U. S. 137; *Beals* v. *Cone,* 188 U. S. 184; *Leigh* v. *Green,* 193 U. S. 79; *Mallett* v. *North Carolina,* 181 U. S. 589; *Gableman* v. *Peoria &c.,* 179 U. S. 335; *Defiance &c.* v. *Defiance,* 191 U. S. 184; *Home for Incurables* v. *New York,* 187 U. S. 155; *Johnson* v. *New York &c.,* 187 U. S. 491; *Mutual Life* v. *McGrew,* 188 U. S. 291; *Bausman* v. *Dixon,* 173 U. S. 113; *West. Un. Tel. Co.* v. *Ann Arbor &c.,* 178 U. S. 239; *Pope* v. *Louisville &c.,* 173 U. S. 573; *Marrow* v. *Brinkley,* 129 U. S. 178; *Wedding* v. *Meyler,* 192 U. S. 573; *Wabash Railway* v. *Pearce,* 192 U. S. 179; *Cent. Nat. Bk.* v. *Stevens,* 169 U. S. 432, 460; *Crawford* v. *Burke,* 195 U. S. 176, and as to the proper presentation of the case in the state court, *Bane* v. *Keefer,* 152 Indiana, 544; *Terre Haute* v. *Fagan,* 21 Ind. App. 371; *Hedrick* v. *Hall,* 155 Indiana, 371.

Mr. W. H. H. Miller and *Mr. Maurice Winfield* for defendants in error.

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

Motion is made to dismiss this writ of error upon two grounds, (1) That the supposed Federal question was not set up and claimed until too late. (2) That there is no Federal question in the case.

The motion must be sustained upon the first ground. The Federal question now put forward by the plaintiff is that the

Appellate Court failed to give full faith and credit to the foreclosure decree made by the Circuit Court of the United States and the sale in pursuance thereof, in refusing to hold that the mortgages foreclosed by said decree covered and included in their description of the property therein conveyed the real estate in controversy. This question, however, never seems to have been presented either to the court of first instance or to the court of appellate jurisdiction. It is true the question was argued at length as to what was intended to be covered by the description in the mortgages and by the foreclosure and sale, but the Federal character of this question was not indicated until after a petition for a rehearing in the Appellate Court had been overruled. Plaintiff then filed in the Supreme Court of the State a petition for the transfer of the cause to that court, and, as grounds for such transfer, insisted that the Appellate Court erred in holding that the property in controversy was after-acquired property, not used for railway purposes, and on this account was not within the mortgages upon which appellant's title was based, and that the court thereby "refused to give due effect to the judgment of the Federal court."

This petition appears to have been denied by the Supreme Court without an opinion. Doubtless, if that court had proceeded to pass upon this as a Federal question we should have held it sufficient, but it will be observed that the petition contained a mere suggestion of a violation of a Federal right, not the distinct presentation of a Federal question, and that no reference was made to the Constitution of the United States. *Oxley Stave Co.* v. *Butler County*, 166 U. S. 648. We are left to infer that the petition was denied because the point of constitutionality was not made in either of the courts below. The rule seems to be settled in Indiana, as in many other States, that the matter assigned in the Supreme Court of the State as error must have been properly presented in the court below and there adjudicated. *Coleman* v. *Dobbins*, 8 Indiana, 156, 164; *Priddy* v. *Dodd*, 4 Indiana, 84; *Wesley* v. *Milford*, 41

Indiana, 413; *Selking* v. *Jones*, 52 Indiana, 409; *Russell* v. *Harrison*, 49 Indiana, 97. This is also the practice in this court. *Cornell* v. *Green*, 163 U. S. 75, 80; *Ansbro* v. *United States*, 159 U. S. 695; *Pine River Logging Co.* v. *United States*, 186 U. S. 279, 289. If the Supreme Court did in fact consider the Federal question the burden was upon the plaintiff to show it. There is no presumption that the court considered such question. Under such circumstances we decline to review the constitutional question here. This was expressly held in *Jacobi* v. *Alabama*, 187 U. S. 133; *Layton* v. *Missouri*, 187 U. S. 356; *Spies* v. *Illinois*, 123 U. S. 131.

True, the Federal question was set up at length in the petition filed in the Appellate Court for a writ of error from this court, but that was clearly too late. *Fowler* v. *Lamson*, 164 U. S. 252; *Missouri Pacific Co.* v. *Fitzgerald*, 160 U. S. 556, 575; *Ansbro* v. *United States*, 159 U. S. 695.

In this connection the plaintiff in error urges upon us the proposition that, as it relied solely upon a title derived by a foreclosure and sale in a Federal court, the state court must necessarily have considered and decided that question, and that in such cases the Federal Constitution need not be specially set up and claimed. This argument would necessarily not apply to the Supreme Court of the State, which, as above indicated, might have held and probably did hold that the Federal question, not having been suggested in the court below, could not be made available on appeal. The Appellate Court did not discuss it. There are doubtless a few cases which hold that, where the validity of a treaty or statute or authority of the United States is raised, and the decision is against it, or the validity of a state statute is drawn in question, and the decision is in favor of its validity, and the Federal question appears in the record and was decided, or such decision was necessarily involved in the case, the fact that it was not specially set up and claimed is not conclusive against a review of such question here. *Columbia Water Power Company* v. *Street Railway Co.*, 172 U. S. 475, 488. But as the validity of

no statute, state or Federal, or authority thereunder, was called in question here, this rule does not apply. The true and rational rule stated by this court in *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116, 143, is clearly applicable: "That the court must be able to see clearly, from the whole record, that a certain provision of the Constitution or act of Congress was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied." This case is the not infrequent one of an attempt to clutch at the jurisdiction of this court as an afterthought, when all other resources of litigation have been exhausted.

The Federal question, if any such existed, as to which we express no opinion, was not set up or claimed at the proper time, and

The writ of error must, therefore, be dismissed.

AMERICAN EXPRESS COMPANY *v.* IOWA.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

No. 67. Argued December 2, 1904.—Decided January 3, 1905.

The writ of error in *O'Neil* v. *Vermont*, 144 U. S. 344, was dismissed because it did not appear that the commerce clause of the Constitution was relied on in, was called to the attention of, or passed on by, the state court, and the case is inapposite where it appears that the protection of commerce clause was properly set up, relied upon in, and denied by, the state court.

Bowman v. *Chicago*, 125 U. S. 465, *Leisy* v. *Hardin*, 135 U. S. 100, *Rhodes* v. *Iowa*, 170 U. S. 412, *Vance* v. *Vandercook Co. No. 1*, 170 U. S. 438, rest on the broad principle of the freedom of commerce between the States, of the right of citizens of one State to freely contract to receive and send merchandise from and to another State, and on the want of power of one State to destroy contracts concerning interstate commerce valid in the States where made.

The right of the parties thereto to make a contract, valid in the State where made, for the sale and purchase of merchandise and in so doing to fix the

time when, and condition on which, completed title shall pass is beyond question.

Without passing on the questions whether the property in a C. O. D. shipment is at the risk of buyer or seller and when the sale is completed, a package of intoxicating liquor received by an express company in one State to be carried to another State, and there delivered to the consignee C. O. D. for price of the package and the expressage, is interstate commerce and is under the protection of the commerce clause of the Federal Constitution and cannot, prior to its actual delivery to the consignee, be confiscated under prohibitory liquor laws of the State.

THE American Express Company received at Rock Island, Illinois, on or about March 29, 1900, four boxes of merchandise to be carried to Tama, Iowa, to be there delivered to four different persons, one of the packages being consigned to each. The shipment was C. O. D., three dollars to be collected on each package, exclusive of thirty-five cents for carriage on each. On March 31 the merchandise reached Tama, and on that day was seized in the hands of the express agent. This was based on an information before a justice of the peace, charging that the packages contained intoxicating liquor held by the express company for sale. The express company and its agent answered, setting up the receipt of the packages in Illinois, not for sale in Iowa, but for carriage and delivery to the consignees. An agreed statement of facts was stipulated admitting the receipt, the carriage, and the holding of the packages as above stated. The seizure was sustained. Appeal was taken to a District Court. The express company and its agent amended their answer, specially setting up the commerce clause of the Constitution of the United States. There was judgment in favor of the express company, and the State of Iowa appealed to the Supreme Court and obtained a reversal. 118 Iowa, 447. This writ of error was prosecuted.

Mr. Lewis Cass Ledyard for plaintiff in error:

Plaintiff in error relies on the principles fairly established as to the right of shippers sending goods from one State to another free from state interference in *Leisy* v. *Hardin,* 135 U. S. 100, 110; *Bowman* v *Chicago &c. Ry.,* 125 U. S. 465;

Rhodes v. *Iowa*, 170 U. S. 412; *Vance* v. *Vandercook Co.*, 170 U. S. 438, 444; *In re Rahrer*, 140 U. S. 545.

The effect of the propositions established in these cases is to exempt from state regulation or interference, a shipment of liquors imported into a State, until the contract of shipment or the act of interstate transportation is fully performed and consummated by delivery to the consignee. Such delivery marks the first point of time at which the goods become subjected to state control, as being commingled in the general mass of property within the State, and then only is there a subject upon which the police power of the State can operate.

The seizure of the liquors in the present case took place before that time and while the goods were still in the possession of the interstate carrier engaged in the act of interstate transportation. They were, therefore, clearly exempt from seizure or interference or regulation by the State under the propositions above stated.

O'Neil v. *Vermont*, 144 U. S. 323, was not decided on Federal grounds but the writ of error was dismissed because not properly taken to the state court. While the position taken by the state court in this case that the technical property in the goods remained in the consignor, and that the express company was their agent with authority to transfer the title to the consignee upon payment of the purchase price, is of little importance, it is opposed by the great weight of authority. In such a case, the sale is complete upon a delivery of the goods to the carrier, who becomes the agent of the consignee for the purpose of accepting a delivery and transporting the goods to him, and the agent of the consignor for the purpose of the collection of the purchase price. *Commonwealth* v. *Russell*, 11 Kentucky, 576; *State* v. *Cairns* (Kansas), 68 Pac. Rep. 621; *James* v. *Commonwealth*, 42 S. W. Rep. 1107; *Commonwealth* v. *Fleming*, 130 Pa. St. 138; *State* v. *Flanagan*, 38 W. Va. 53; *Pilgreen* v. *State*, 71 Alabama, 368; *Higgins* v. *Murray*, 73 N. Y. 252.

At the time of the seizure, the carrier in the present case was

engaged in an act of interstate commerce transportation, and until that was concluded and consummated the goods were not subject to the police power of the State. *Norfolk & Western Railway Co.* v. *Sims*, 191 U. S. 441, citing *Brown* v. *Maryland*, 12 Wheat. 419.

If such a transaction be not interstate commerce, protected by the Federal Constitution from state regulation, then no transaction can come within the definition of those words.

The suggestion in the opinion that "the express company in effect engaged in the business of selling, through agents in this State, intoxicating liquors shipped by it for that purpose from the State of Illinois," and that "this was a mere device, to evade the police laws of this Commonwealth" is not tenable.

The merchandise was not shipped by the express company, but by the consignors.

The express company acted in entire good faith, accepting and forwarding the shipment in the ordinary course of business, without the slightest knowledge or suspicion that it contained intoxicating liquors.

But if this were otherwise, and it had been shown that the carrier had knowledge of the contents of the shipment, it would be quite immaterial as under the cases cited *supra* the property was under the protection of the commerce clause of the Constitution while it was in transportation from one State to another.

Mr. Lawrence Maxwell, Jr., for plaintiff in error in No. 82[1] argued simultaneously herewith:

The Iowa statute, as construed by its Supreme Court, is repugnant to the Constitution and laws of the United States, unless it is authorized by the Wilson Act.

The Wilson Act does not allow the State of Iowa to prevent the delivery of liquor shipped from another State. Its power under the Wilson Act does not attach until the interstate

[1] *Adams Express Co.* v. *Iowa*, p. 147, *post*.

transportation has been completed by delivery to the consignee in Iowa.

The express company did not sell the liquor. It acted only as a common carrier to deliver, on certain conditions, liquor already sold, and its agreement not to deliver the goods until C. O. D. charges were paid and then to return the money to the shippers is a mere incident to its express business and does not subject it to the charge that thereby it engaged in liquor selling at retail in Iowa.

The right to contract in another State for the transportation of merchandise from that State into Iowa, and incidentally to fix the terms upon which the goods shall be delivered, involves interstate commerce in its fundamental aspect, and cannot be controlled by the State of Iowa.

The Supreme Court of Iowa misconceived the decision of this court in *O'Neil* v. *Vermont*, see cases cited by plaintiff in error in No. 67.

See article on Carriers by Justice Emlin McClain, of Iowa, published in 1903, in 6 Cyc. 476, stating that on delivery C. O. D. the title to the goods passes to the consignee on delivery to the carrier, but right to possession in the nature of a vendor's lien remains with the consignor while the goods are in the carrier's possession, and terminates only when the condition is performed and the money paid by the consignee to the carrier, whereupon the title to and possession of the money vests in the consignor. The following cases involved C. O. D. shipments and support that view. *Pilgreen* v. *State*, 71 Alabama, 368; *State* v. *Carl*, 43 Arkansas, 353; *Carthage* v. *Duvall*, 202 Illinois, 234; *Carthage* v. *Munsell*, 203 Illinois, 474; *Breechwald* v. *The People*, 21 Ill. App. 213; *Frolich* v. *Alexander*, 36 Ill. App. 428; *Coffeen* v. *Huber*, 78 Ill. App. 455; *State* v. *Cairns*, 68 Pac. Rep. (Kansas) 621; *Commonwealth* v. *Russell*, 11 Ky. L. R. 576; *James* v. *Commonwealth*, 102 Kentucky, 108; *S. C.*, 19 Ky. L. R. 1045; *S. C.*, 42 S. W. Rep. 1107; *State* v. *Intoxicating Liquors*, 73 Maine, 278; *State* v. *Peters*, 91 Maine, 31; *Higgins* v. *Murray*, 73 N. Y. 252; *Norfolk & Western R. R. Co.*

v. *Barnes*, 104 N. Car. 25; *Commonwealth* v. *Fleming*, 130 Pa. St. 138; *Bruce* v. *State*, 36 Texas Crim. App. 53; *S. C.*, 35 S. W. Rep. 383; *Freshman* v. *State*, 37 Texas Crim. App. 126; *S. C.*, 38 S. W. Rep. 1007; *State* v. *Flanagan*, 38 W. Va. 53; *Sarbecker* v. *State*, 65 Wisconsin, 171; *United States* v. *Adams Express Co.* (Iowa), 119 Fed. Rep. 240; *United States* v. *Lackey* (W. Va.), 120 Fed. Rep. 577; *United States* v. *Orene Parker Co.* (Ky.), Cochran, D. J., October 30, 1902, unreported.

Mr. Charles W. Mullan, Attorney General of the State of Iowa, for defendant in error in this case and in No. 82:

Where merchandise is delivered by a consignor to a common carrier to be transported by such common carrier to the consignee, and the common carrier is required to collect from the consignee the purchase price of such merchandise before delivering the same to him, the sale is made at the place where the purchase price is paid and the merchandise delivered to the consignee.

Intoxicating liquors which are shipped C. O. D. from another State into the State of Iowa cease to be protected by the interstate commerce clause upon arrival at their destination, and under the Wilson Act they at once upon arrival at their destination become subject to the operation and effect of the laws of Iowa.

No Federal question is involved which gives this court jurisdiction to hear and determine this cause, for the reason that the decision of the Supreme Court of Iowa does not deny the authority of Congress to regulate commerce among the several States.

The ownership and possession of merchandise which is shipped C. O. D. remain in the consignor until it is delivered to the consignee by the common carrier upon payment of the purchase price, and the sale is made at the place of delivery, except where the consignee expressly designates the common carrier as his agent to transport and deliver such merchandise, or where the acts of the parties show that the consignor in-

tended to part with his property and to transfer the title and possession thereof to the consignee at the time of delivery to the common carrier. *United States* v. *Shriver*, 23 Fed. Rep. 134; *United States* v. *Cline*, 26 Fed. Rep. 515; *McElwee* v. *Met. Lumber Co.*, 69 Fed. Rep. 302; *McNeil* v. *Brawn*, 53 N. J. Law, 617; *Thompson* v. *Cincinnati, W. & Z. Ry. Co.*, 1 Bond C. C. 152; *Hooper* v. *C. & N. Ry. Co.*, 27 Wisconsin, 81; *Braddock Glass Co.* v. *Irwin*, 153 Pa. St. 440; *Millheiser* v. *Erdman*, 98 N. Car. 292; *Stone* v. *Perry*, 60 Maine, 48; *Moakes* v. *Nicholson*, 19 C. B. N. S. 290; *Hirshorn* v. *Canney*, 98 Massachusetts, 149; *Daugherty* v. *Fowler*, 44 Kansas, 628; *Suit* v. *Woodhall*, 13 Massachusetts, 391; *Wasserboehr* v. *Boulier*, 84 Maine, 165; *Lane* v. *Chadwick*, 146 Massachusetts, 68; Benjamin on Sales (1883), § 1040; *State* v. *O'Neil*, 58 Vermont, 140; *Brewing Co.* v. *DeFrance*, 91 Iowa, 108; *State* v. *U. S. Ex. Co.*, 70 Iowa, 271; *The Francis*, 13 U. S. 183; Mechem on Sales, §§ 494, 502, 740.

The place of the sale of goods or merchandise is the place of delivery; that is, where the sale is completed by delivery. *Dow* v. *Gould &c. Silver Min. Co.*, 31 California, 629; *Mead* v. *Dayton*, 28 Connecticut, 39; *Lewis* v. *McCabe*, 49 Connecticut, 155; *Weil* v. *Golding*, 141 Massachusetts, 364.

Under the Wilson Act all fermented, distilled or other intoxicating liquors transported into any State or remaining therein for use, consumption, sale or storage, are, upon arrival in such State, subject to the operation and effect of the laws of the State to which they are shipped, and subject to the police powers of such State, to the same extent as domestic property therein, whether such liquors are transported in original packages or otherwise. 26 Stat. 313, c. 728; *In re Rahrer*, 140 U. S. 545; *Rhodes* v. *Iowa*, 170 U. S. 412.

Where merchandise is shipped C. O. D., the liability of the carrier ceases and that of a warehouseman attaches at the time of the arrival of such merchandise at the place of its destination. *Weed* v. *Barney*, 45 N. Y. 344; *Gilson* v. *Am. Merchants' Union Ex. Co.*, 1 Hun (N. Y.), 387; *Marshall* v. *Am. Ex. Co.*, 7 Wisconsin, 1; *Pac. Ex. Co.* v. *Wallace*, 60

Arkansas, 100; Schouler on Bailments and Carriers, 2d ed., § 507.

There is no duty or obligation arising out of the nature of a carrier's business which requires such carrier to collect payment of the price of goods transported by it as a condition precedent to their delivery. Such obligation arises, if at all, by special contract, express or implied. *Cox* v. *Columbus &c. R. Co.*, 91 Alabama, 392; *Union R. Co.* v. *Riegel*, 73 Pa. St. 72.

The statute of Iowa under which the liquors were seized and condemned is set out upon pages 19 and 20 of the transcript of the record.

In the seventh paragraph of the agreed statement of facts, it is expressly stipulated that the packages of intoxicating liquors in question were to be delivered to the consignees at the office of the American Express Company in Tama, Tama County, Iowa. (Transcript of record, p. 5.)

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

Although the majority of the Supreme Court of Iowa doubted the correctness of a ruling previously made by that court, nevertheless it was adhered to under the rule of *stare decisis*, and was made the basis of the decision in this cause. In the previous case it was held by the Supreme Court of Iowa that, where merchandise was received by a carrier with a duty to collect the price on delivery to the consignee, the merchandise remained the property of the consignor, and was held by the carrier as his agent with authority to complete the sale. Upon this premise it was decided that intoxicating liquors shipped C. O. D. from another State were subject to be seized on their arrival in Iowa in the hands of the express company. Sustaining upon this principle the seizure in this case, the Supreme Court of Iowa did not expressly consider the defense based on the commerce clause of the Constitution of the United States, because the court deemed that its ruling on the subject of the effect of the C. O. D. shipment was a wholly non-Federal

ground, broad enough to sustain the conclusion reached. And this the court considered was sanctioned by *O'Neil* v. *Vermont*, 144 U. S. 324.

In accord with the opinion of the Supreme Court of Iowa it is insisted at bar that this writ of error should be dismissed for want of jurisdiction, because the decision below involved no Federal question, and the case of *O'Neil* v. *Vermont*, *supra*, is relied upon. The contention is untenable. As pointed out in *Norfolk & Western Ry. Co.* v. *Sims*, 191 U. S. 441, the view taken of the *O'Neil* case is a mistaken one. True, in that case the Supreme Court of Vermont gave to a C. O. D. shipment the effect attributed to it by the Supreme Court of Iowa in this case. True, also, a writ of error was prosecuted from this court to the Vermont court upon the assumption that the commerce clause of the Constitution was involved, but this court dismissed the writ of error because it did not appear that the commerce clause of the Constitution was relied on in the state court, was in any way called to the attention of that court, or was passed upon by it. As on this record it appears that the protection of the commerce clause was directly invoked in the state court, it is apparent that the *O'Neil* case is inapposite. And as, in order to decide the contention that the judgment below rests upon an adequate non-Federal ground, we must necessarily consider how far the C. O. D. shipment was protected by the commerce clause of the Constitution, which is the question on the merits, we pass from the motion to dismiss to the consideration of the rights asserted under the commerce clause of the Constitution.

We can best dispose of such asserted rights by a brief reference to some of the controlling adjudications of this court.

In *Bowman* v. *Chicago & N. W. Ry. Co.*, 125 U. S. 465, it was held that the statutes of Iowa, forbidding common carriers from bringing intoxicating liquors into the State of Iowa from another State or Territory without obtaining a certificate required by the laws of Iowa, was void, as being a regulation of commerce between the States, and, therefore, that those laws

did not justify a common carrier in Illinois from refusing to receive and transport intoxicating liquors consigned to a point within the State of Iowa.

In *Leisy* v. *Hardin*, 135 U. S. 100, it was held that a law of the State of Iowa, forbidding the sale of liquor in that State, could not be made to apply to liquors shipped from another State into Iowa, before the merchandise had been delivered in Iowa and there sold in the original package, without causing the statute to be a regulation of commerce repugnant to the Constitution of the United States. In *Rhodes* v. *Iowa*, 170 U. S. 412, the same doctrine was reiterated, except that it was qualified to the extent called for by the provisions of the act of Congress of August 8, 1890, 26 Stat. 313, commonly known as the Wilson Act. In that case a shipment of intoxicating liquors had been made into the State of Iowa from another State, and the agent of the ultimate railroad carrier in Iowa was proceeded against for an alleged violation of the Iowa law, because when the merchandise reached its destination in Iowa he had moved the package from the car in which it had been transported to a freight depot, preparatory to delivery to the consignee. The contention was that, as by the Wilson Act, the power of the State operated upon the property the moment it passed the state boundary line, therefore the State of Iowa had the right to forbid the transportation of the merchandise within the State and to punish those carrying it therein. This was not sustained. The court declined to express an opinion as to the authority of Congress, under its power to regulate commerce, to delegate to the States the right to forbid the transportation of merchandise from one State to another. It was, however, decided that the Wilson Act manifested no attempt on the part of Congress to exert such power, but was only a regulation of commerce, since it merely provided, in the case of intoxicating liquors, that such merchandise, when transported from one State to another, should lose its character as interstate commerce upon completion of delivery under the contract of interstate shipment, and before sale in the original packages.

The doctrine of the foregoing cases was applied in *Vance* v. *Vandercook Company, No. 1,* 170 U. S. 438, 442, to the right of a citizen of South Carolina to order from another State, for his own use, merchandise, consisting of intoxicating liquors, to be delivered in the State of South Carolina.

Coming to test the ruling of the court below by the settled construction of the commerce clause of the Constitution, expounded in the cases just reviewed, the error of its conclusion is manifest. Those cases rested upon the broad principle of the freedom of commerce between the States and of the right of a citizen of one State to freely contract to receive merchandise from another State, and of the equal right of the citizen of a State to contract to send merchandise into other States. They rested also upon the obvious want of power of one State to destroy contracts concerning interstate commerce, valid in the States where made. True, as suggested by the court below, there has been a diversity of opinion concerning the effect of a C. O. D. shipment, some courts holding that under such a shipment the property is at the risk of the buyer, and, therefore, that delivery is completed when the merchandise reaches the hands of the carrier for transportation; others deciding that the merchandise is at the risk of the seller, and that the sale is not completed until the payment of the price and delivery to the consignee at the point of destination.

But we need not consider this subject. Beyond possible question, the contract to sell and ship was completed in Illinois. The right of the parties to make a contract in Illinois for the sale and purchase of merchandise, and in doing so to fix by agreement the time when the condition on which the completed title should pass, is beyond question. The shipment from the State of Illinois into the State of Iowa of the merchandise constituted interstate commerce. To sustain, therefore, the ruling of the court below would require us to decide that the law of Iowa operated in another State so as to invalidate a lawful contract as to interstate commerce made in such other State; and, indeed, would require us to go yet further, and say

that, although under the interstate commerce clause a citizen in one State had a right to have merchandise consigned from another State delivered to him in the State to which the shipment was made, yet that such right was so illusory that it only obtained in cases where in a legal sense the merchandise contracted for had been delivered to the consignee at the time and place of shipment.

When it is considered that the necessary result of the ruling below was to hold that wherever merchandise shipped from one State to another is not completely delivered to the buyer at the point of shipment so as to be at his risk from that moment the movement of such merchandise is not interstate commerce, it becomes apparent that the principle, if sustained, would operate materially to cripple if not destroy that freedom of commerce between the States which it was the great purpose of the Constitution to promote. If upheld, the doctrine would deprive a citizen of one State of his right to order merchandise from another State at the risk of the seller as to delivery. It would prevent the citizen of one State from shipping into another unless he assumed the risk; it would subject contracts made by common carriers and valid by the laws of the State where made to the laws of another State, and it would remove from the protection of the interstate commerce clause all goods on consignment upon any condition as to delivery, express or implied. Besides, it would also render the commerce clause of the Constitution inoperative as to all that vast body of transactions by which the products of the country move in the channels of interstate commerce by means of bills of lading to the shipper's order with drafts for the purchase price attached, and many other transactions essential to the freedom of commerce, by which the complete title to merchandise is postponed to the delivery thereof.

But general considerations need not be further adverted to in view of prior decisions of this court relating to the identical question here presented. In *Caldwell* v. *North Carolina*, 187 U. S. 622, the facts were these: The Chicago Portrait Com-

pany shipped to Greensboro, North Carolina, by rail, consigned to its order, certain pictures and frames. At Greensboro the company had an agent who received the merchandise, put the pictures and frames together and delivered them to the purchasers who had ordered them from Chicago. The contention was that the portrait company was liable to a license charge imposed by the town of Greensboro for selling pictures therein, and this was supported by the argument that, although the contract for sale was made in Chicago, it was completed in North Carolina by the assembling of the pictures and frames and the delivery there made. It was held that the license could not be collected, because the transaction was an interstate commerce one. In the course of the opinion, after a full review of the authorities, it was observed (p. 632):

"It would seem evident that, if the vendor had sent the articles by an express company, which should collect on delivery, such a mode of delivery would not have subjected the transaction to State taxation. The same could be said if the vendor himself, or by a personal agent, had carried and delivered the goods to the purchaser. That the articles were sent as freight, by rail, and were received at the railroad station by an agent, who delivered them to the respective purchasers, in nowise changes the character of the commerce as interstate."

In *Norfolk & Western Railway Company* v. *Sims*, 191 U. S. 441, these were the facts: A resident of North Carolina ordered from a corporation in Chicago a sewing machine. The machine was shipped under a bill of lading to the order of the buyer, but this bill of lading was sent to the express agent at the point of delivery in North Carolina, with instructions to surrender the bill on payment of a C. O. D. charge. The contention was that the consummation of the transaction by the express agent in transferring the bill of lading upon payment of the C. O. D. charge was a sale of the machine in North Carolina, which subjected the company to a license tax. The contention was held untenable. Calling attention to the fact that the contract of sale was completed as a contract in Chi-

cago, and after reviewing some of the authorities on the subject of interstate commerce, the court said (p. 450):

"Indeed, the cases upon this subject are almost too numerous for citation, and the one under consideration is clearly controlled by them. The sewing machine was made and sold in another State, shipped to North Carolina in its original package for delivery to the consignee upon payment of its price. It had never become commingled with the general mass of property within the State. While technically the title of the machine may not have passed until the price was paid, the sale was actually made in Chicago, and the fact that the price was to be collected in North Carolina is too slender a thread upon which to hang an exception of the transaction from a rule which would otherwise declare the tax to be an interference with interstate commerce."

The controlling force of the two cases last reviewed upon this becomes doubly manifest when it is borne in mind that the power of the States to levy general and undiscriminating taxes on merchandise shipped from one State into another may attach to such merchandise before sale in the original package when the merchandise has become at rest within the State, and therefore enjoys the protection of its laws, and this upon the well-recognized distinction that the movement of merchandise from State to State, whilst constituting interstate commerce, is not an import in the technical sense of the Constitution. *American Steel & Wire Company* v. *Speed*, 192 U. S. 500.

As from the foregoing considerations it results that the court below erred in refusing to apply and enforce the commerce clause of the Constitution of the United States, its judgment must be reversed.

The judgment of the Supreme Court of Iowa is reversed, and the cause is remanded to that court for proceedings not inconsistent with this opinion.

Mr. Justice Harlan dissents.

ADAMS EXPRESS COMPANY *v.* IOWA.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

No. 82. Argued December 2, 1904.—Decided January 3, 1905.

American Express Co. v. *Iowa, ante,* p. 133, followed.

THE facts are stated in the opinion.

Mr. Lawrence Maxwell, Jr., for plaintiff in error.[1]

Mr. Charles W. Mullan, Attorney General of the State of Iowa, for defendant in error.[1]

MR. JUSTICE WHITE delivered the opinion of the court.

This was an indictment against the Adams Express Company, in a court of Iowa, for maintaining a nuisance in violation of a section of the code of that State. It was charged in the indictment in substance that the Adams Express Company, between July and December, 1900, at St. Charles, Madison County, Iowa, used a building for the purpose of selling intoxicating liquors therein, contrary to law, and that the company owned and kept in said building intoxicating liquors with the intent unlawfully to sell them within the State, contrary to an Iowa statute. There was a plea of not guilty, a trial and verdict of guilty, and a sentence imposing a fine of $350 and costs.

An agreed statement of facts was stipulated, from which it appears that the Adams Express Company was a common carrier, engaged in the express business between the States of Missouri and Iowa; that it received the liquor in question at

[1] This case was argued simultaneously with *American Express Co.* v. *Iowa,* for abstracts of arguments see p. 134, *ante.*

St. Joseph, Missouri, to be carried to St. Charles, Iowa, there to be delivered to the consignees, whose names were upon the packages, and that each and all were marked C. O. D., meaning that they were not to be delivered by the express company to the consignees until the purchase price and the express charges were paid to the agent of the express company. It was further recited in the statement of facts that the only connection of the Adams Express Company with the transaction or transactions in relation to said liquors was as a common carrier, having received the same in Missouri for carriage to the consignees at St. Charles, Iowa.

The trial court charged the jury, in substance, that if from the evidence it appeared, beyond a reasonable doubt, that the defendant express company held at its depot for delivery to the consignees packages of liquor shipped from other States, upon which the price was to be collected under a C. O. D. arrangement, the defendant must be found guilty of keeping and maintaining a place for the sale of intoxicating liquors within the meaning of the Iowa statutes.

On appeal to the Supreme Court of Iowa from the judgment of conviction the action of the trial court was approved upon the authority of the case of the State of Iowa against the American Express Company, and at bar it was conceded that the issues in this case "are identical in every particular" with those which were involved in that case. As we have just reversed the judgment of the Supreme Court of Iowa in the *American Express Company* case, it follows, for the reasons stated in the opinion in that case, that the judgment in this must also be reversed.

The judgment of the Supreme Court of Iowa is reversed, and the cause is remanded to that court for proceedings not inconsistent with this opinion.

Mr. Justice Harlan dissents.

LUCIUS *v.* CAWTHON-COLEMAN COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ALABAMA.

No. 110. Submitted December 13, 1904.—Decided January 3, 1905.

The bankruptcy court has jurisdiction to determine on a claim asserted by the bankrupt whether property in the hands of the trustee is exempt; and while an erroneous decision against the asserted right may be corrected in the appropriate mode for the correction of errors, the jurisdiction of the court is not in issue within the meaning of the act of March 3, 1891, and a direct appeal to this court will not lie.

THIS is an appeal from a decree of the District Court of the United States for the Southern District of Alabama, sitting in bankruptcy, establishing and directing the enforcement of a lien upon the proceeds of two policies of insurance in the hands of the trustee in bankruptcy. The District Court filed findings of fact and its conclusions of law, in pursuance to the third subdivision of General Order in Bankruptcy 36; and an appeal was taken upon the question of jurisdiction alone, under the supposed authority of the fifth section of the judiciary act of March 3, 1891.

In substance the pertinent facts stated in the findings were as follows:

D. D. Lucius, a resident citizen of Alabama, was, in voluntary proceedings, adjudged a bankrupt, and the case was sent to a referee. In his schedules, Lucius claimed as exempt drugs to the value of $1,000 and $1,000 of a balance of $1,150 due upon the aforementioned policies of insurance. The policies subsequently came into the possession of the trustee in bankruptcy.

The Cawthon-Coleman Company were creditors of Lucius for about the sum of $1,000, evidenced by a note containing a

waiver of exemption of personal property, and secured by a mortgage upon the homestead of Lucius, which mortgage contained a stipulation for insurance for the benefit of the mortgagees. The two policies above referred to were obtained in consequence of the stipulation referred to, and while in force and before the adjudication in bankruptcy the dwelling insured was destroyed by fire. Claiming, by reason of the facts just stated, an equitable lien upon the proceeds of the insurance, the Cawthon-Coleman Company filed a petition in the bankruptcy proceedings to establish and enforce their alleged lien. During the pendency of this proceeding the trustee in bankruptcy collected the balance due upon the policies. The trustee reported an allowance of the exemption out of such proceeds as claimed by the bankrupt, and shortly afterwards the bankrupt filed a plea denying jurisdiction in the court to hear and determine the claim of lien. This plea was overruled by the referee, who also refused to confirm the allowance of the exemption claimed by the bankrupt, and an order was made by the referee directing the trustee to pay to the Cawthon-Coleman Company on the mortgage indebtedness the sum of $1,001.40 out of the insurance proceeds. Thereafter, to quote from the findings, "upon a review by the district judge sitting in bankruptcy, of the referee's decision, the judge affirmed it, and rendered a decree asserting that the bankruptcy court had jurisdiction to hear and determine this matter, and granted the relief prayed by the petition of Cawthon-Coleman Company." This appeal on the question of jurisdiction was then taken direct to this court.

Mr. Harry Pillans and *Mr. William James Johnson* for appellant:

The bankruptcy court is of limited jurisdiction and has only the authority conferred by the statute creating it. *Re Morris*, Fed. Cas. 9,825; Collier on Bankruptcy, 11. Where jurisdiction of the court has been sustained see *Re Turnbull*, 106 Fed. Rep. 667; *Re Mayer*, 108 Fed. Rep. 599; *McGahan* v. *Anderson*, 113

Fed. Rep. 115; Brand. on Bankr., 2d ed., 126, § 2, and cases there cited. It has, however, been expressly held that property *generally* exempt cannot be subjected *in the bankruptcy court* to the satisfaction of the debt of a creditor who holds a waiver of exemption as to this particular debt, or has a claim of lien on the exempt property. *Re Grimes*, 96 Fed. Rep. 534; *Woodruff* v. *Cheeves*, 105 Fed. Rep. 601, 606; *Re Hill*, 96 Fed. Rep. 185; *Lockwood* v. *Exchange Bank*, 190 U. S. 294; *Re Hatch*, 102 Fed. Rep. 280; *Re Jackson*, 116 Fed. Rep. 46; *Ingram* v. *Wilson*, 125 Fed. Rep. 913.

The cases cited by the judge below, to the effect that the court had jurisdiction, to wit: *Cannon* v. *Dexter Broom Co.*, 120 Fed. Rep. 657; *Re Butler*, 120 Fed. Rep. 100; *Re Boyd*, 120 Fed. Rep. 999; *Re Campbell*, 124 Fed. Rep. 417, are all on the border line. They involve cases in which the state statutes provided that goods shall not be exempt against claims for the unpaid purchase price. They are flatly opposed by the cases cited *supra*.

There was no appearance or brief for appellee.

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

By the express terms of subdivision 11 of section 2 of the Bankruptcy Act of 1898 jurisdiction is conferred upon courts of bankruptcy to determine all claims of bankrupts to their exemptions. When, therefore, as in the case at bar, property of the bankrupt has come into the possession of the trustee in bankruptcy, and the bankrupt has asserted in the bankruptcy court a claim to be entitled to a part or the whole of such property, as exempt property, the bankruptcy court necessarily is vested with jurisdiction to determine upon the facts before it the validity of the claimed exemption. An erroneous decision against an asserted right of exemption and a consequently erroneous holding that the property forms assets of the estate

in bankruptcy, to be administered under the direction of the bankruptcy court, while subject to correction in the mode appropriate for the correction of errors, *Lockwood* v. *Exchange Bank*, 190 U. S. 294, does not create a question of jurisdiction proper to be passed upon by this court by a direct appeal under the provisions of the act of March 3, 1891. *Denver First National Bank* v. *Klug*, 186 U. S. 202, 204, and cases cited. It necessarily results from the foregoing that as the bankruptcy court determined that the proceeds of the insurance policies in the hands of the trustee were assets of the estate in bankruptcy and not exempt property of the bankrupt, the jurisdiction existed to proceed to adjudicate the validity of an alleged equitable lien upon such property. *Hutchinson* v. *Otis*, 190 U. S. 552, 555.

As, therefore, upon the record before us, the jurisdiction of the court was not in issue within the meaning of the act of March 3, 1891, the direct appeal to this court was not properly brought, and the order must be

Appeal dismissed.

WOLFF *v.* DISTRICT OF COLUMBIA.

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

No. 62. Argued November 11, 1904.—Decided January 3, 1905.

An object which subserves the use of streets need not necessarily be considered an obstruction although it may occupy some part of the space of the street.

The duty of a city to specially illuminate and guard the place where an object is depends upon whether such object is an unlawful obstruction.

Under §§ 222 and 233, Rev. Stat., District of Columbia, the District is not prohibited from permitting a stepping-stone on any part of the street because it is an obstruction *per se* nor is the District required to specially illuminate and guard the place where such stepping-stone is located.

THIS is an action for damages for injury caused to plaintiff in error (who was also plaintiff below) by an alleged negligent omission of duty by the District of Columbia.

On the twenty-seventh of October, 1895, about nine o'clock in the evening, plaintiff had occasion to visit Sangerbund Hall, a house on C street, in the city of Washington. On coming out, and for the purpose of approaching a wagon which was standing in the street, he walked rapidly across the sidewalk and, by falling over a block of stone called a stepping-stone or carriage step, which was on the sidewalk near the curb, broke his leg. Some time subsequently he was compelled to submit to its amputation.

The charge against the city was that it was a body corporate and municipal, and had the power, and was its duty, to keep the sidewalks free of obstructions and nuisances, one of which, it was alleged, said stone was. And further, that it was the duty of the District of Columbia to keep the streets properly lighted. In neglect of both, it was alleged, it did "allow and suffer" the stone to be securely fastened into and remain upon the sidewalk, and did "keep and continue" it there during the nighttime of the twenty-seventh of October, without a light to show its presence or a watchman to notify wayfarers of its existence. Damages were laid at $25,000. The District of Columbia pleaded not guilty. A jury was impanelled. At the conclusion of the testimony the District moved the court to instruct a verdict for it on the ground that the plaintiff had not made out a case. The motion was granted, and a verdict rendered in accordance with the instructions. A motion for a new trial was made and denied, and the case was then taken to the Court of Appeals, which affirmed the judgment of the court below. 21 D. C. App. 464.

Mr. John C. Gittings, with whom *Mr. D. W. Baker* was on the brief, for plaintiff in error:

The stepping-stone was an unlawful obstruction *per se.* Secs. 222–230, Rev. Stat., Dist. of Col.; *Dist. of Col.* v. *Libbey,*

9 D. C. App. 321; *Curry* v. *Dist. of Col.*, 14 D. C. App. 423; *United States* v. *Cole*, 18 D. C. App. 504; *Scranton* v. *Catterson*, 94 Pa. St. 203; *Davis* v. *City of Austin*, 22 Tex. Civ. App. 460. The District of Columbia is liable to the same extent as other municipalities are. *Barnes* v. *Dist. of Col.*, 91 U. S. 540; *Woodbury* v. *Dist. of Col.*, 136 U. S. 450. *Dubois* v. *Kingston*, 102 N. Y. 219; *Roberts* v. *Powell*, 168 N. Y. 411, on which defendant in error relies can be distinguished.

It was the duty of the District of Columbia to so light this street as to show the existence of this stone.

Mr. E. H. Thomas, with whom *Mr. Andrew B. Duvall* was on the brief, for defendant in error:

No duty of the municipality was violated by permitting this stone to remain on the sidewalk. It was not, in view of its size and location, an unlawful obstruction, or a nuisance. See Building Regulation, January 1, 1877, p. 23, § 23; June 3, 1882, p. 23, § 23; November 1, 1899, p. 24, § 4; June 26, 1891, p. 27, § 11; December 1, 1892, p. 28, § 10; May 2, 1894, p. 31, § 10; August 8, 1892, Art. VIII, § 3, p. 14; March 12, 1895, p. 23; Present Police Regulations, Art. VIII, § 10, p. 38; Webb's Digest, 65; Act of March 3, 1891, Bldg. Reg., pp. 80–89; *O'Lind* v. *Lothrop*, 21 Pick. 292, 297; 2 Dillon Munic. Corp. § 734; *Howes* v. *Dist. of Col.*, 2 D. C. App. 193; *Dist. of Col.* v. *Libbey*, 9 D. C. App. 325; *Nor. Transp. Co.* v. *Chicago*, 99 U. S. 635; *Dubois* v. *Kingston*, 102 N. Y. 219; *Robert* v. *Powell*, 16 N. Y. 414.

Municipalities must exercise ordinary care in the construction and maintenance of streets and sidewalks, but that duty is not violated by permitting a carriage block of the usual size to occupy the usual position of such blocks on the sidewalk, near the curb, and not upon that portion of the sidewalk which is designed for the use of pedestrians going upon or passing along the walk. *Cincinnati* v. *Fleisher*, 63 Ohio St. 229. A hitching post is not a defect. *Macomber* v. *Taunton*, 100 Massachusetts, 255; *Rockford* v. *Tripp*, 83 Illinois, 247. A

city's failure to place a fence around a water hydrant which is properly located cannot render it liable for an injury caused by a traveler driving against it. *Vincennes* v. *Thuis*, 63 N. E. Rep. 315; *Canavan* v. *Oil City*, 183 Pa. St. 611.

A municipality has the discretionary power to locate a fire plug on a sidewalk. *Horner* v. *Philadelphia*, 194 Pa. St. 542.

Plaintiff in error was bound to exercise ordinary care. *Howes* v. *Dist. of Col.*, 2 D. C. App. 188; *Allis* v. *Columbian University*, 19 D. C. App. 270; *Dist. of Col.* v. *Ashton*, 14 D. C. App. 579; *Swart* v. *Dist. of Col.*, 17 D. C. App. 412; *Quimby* v. *Filter*, 62 N. J. L. 766; *Moore* v. *Richmond*, 85 Virginia, 538.

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

1. The first contention of plaintiff in error is that the stone was an unlawful obstruction, *per se*. This is deduced as a consequence from section 222 of the Revised Statutes of the District of Columbia, which reads as follows:

"No open space, public reservation, or other public grounds in the city of Washington, nor any portion of the public streets and avenues of said city, shall be occupied by any private person or for any private purpose whatever."

This section cannot be construed to prohibit putting upon a street any object without regard to its effect on the use of the street. The sweeping character of such a construction need not be pointed out. There are objects which subserve the use of streets and cannot be considered obstructions to them, although some portion of their space may be occupied. This is illustrated by a number of cases.

In *Dubois* v. *City of Kingston*, 102 N. Y. 219, a stepping-stone three feet four inches in length and twenty inches wide was placed on the edge of the sidewalk. The court observed that the stone was not of unusual size or located in an improper place, and that it would be extending the liability of cities too far to hold them liable for permitting stepping stones on the edge of sidewalks.

Robert v. *Powell*, 168 N. Y. 411, was also an action for injuries caused by a stepping-stone. The court said: "There are some objects which may be placed in or exist in a public street, such as hydrants, hitching posts, telegraph poles, awning posts or stepping-stones, such as the one described in this case, which cannot be held to constitute a nuisance. They are in some respects incidental to the proper use of the streets as to a highway. . . . The stepping-stone in this case, located upon the sidewalk in front of a private house, was a reasonable and necessary use of the street, not only for the convenience of the owner of the house but for other persons who desired to visit or enter the house for business or other lawful purposes."

It was further remarked: "The question involved in this class of cases is, whether an object complained of is usual, reasonable or necessary in the use of the street by the owner of the premises, or any one else."

City of Cincinnati v. *Fleisher, Ad'mr.*, 63 Ohio St. 229, 234, also passed upon a city's liability for the existence of a stepping-stone upon a sidewalk. The court said: "It [the stone] was within that portion of the street by the curb which, according to common usage, is devoted to carriage blocks, lamps, hitching posts and shade trees, which pedestrians of ordinary care observe and avoid." And *Elster* v. *Springfield* was quoted, to the effect that "the laying of sewers, like that of gas and water pipes, beneath the soil, and the erection of lamps and hitching posts, etc., upon the surface, is a street use, sanctioned as such by their obvious purpose and long-continued usage."

It was held in *Macomber* v. *City of Taunton*, 100 Massachusetts, 255, that a hitching post was not a defect in the highway for which the city was liable for permitting it to remain.

Plaintiff in error cites *City of Scranton* v. *Callerson*, 94 Pa. St. 202, and *Davis* v. *City of Austin*, 22 Texas Civ. App. 460.

In the first case, an iron water plug in the middle of a street and projecting above its surface, was held to be a nuisance. Obviously the case is not in point. The second case sustains

the contention of plaintiff in error, but cannot be followed against the authority and reasoning of the other cases.

2. The second contention of plaintiff in error is that it was the duty of the District of Columbia to so light the street as to show the presence of the stone thereon, the District having full knowledge thereof. This duty is made to rest mainly upon section 233 of the Revised Statutes of the District of Columbia, which is as follows:

"The proper authorities are directed to increase, from time to time as the public good may require, the number of street lamps on any of the streets, lanes, alleys, public ways and grounds in the city of Washington, and to do any and all things pertaining to the well lighting of the city."

This, in one sense, is but another form of the first contention. The duty of a city to especially illuminate a place where an object is, or to put a policeman on guard by it to warn pedestrians, depends upon the object being an unlawful obstruction.

The plaintiff in error can claim nothing from the general duty of the city under the statute to light the streets. The exercise of such duty was necessarily a matter of judgment and discretion, depending upon considerations which this record does not exhibit.

Judgment affirmed.

MOORE v. UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 71. Argued December 6, 1904.—Decided January 3, 1905.

Usage may be resorted to in order to make definite what is uncertain, clear up what is doubtful, or annex incidents, but not to vary or contradict the terms of a contract.

Under contracts between a San Francisco coal dealer and the United States for the delivery of coal at Honolulu "at wharf" or "on wharf as customary," the customs referred to held to be those of Honolulu and not of San

Francisco, and that the United States, in the absence of any provision to the contrary, could not be held liable for the demurrage paid by the shipper to the owners of vessels carrying the coal for delay in discharging their cargoes on account of the crowded condition of the harbor.

In engagements to furnish goods to a certain amount the quantity specified governs. Words like "about" and "more or less" are only for the purpose of providing against accidental and not material variations.

Under the contract in this case for delivery of "about" 5,000 tons of coal the United States cannot refuse to accept more than 4,634 tons, but is liable for the difference in value on 366 tons tendered and acceptance refused.

THE facts are stated in the opinion.

Mr. L. T. Michener, with whom *Mr. W. W. Dudley* was on the brief, for appellant:

As the agreement was prepared by the Government it will be construed most strongly against it. *Garrison* v. *United States*, 7 Wall. 688, 690; *Chambers* v. *United States*, 24 C. Cl. 387, 392; *Simpson & Co.* v. *United States*, 31 C. Cl. 217, 243; *Edgar & Thompson Works* v. *United States*, 34 C. Cl. 205, 219.

The Government was bound by the customs of the Port of San Francisco. 2 Parsons on Contract, side pp. 535, 539; *Robinson* v. *United States*, 13 Wall. 363, 366; *Hostetter* v. *Park*, 137 U. S. 30, 40; *Honge* v. *Woodruff*, 19 Fed. Rep. 136; *Smith* v. 60,000 *feet of Lumber*, 2 Fed. Rep. 396; *Moody* v. 500,000 *Laths*, 2 Fed. Rep. 607; *Pleasant* v. *Pendleton*, 6 Rand. (Va.) 493; *Barlow* v. *Lambert*, 28 Alabama, 704; *Foley* v. *Mason*, 6 Maryland, 37; *Van Hoesen* v. *Cameron*, 54 Michigan, 609; *McClusky* v. *Klosteman*, 20 Oregon, 108; *Lyon* v. *Culbertson*, 83 Illinois, 33; Maclachan on Mer. Ship. 360; Abbot on Ship. 228; Parsons on Ship. 324; *Barnard* v. *Kellogg*, 10 Wall. 390, distinguished. It is immaterial whether or not the officers and agents of the United States had knowledge of the custom. Phillips on Ins. §§ 980, 1003; *Thatcher* v. *McCulloch*, Olcott, 365; *Lowry* v. *Russell*, 8 Pick. 360; *McMasters* v. *Pa. R. R. Co.*, 60 Pa. St. 372; *Pittsburg Ins. Co.* v. *Dravo*, 2 Phil. W. N. C. 194; cases and authorities cited *supra*.

The facts proved as to the conditions at Honolulu do not

relieve defendant. *Williams* v. *Theobald*, 15 Fed. Rep. 468; citing *Randall* v. *Lynch*, 2 Camp. (N. P.) 352.

The parties having contracted in such a way as to fix the rate of discharge, it follows inevitably that local conditions at Honolulu could not relieve them from such contract stipulations.

If the shipper or freighter covenants to do a particular act, which it becomes impracticable for him to do, he must answer for his default. *Cross* v. *Beard*, 26 N. Y. 85; Abbott on Shipping, 307, 387; *Ford* v. *Cotesworth*, L. R. 4 Q. B. 127; *Williams* v. *Theobald*, 8 Sawyer, 443, 448; *Allen* v. 385 *Tons of Coal*, 27 Fed. Rep. 316; 9 Am. & Eng. Ency. of Law, 223, 242.

Even if there were no contract at all concerning lay days or demurrage, the law will imply a contract that the ship shall be detained a reasonable time only, and that the ship shall have reasonable demurrage therefor. Maclachlan, 546; 1 Parsons Mar. Law, 152; 1 Leggett on Bills of Lading, 297.

The burden of getting wharf at Honolulu was on the Government and not on the shipper. 1 Parsons on Ship. 226; Porter on Bills of Lading, § 400; Oliver on Shipping, 77; Scrutton on Charter-parties, 90; *Stewart* v. *Rogerson*, 6 L. R. Com. Pl. 424; *Jacques* v. *Wilson*, 7 Times L. R. 119; *Tharsis Co.* v. *Morrell*, L. R. 2 Q. B. (1891,) 647, 652; *The Boston*, 1 Lowell, 464; *Manson* v. *Railroad Co.*, 26 Fed. Rep. 923; *Nelson* v. *Dahl*, 12 Ch. Div. 562; *Choate* v. *Meredith*, 1 Holmes, 500; *Moody* v. 500,000 *Laths*, 2 Fed. Rep. 607; *Davis* v. *Wallace*, 3 Clifford, 133; *Thatcher* v. *Gas Light Co.*, 2 Lowell, 362; *Smith* v. *Lee*, 66 Fed. Rep. 344; *P. & R. R. R. Co.* v. *Northam*, 2 Ben. 1; *Reed* v. *Weld*, 6 Fed. Rep. 304.

If the wharves were all occupied the Government should have directed other delivery. *Williams* v. *Theobald*, 8 Sawyer, 443, 448; *Nelson* v. *Dahl*, 12 L. R. Ch. Div. 568; *Ford* v. *Colesworth*, L. R. 4 Q. B. 127; *Cross* v. *Beard*, 26 N. Y. 85; *Allen* v. 385 *Tons of Coal*, 27 Fed. Rep. 316.

In the absence of any express agreement as to the time for unloading, the law implies a contract to unload within a rea-

sonable time, and if the charterer or consignee fails to do so, through his own fault or that of his agent, he is liable for damages in the nature of demurrage for the detention of the vessel. 9 Am. & Eng. Ency. of Law, 253, n. 3; *Melloy* v. *Lehigh Co.*, 37 Fed. Rep. 377; *Sprague* v. *West*, Abb. Admr. 548, 553; *Bacon* v. *Transp. Co.*, 3 Fed. Rep. 344; *Hangood* v. *Tons of Coal*, 21 Fed. Rep. 681; *Crawford* v. *Mellor*, 1 Fed. Rep. 638; *Hyperion's Cargo*, 2 Lowell, 93; *The T. L. Adams*, 26 Fed. Rep. 655; *Empire Co.* v. *P. & R. R. R. Co.*, 70 Fed. Rep. 263; *S. C.*, affirmed 77 Fed. Rep. 919; *Randall* v. *Sprigg*, 74 Fed. Rep. 247; *Hoxie* v. *Reuben Doub*, 46 Fed. Rep. 800.

The Government having accepted the cargoes as consignee is liable the same as if it had been the charterer or party to the bill of lading. 1 Parsons Ship. 312; *Sutton* v. *Housatonic R. R. Co.*, 45 Fed. Rep. 507; *N. German Lloyd* v. *Heule*, 44 Fed. Rep. 100; *Neilson* v. *Jesup*, 30 Fed. Rep. 138; *The Thames*, 14 Wall. 98, 107; *Gates* v. *Ryan*, 37 Fed. Rep. 154.

The authorities established that the Government is liable as consignee for the demurrage paid by the charterer to the shipowner. Cases cited *supra* and *The Rebecca J. Moulton*, 5 Dec. of Comptroller, 305; 275 *Tons of Phosphates*, 9 Fed. Rep. 209; *Young* v. 140,000 *Bricks*, 78 Fed. Rep. 149; *Falkenberg* v. *Clark*, 11 R. I. 278; Abb. on Ship. 306; 1 Kay on Shipmaster & Seaman, 151; *Jesson* v. *Solly*, 4 Taunton, 52; *Mitchell* v. *Langdon*, 10 Biss. 527; *Wright* v. *New Zealand Co.*, L. R. 4 Exch. Div. 165, 170; *Tillett* v. *Com. Avon Wks.*, 2 Times Law Rep. 675; Carver on Carriage by Sea, §§ 644, 712.

As to the true rule of interpretation of "more or less" "about," "say," and equivalents, see *Brawley's Case*, 11 C. Cl. 522; *S. C.*, affirmed 96 U. S. 168, 173, and *Norrington* v. *Wright*, 115 U. S. 188.

Mr. Special Attorney Philip M. Ashford, with whom *Mr. Assistant Attorney General Pradt* was on the brief, for the United States:

The contracts are silent as to the carriage of the coal which

was to be delivered on the wharf at Honolulu. The agent of the United States had no knowledge of the customs of San Francisco. If any customs controlled they would be those of Honolulu and not of San Francisco. Carver on Carriage by Sea, § 461. The liability of the United States was only that of consignee. 9 Am. & Eng. Ency. of Law, 2d ed., 229, 257.

Where the vessel arriving is obliged either by custom of the port or bill of lading to await its turn in discharging the consignee is not liable for demurrage caused by the harbor being overcrowded. *Owen* v. 49,774 *Bushels of Rye*, 54 Fed. Rep. 185; *Riley* v. *Cargo of Iron Pipes*, 40 Fed. Rep. 605; *Cross* v. *Beard*, 26 N. Y. 85; *Wordin* v. *Bemis*, 32 Connecticut, 268; *The Glover*, 1 Brown, Adml. 166; *Clendaniel* v. *Tuckerman*, 17 Barb. 184; *Towle* v. *Kettell*, 5 Cush. 18; *Weaver* v. *Walton*, 5 Chi. Leg. N. 125; Abbs. Ship. 311; *Fulton* v. *Blake*, 5 Biss. 371; *Rodgers* v. *Forresters*, 2 Camp. 483; *Burmaster* v. *Hodgson*, 2 Camp. 488; *The M. S. Bacon*, 3 Fed. Rep. 344; *Coombs* v. *Nolan*, 7 Ben. 301; *Velatty* v. *Curtis*, 41 Fed. Rep. 479; *The Elida*, 31 Fed. Rep. 420; *The Mary Riley* v. 3,000 *Railroad Ties*, 38 Fed. Rep. 254; *Empire Transp. Co.* v. *P. & R. C. & I. Co.*, 77 Fed. Rep. 919; *Smith* v. *Granite Paving Co.*, 56 Fed. Rep. 525.

Where the consignee is not bound by the contract to furnish a berth (and the consignee in this case certainly was not), and where the vessel is required to take its turn in unloading (the vessels in this case certainly were), he is not liable for delay caused by an extraordinary accumulation of vessels to be unloaded. Such is the principle to be gleaned from the authorities heretofore cited. Reasonableness is all that is required of the consignee with reference to the receipt and disposal of a cargo in all shipping contracts, and as we have before stated, where the charter party or the bill of lading is silent as to the matters in dispute here, reasonable conduct only is required. *Whiteside* v. *Halstead*, 90 Illinois, 95; *Etten* v. *Newton*, 134 N. Y. 143; *Dayton* v. *Park*, 142 N. Y. 391; 9 Am. & Eng. Ency. of

Law, 2d ed., 255; Carver's Carriage by Sea, § 736; 7 Comp. Dec. 573; 2 Parsons, 423.

No particular wharf was designated, but it was specifically and definitely stated in the contract that the coal should be delivered at *a* wharf in the port of Honolulu and the facts found show that only one of three places at said port would conform to this requirement. To one of these places the ships in question must come before "lay days" would commence to run, and the United States as consignee was not liable for delays to the ships in coming to such place or places caused by their occupation by other ships.

So it seems clear that the "lay days" provided for said vessels should not be held to begin to run against the United States until after the arrival of the vessels in question at the wharf. *Bereton* v. *Chapman*, 5 Moo. P. 526; *Bremner* v. *Bunell*, 4 Sess. Cass. 934.

As to definition of "about," see Benj. on Sales, § 691; 96 U. S. 168, 171, 172; 115 U. S. 189, 204; 57 N. Y. Super. Ct. 57; 54 Maryland, 187; 7 Ind. App. 462, 467; 5 Gray (Mass.), 589; 6 El. & Bl. 675, 678; 2 Camp. 56; L. R. 5; P. C. 203, 217; 1 P. C. Div. 155, 158.

It is only a question of whether or not, under the circumstances surrounding this particular case, the delivery of 4,634 tons of coal was the delivery of "about 5,000 tons" of coal. It seems clear that it was.

Mr. Justice McKenna delivered the opinion of the court.

The appellant is a general commission merchant and shipper at San Francisco. He filed his petition in the Court of Claims, consisting of two paragraphs, in the first of which he claimed reimbursement from the United States of the sum of $1,053.36, demurrage paid by him for the detention over lay days of two ships chartered by him to transport coals to Honolulu and there to be delivered to the United States. By the second paragraph he prayed the recovery of the sum of $1,120.87, the

difference between the contract price of 366 tons of coal, which the United States refused to receive, and the price obtained for the same upon the sale in open market.

The causes of action rested on two contracts entered into by appellant with the United States through the proper officer of the Quartermaster's Department, United States Army, by which appellant agreed to furnish and deliver to that Department, Honolulu, Hawaiian Islands, "*at the wharf*," about 3,900 tons of the best merchantable "Wallsend" Australian steam coal, at the rate of not less than 100 tons a day, at 2,240 pounds to the ton, dangers of the sea and any causes beyond appellant's control excepted, the deliveries to commence on the arrival of the Hawaiian ship Euterpe at Honolulu, on or about July 23, 1898, for and in consideration of which appellant was to be paid at the office of the Quartermaster, United States Army, at San Francisco, California, at the rate of $9 per ton, in gold coin of the United States.

And by the second contract appellant was to deliver "on wharf, as customary," about 5,000 tons of the best merchantable Australian, Seaham, Wallsend or Pacific Coöperative steam coal, deliveries to commence at Honolulu on or about October 1, 1898. The other facts were found by the Court of Claims, as follows:

"III. That at the respective times these contracts were made it was the custom at San Francisco, between shippers and shipowners to insert in their charter parties a stipulation to the effect that cargoes were to be discharged as customary, in such customary berth or place as consignee shall direct, ship being always afloat, and at an average specified number of tons per weather working days (Sundays and holidays excepted), to commence when ship is ready to discharge, and notice thereof has been given by the captain in writing, and if detained over and above the said laying days, demurrage to be at 4d. register ton per day, which stipulation was duly inserted in the contract of the claimant with the ships employed by him to transport the coal mentioned in the contracts. It does not appear

that the officers and agents of the defendant, who were authorized to make, and did make, the contracts for the defendant, had knowledge or notice of such custom, nor that the contracts or either of them were made in view of such custom.

"IV. The claimant [appellant] discharged his said contracts as follows: The first contract: By the arrival at Honolulu of the ship Euterpe with 1,543 tons of coal, July 31, 1898, which was placed in berth at the wharf by the harbormaster of said port August 8, 1898, at 2.15 P. M., and commenced discharging coal at 3 P. M. same day, and finished August 29, 1898, consuming eighteen working days. If she had been discharged at not less than 100 tons per day, the time consumed would have been sixteen days. It does not appear that the defendant was at fault either in the loss of time in arriving at the wharf, nor in the discharge of the cargo afterwards. The court finds the defendant was able, ready and willing to receive the cargo as rapidly as discharged at the wharf. The claimant paid to the shipowner $1,053.36 demurrage for these delays.

"The second contract: 1. By the arrival of the bark Harvester, with 2,179 tons of coal, August 28, 1898, at Honolulu, which was placed at a berth at the wharf by the harbormaster September 16, 1898, and began discharging coal on that date, and completed same October 7, 1898, a period of eighteen working days. It does not appear that the defendant was at fault in the loss of time of said last-mentioned ship in arriving at the wharf. 2. By the arrival of the ship General Gordon at Honolulu, August 27, 1898, with 2,455 tons of coal. While at anchor, September 9, 10 and 11, 330 tons were discharged into steamship Arizona, a transport of defendant, for its own use, after which the Gordon was placed at a berth at the wharf by the harbormaster, September 14, at 1 P. M., and then commenced the further discharge of the cargo, completing the same October 4, no delays having occurred at the wharf. It does not appear the defendant was at fault in the ship's delay in reaching the wharf. In the case of each ship the defendants had notice in writing of their respective arriv-

als within twenty-four hours thereafter. The wharves at Honolulu are under the control of a harbormaster. The practice of such harbormaster was to assign ships to berths at the wharves in the order of their respective arrivals, and this practice was followed by him in respect to the ships mentioned. Claimant paid said shipowners for delays $1,433.12 to the Harvester and $744.48 to the General Gordon. All coal delivered was paid for by defendant.

"V. The coal actually delivered under the second contract was 4,634 tons, completed October 7, 1898. About a month subsequent to this claimant purchased 366 tons of coal of the barkentine Omega, then in the Honolulu harbor, and tendered the same to the defendant upon its contract of June 23, 1898, but the defendant refused to receive it, whereupon claimant sold the same in market, for the best price he could obtain, at $3.06\frac{1}{4}$ per ton less than $9, the contract price with the defendant, equivalent to $1,120.87 in all, and to his loss in that amount.

"VI. At the time of the delivery of the coal mentioned in the foregoing findings the Honolulu harbor had eleven docks or wharves, three of which only were used for the discharge of coal. The docks were crowded, and several vessels were moored at the reef. By local regulations of the Government, a harbormaster had general supervision of all vessels in the harbor, and all vessels were anchored and assigned to berths, in the order of their arrival, by the harbormaster. There were no lighters for public use, and defendant had none at the port, and it was usual or customary to discharge freight upon the wharves. The defendant had no authority over the wharves, and was subject to local regulations, and the order of the harbormaster, the same as individuals."

As a conclusion of law the court decided that appellant was not entitled to recover. 38 C. Cl. 590.

The question in the case is whether the delay at Honolulu in the delivery of the coal was caused by the United States or by appellant; or, in other words, whether it was the duty of

the United States to designate and furnish a wharf for the discharge of the coal from the ships, or its duty only to receive the coal at the wharf when delivered there by appellant.

The question is one of law. Any fault in fact upon the part of the United States is excluded by the findings of the court. The cause of delay is expressly found to have been due to the conditions in Honolulu harbor, and that to these conditions the United States was as subordinate and subject as appellant. The liability of the United States is asserted, nevertheless, on account of the custom existing in San Francisco between shippers and shipowners.

But the terms of the contracts are explicitly opposite to the custom. The custom requires a consignee to designate a berth for the discharge of cargo, and is hence responsible, it is contended, for the delays to a ship in reaching the berth, though caused by the conditions existing at the port of discharge. The contracts have no such provision, nor do they refer to the charter parties entered into between claimant and the ships. The contracts require delivery to be "at wharf" (first contract); "*on wharf as customary*" (second contract). "As customary" meant the mode of discharging freight at Honolulu. Carver, Carriage by Sea, 696. The custom there was to discharge freight upon the wharves. The terms of the contracts, therefore, are reinforced by the custom at Honolulu, and the custom at San Francisco cannot prevail against them.

The effect of usage upon the contracts of parties has been decided many times. It may be resorted to in order to make definite what is uncertain, clear up what is doubtful, or annex incidents, but not to vary or contradict the terms of a contract. Various applications of this principle are presented in the following cases: *Barnard* v. *Kellogg*, 10 Wall. 383; *Heame* v. *Marine Ins. Co.*, 20 Wall. 488; *The Insurance Companies* v. *Wright*, 1 Wall. 456; *Oelricks* v. *Ford*, 23 How. 49; *Hostetter* v. *Park*, 137 U. S. 30; *National Bank* v. *Burkhardt*, 100 U. S. 686. We do not think it is necessary to make a detailed review of these cases or of the cases which appellant has cited in which

consignees have been charged with demurrage. To trace and relate the various conditions upon which consignees have been held liable would extend this opinion to too great length, and discuss matters irrelevant to the case as we regard it. In all of the cases cited there was an omission of duty on the part of the consignees. In the case at bar there was no omission of duty, and, besides, the United States was not a consignee of the coal in any proper sense of that word. There was no privity between it and the ships. Its contract was to receive coal at the wharf and pay for it on delivery there, after inspection. Its contract was not to receive coal in lighters or to bear any expense in the transportation to the wharves. It is manifest that coal on board ships in a harbor is not in the same situation as coal on a wharf. The wharf, under the contract, was the place of destination, and the appellant took the chances, as observed by the Court of Claims, of obstacles which should intervene to delay the delivery of the coal at the wharf, as they did of other obstacles which might have intervened to prevent the coal reaching the harbor. It was not strictly the coal in the ships that the United States contracted to take. It was certain quantities of coal, and on account of this, in the exercise of their rights under the second contract, appellant bought coal in the open market and tendered it in fulfillment of that contract. The liability of the United States to accept we shall presently consider. We cite the fact now as illustrating the meaning of the contract. It is manifest from these views the Court of Claims was right in holding the United States was not liable for the delay caused to the ships by the conditions which existed in Honolulu harbor.

2. By the terms of the second contract (June 23, 1898) the appellant agreed to deliver and the United States agreed to "receive about 5,000 tons" of coal, delivery to commence with about 2,200 tons, to arrive at Honolulu on or about the first day of October, 1898. By the seventh of October delivery was made of 4,634 tons. About a month subsequently appellant purchased 366 tons of coal of a ship then in the harbor,

and tendered the coal to the United States in fulfillment of the contract to deliver 5,000 tons. The United States refused to receive it, and appellant sold it in the open market for $3.06¼ per ton less than $9, the contract price. This was the best price which could be obtained, and the loss to appellant was $1,120.87. The Court of Claims held that the appellant was not entitled to recover. We think this was error. The obligations of parties were reciprocal; one to deliver, the other to receive, about 5,000 tons of coal, and equally reciprocal is the liability for non-performance of the obligations. The only question can be, is 366 tons less than 5,000 tons, "about 5,000 tons"? We think not. The difference is too great. We said in *Brawley* v. *United States*, 96 U. S. 168, 172, that in engagements to furnish goods to a certain amount, the quantity specified is material and governs the contract. "The addition of the qualifying words 'about,' 'more or less,' and the like, in such cases, is only for the purpose of providing against accidental variations arising from slight and unimportant excesses or deficiencies in number, measure or weight." See also *Cabot* v. *Winsor*, 1 Allen, 546, 550; *Salmon* v. *Boykin*, 66 Maryland, 541; *Indianapolis Cabinet Co.* v. *Herrman*, 7 Ind. App. 462; *Cross* v. *Eglin*, 2 Barn. & Adol. 106; *Morris* v. *Levison*, 1 C. P. D. 155, 158; *Bourne* v. *Seymour*, 16 C. B. 337, 353; *Simpson* v. *N. Y., N. H. & H. R. R. Co.*, 38 N. Y. Supp. 341, 342.

The record does not inform us why the United States refused the tender, and we must assume that it had no other justification than its supposed right under the contract.

Judgment reversed and cause remanded with directions to enter judgment for appellant (claimant) in the sum of $1,120.87.

MR. JUSTICE HOLMES concurs in the result.

HARTIGAN v. UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 72. Submitted December 6, 1904.—Decided January 3, 1905.

A cadet at the West Point Military Academy is not an officer of the United States Army within the meaning of §§ 1229, 1342, Rev. Stat., and, if delinquent, may be dismissed by the President without trial and conviction by court-martial.

APPELLANT filed a petition in the Court of Claims to have declared void his dismissal from the United States Military Academy at West Point, and for judgment for his pay as a cadet from July 27, 1883, to July 1, 1889, amounting to $3,417.

The appellant was duly appointed a cadet in the Military Academy on the first day of July, 1880, and served as such until the twenty-seventh of July, 1883, when he was summarily dismissed, by order of the President, upon charges of maltreating a new cadet upon guard, as well as other improper conduct. After the dismissal of appellant another cadet was appointed to succeed him, was duly graduated from the Academy, and appointed and commissioned a second lieutenant in the Army, and subsequently a captain of the Twenty-fifth Regiment of Infantry.

The appellant, subsequently to his dismissal, presented petitions respectively to the Adjutant General of the Army and to the Secretary of War, in which he asserted his innocence of the charges made against him, and prayed for reinstatement or trial by court-martial. He also presented a petition April 21, 1888, to the President, asking for a revocation of the order of dismissal, a trial by court-martial, and for an order assigning and appointing him to the Army as of the date of the assignment of the last graduate of his class. The petitions were all denied.

The Court of Claims held that he was not entitled to recover, and dismissed his petition. 38 C. Cl. 346.

Mr. L. T. Michener and *Mr. W. W. Dudley* for appellant:

Appellant was an officer in the sense of § 2, Art. 2, of the Constitution. He was appointed pursuant to § 1315, Rev. Stat., and took the oath presented by § 1320. Cadets are subject to perform duty, § 1323, to courts-martial, § 1326, and receive a salary, § 1339. Their service is actual service in the Army. *United States* v. *Morton*, 112 U. S. 1; their status that of officers, *United States* v. *Hartwell*, 6 Wall. 385, 393. Similar rules apply to cadets at the Naval Academy, Rev. Stat. §§ 1511, 1528; *United States* v. *Baker*, 125 U. S. 646; *Fitzpatrick* v. *United States*, 37 C. Cl. 332; *Perkins* v. *United States*, 20 C. Cl. 438; *S. C.*, 116 U. S. 483; *Jasper's Case*, 38 C. Cl. 202; *United States* v. *Hartwell*, 95 U. S. 760; *United States* v. *Cook*, 128 U. S. 254.

The President has not the legal authority to dismiss a cadet in the Military Academy in time of peace except upon and in pursuance of the sentence of a court-martial. § 1229 Rev. Stat.; § 5, Act of July 13, 1866, 14 Stat. 92; *Blake* v. *United States*, 103 U. S. 227; *Gratiot's Case*, 1 C. Cl. 258; 2 Story Const. § 1537; *McBlair's Case*, 19 C. Cl. 528, 541; Sunderland Stat. Con. § 203.

The law provided a military tribunal by which appellant could have been tried. Rev. Stat. §§ 1229, 1326; Arts. of War, §§ 71–114; 17 Stat. 604.

Cadets are not merely candidates. This action for pay will lie as brought. *United States* v. *Perkins*, 116 U. S. 483.

Mr. Assistant Attorney General Pradt and *Mr. Assistant Attorney George M. Anderson* for the United States:

Claimant was not an officer within the intent of § 1229 Rev. Stat. For the various acts establishing the position of cadet, see 1 Stat. 366; Act of July 16, 1798; Act of March 16, 1802, 2 Stat. 132, 137; Act of April 29, 1812, 2 Stat. 720; § 3, Act of June 18, 1878. A West Point cadet is an enlisted man. As to what is enlistment, see *Erichson* v. *Beach*, 40 Connecticut, 283; *In re Grimley*, 137 U. S. 147; §§ 1315-1323

Rev. Stat.; *Babbitt* v. *United States,* 16 C. Cl. 204; *S. C.*, affirmed 104 U. S. 767; 1 Op. Atty. Genl's, 276, 290; compare provisions in Rev. Stat. §§ 1116–1119 for enlistment of private soldiers; *United States* v. *Watson,* 130 U. S. 82. The claimant by his contract with the Government bound himself to obey the Articles of War, which were enacted under § 1342 Rev. Stat. Under Arts. of War, 4 and 99, officer means commissioned officer.

The status of naval cadets differs from that of military cadets.

Whatever claimant's status, he is not protected under § 1229 Rev. Stat. *Blake* v. *United States,* 103 U. S. 227, 236; *Mullan* v. *United States,* 140 U. S. 240; *Parsons* v. *United States,* 167 U. S. 334; *Shurtleff* v. *United States,* 189 U. S. 314.

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

The contention of appellant is that, as a cadet, he was an officer in the Army, within the meaning of section 1229 of the Revised Statutes of the United States, and could only have been dismissed from the Academy upon trial and conviction by court-martial, as provided in that section.

That section provides as follows: "The President is authorized to drop from the rolls of the Army for desertion any officer who is absent from duty three months without leave; and no officer so dropped shall be eligible for reappointment. And no officer in the military or naval service shall in time of peace be dismissed from service except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof."

In the Articles of War, enacted by section 1342 of the Revised Statutes, the word "commutation" is changed to "mitigation." Art. 99.

The first impression of claimant's contention is that it ignores obvious distinctions, and makes a state of preparation for a position the same as the position itself, and claims its

sanction for one who is not bearing its responsibilities or capable of discharging its duties. And an examination of the Revised Statutes relating to the organization of the Army confirms the impression.

Manifestly, it is impossible to reproduce all the sections of the Revised Statutes applicable to the military establishment, and we will only observe that they distinguish between the Army proper and the Military Academy, and make a distinction between an officer and a cadet. A few citations only are necessary.

Title XIV of the Revised Statutes of the United States provides for the organization of the Army of the United States. The name, rank and function of each officer is provided for, and section 1213 explicitly states when a cadet shall become an officer. That section enacts that when a cadet shall have regularly graduated from the Academy he "shall be considered a candidate for a commission in any corps for whose duties he may be deemed competent." He then becomes a commissioned officer. Prior to that time he is denominated a cadet, appointed as a cadet, and provision made for him under that name and state. He becomes an officer when he ceases to be a cadet; that is, when he has finished his pupilage; or, as section 1213 expresses it, when "he has gone through all his classes and received a regular degree from the academic staff" and commissioned. And his government while a cadet is provided for in chapter 5 of title XIV.

A cadet may be in the Army (section 1094), may be an officer in a certain sense as distinguished from an enlisted man, as it is contended by counsel for the Government he is, but nevertheless section 1229 does not apply to him. That section is one of a number of provisions for the organization and government of the Army, distinct from and having no relation whatever to the provisions for the government of the Military Academy and the cadets. Section 1229 is made part of, and the word "officer" given exact definition by section 1342, which provides as follows:

"SEC. 1342. The armies of the United States shall be governed by the following rules and articles: The word officer, as used therein, shall be understood to designate commissioned officers; the word soldier shall be understood to include non-commissioned officers, musicians, artificers, and privates, and other enlisted men, and the convictions mentioned therein shall be understood to be convictions by court-martial."

By article 99 it is enacted:

"No officer shall be discharged or dismissed from the service, except by order of the President, or by sentence of a general court-martial; and in time of peace no officer shall be dismissed, except in pursuance of the sentence of a court-martial, or in mitigation thereof."

It is only a commissioned officer, therefore, who is entitled to the protection of a general court-martial, and a cadet is not a commissioned officer.

The argument of appellant, contending against this construction of the statute, is not easy to reproduce or make clear, and it involves the anomaly that there can be an officer in the Army of the United States who is not covered by the Articles of War, notwithstanding the declaration of section 1342, that the Armies of the United States shall be governed by those articles.

The object of the argument is to make independent section 1229 of section 1342, and to give a cadet the protection expressed by the former, on the ground that a cadet is an officer, but not a commissioned officer. That a cadet is an officer is deduced from the fact that he is appointed by the President, takes an oath to obey his "superior officers," and receives pay. But, as we have already intimated, it is not necessary to dispute that a cadet is an officer. Whether he is or not is not the question in the case. The question is, whether section 1229 applies to him, and to so construe it would seemingly give it no application except to cadets (and officers in the naval service), and transfer it from the government of the Army to the government of the Academy; and, we may ob-

serve, would render the distinction implied by it between a time of peace and a time of war almost meaningless. It is nevertheless contended by appellant that section 1229 is unaffected by section 1342 and the Articles of War, but is a part of section 1326, which gives the Superintendent of the Academy the power to convene general courts-martial for the trial of cadets. In other words, the contention is that section 1326 is not merely a grant of power to the Superintendent of the Academy to convene courts-martial for the trial of cadets, but commands him to do so. And it would seem necessarily for every infraction of discipline. What, it may be asked, under the contention of appellant, is the relation between section 1326 and section 1325? By the latter section there can be deficiency in studies as well as conduct. Can there be no discharge from the Academy for deficiency in studies except upon and in pursuance of a court-martial to that effect?

The cases cited by appellant do not conflict with these views. *United States* v. *Morton*, 112 U. S. 1, decides only that the time of service as a cadet was actual time of service in the Army within the meaning of the statutes giving longevity pay to officers. In *United States* v. *Baker*, 125 U. S. 646, and *United States* v. *Cook*, 128 U. S. 254, statutes giving longevity pay to officers in the Navy were construed, and it was held that a cadet midshipman was an officer of the Navy. The reasoning of the court, however, has no application to the construction of sections 1229 and 1342.

The power of the President to dismiss a delinquent cadet we do not understand is questioned, except as that power is affected by sections 1229 and 1342. We may, however, refer to *Matter of Hennen*, 13 Pet. 230; *Blake* v. *United States*, 103 U. S. 227, 236; *Mullan* v. *United States*, 140 U. S. 240; *Parsons* v. *United States*, 167 U. S. 324; *Shurtleff* v. *United States*, 189 U. S. 311.

Judgment affirmed.

SIXTO *v.* SARRIA.

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

No. 40. Submitted November 3, 1904.—Decided January 3, 1905.

Under the law of Porto Rico while an heir to an intestate may assert his rights against one already designated heir *ab intestato* any time within five years after the decree of designation, the heir so designated may within the five year period collect debts due to the intestate's estate and, where the payment is made in good faith and under the order of the court into which the money was paid by the debtor, and without notice of existence and claims of other heirs, discharge the debtor from liability, notwithstanding such other heirs subsequently assert their claims and are also designated as joint heirs *ab intestato.*

Where, however, the debtor has legal notice from the court where the matter is pending that one not originally designated has asserted and is prosecuting a claim to recognition as an heir *ab intestato,* any payments he makes to the one first designated are at his own peril and liability to account to the other heir after his claim has been established for his proportionate share, and the debtor is not protected by a decree and order of the court directing payment to the assignee of the heir originally designated in a proceeding to which such asserting heir was not a party.

Where the payment to the heir originally designated is made before the debt is due and after the other heir has asserted his claim, and under circumstances indicating collusion, it is for the jury to determine whether the payment was made in good faith and without knowledge of the rights of the asserting heir.

THIS is a writ of error bringing in review the proceedings of the District Court of the United States for the District of Porto Rico.

The original action was in assumpsit brought by Adolfo Sixto, an alien, and a subject of the King of Spain, against Laureano Sarria, a citizen of Porto Rico. The declaration set forth in substance:

That on November 27, 1892, the defendant was indebted to one Manuel Sixto, since deceased, in the sum of $16,000, Spanish money, with interest from May 15 of the same year, which sum said Sarria had promised to pay in four annual in-

stallments, falling due respectively on the fifteenth day of May of each and every year from 1893 until 1896, inclusive. That the said Manuel Sixto departed this life on November 27, 1892, leaving two children, plaintiff and one Maria Belen Sixto Melendez, as his heirs at law. That as such heir the plaintiff was entitled to one-half of the indebtedness of $16,000, Spanish money, with interest at the rate of eight per cent from May 15, 1892. The declaration contained the usual averments in assumpsit of promise and default. The defendant filed a plea and amended plea to this declaration which set up the general issue, and for further plea averred:

"And for a further and second plea to the said declaration, the defendant says that on the fifteenth day of May, eighteen hundred and ninety-two, the defendant became indebted in the sum of sixteen thousand dollars (16,000) Mexican dollars, money then current in Porto Rico, to one Manuel Sixto, on account of the purchase price of a farm situated in the island of Vieques, district of Porto Rico, and called 'Monte Santo'; that on the said fifteenth day of May, eighteen hundred and ninety-two, the defendant made and constituted a mortgage upon the said farm in favor of the said Sixto, as security for the payment of the aforesaid amount of sixteen thousand (16,000) Mexican dollars, together with a certain interest as stipulated in the said instrument of mortgage; that thereafter the said mortgage was duly registered in the registry of property of Humacao, Porto Rico, on the eleventh day of July, eighteen hundred and ninety-two; that the payment of the aforesaid sum of sixteen thousand (16,000) Mexican dollars, as provided for in the said instrument of mortgage, was to be made in the manner following, to wit: four thousand (4,000) dollars on the fifteenth day of May, eighteen hundred and ninety-three, and four thousand (4,000) dollars on the fifteenth day of May, of the years eighteen hundred and ninety-four, eighteen hundred and ninety-five, and eighteen hundred and ninety-six. And the defendant further says that the aforesaid Emanuel Sixto departed this life on the twenty-seventh day of

November, eighteen hundred and ninety-two, before any of the installments aforesaid had fallen due; that the said Sixto died intestate, and soon after his death, to wit, in the year eighteen hundred and ninety-three, judicial proceedings touching and respecting the settlement and inheritance of the estate of the said Manuel Sixto, deceased, and which said proceedings are known in the law of Porto Rico as 'proceedings *ab intestato*,' were instituted in the court of first instance of Humacao, Porto Rico, the said court being then and there a court of record and of general jurisdiction, and the said court in said proceedings by a decree dated the fifteenth day of June, eighteen hundred and ninety-three, ordered the said defendant to pay into and deposit with the said court all sums of money then due by the said defendant to the said estate of the said Manuel Sixto, deceased, by virtue of the aforesaid mortgage, and the defendant thereupon and in obedience to the said order of the said court did on the twenty-second day of June, eighteen hundred and ninety-three, consign and deposit with the said court and did place at the disposal of the same the sum of four thousand (4,000) pesos of the money then current in Porto Rico, and the further sum of eight hundred twenty-two and fifty-two hundredths (822.52) dollars of the same kind of money, the first sum being the amount of the first installment due May fifteenth, eighteen hundred and ninety-three, and the second sum being the interest due on the aforesaid mortgage credit up to the first of June, eighteen hundred and ninety-three. And the said decree of the said court was duly entered before the commencement of this action and still is in full force and effect.

"And the defendant further says, as to the third installment above mentioned, that by judgment of the Supreme Court of Porto Rico, then known as the 'audiencia territorial,' dated the eighteenth day of February, eighteen hundred and ninety-six, rendered and entered in certain foreclosure proceedings had before the said court on appeal from the court of first instance of Humacao, in which proceedings the

defendant and one Antonio Roig y Torruellas were plaintiffs, and which said proceedings the said Roig, as owner of the third and fourth installments of the mortgage before mentioned, sought to foreclose the same to the extent of the third installment aforesaid, together with certain interest, the defendant was found to be indebted to the said plaintiff, Roig, in the amount of the third installment aforesaid, together with the corresponding interest, and was ordered to pay the amount of said indebtedness so found due by the said judgment to the said Roig within the period of thirty days thereof, and the said judgment further provided for execution to issue upon the non-compliance with the terms thereof by the defendant. Said judgment was duly entered before the commencement of this suit and is still in force and effect. And the said defendant thereupon and in compliance with the said judgment of the said court thereafter paid unto the said plaintiff, Roig, the amounts ordered to be paid by the said judgment, to wit, the amount of the third installment of the aforesaid mortgage, together with the corresponding interest. And all of this the defendant is ready to verify."

The additional or amended plea sets forth:

"And the defendant as to the second installment aforesaid says that he has paid the same, together with the corresponding interest, on the 4th day of April, 1894, to one Belen Sixto, who was then the record owner of said mortgage credit, and who had previously been declared heir *ab intestato* of said Manuel Sixto, deceased, by the order and decree of the proper court, to wit, the court of the first instance of Humacao, respectively on the 21st and 23d of the month of November, 1893.

"And as to the third and fourth installments the defendant says that on the 11th day of September, 1894, the aforesaid Belen Sixto, for a valuable consideration, ceded and transferred the said two installments to one Antonio Roig y Torruellas; that thereupon the said transfer was duly recorded and the said two installments appeared upon the record to

be the property of the said Roig, and thereupon, to wit, on or about the 16th day of May, 1896, the defendant paid the said Roig the amount of said two installments, together with all interest due."

The bill of exceptions brings into the case the testimony and the rulings and charge of the court. The facts developed are: Manuel Sixto sold a farm to the defendant Sarria for $16,000 Mexican money, payable in four equal installments with interest. A mortgage was taken upon the property to secure the payment of the purchase price. Manuel Sixto y Andino died November 27, 1892, leaving no issue except two natural children, a daughter by the name of Maria Belen Sixto y Melendez (hereafter called Maria Belen), who lived in Vieques, and the plaintiff in error, a son, who lived in the island of St. Thomas. After the death of Manuel Sixto, the daughter, Maria Belen, filed her petition in the court of first instance of Humacao, Porto Rico, alleging that she was the only heir of Manuel Sixto, deceased, and praying the court to declare her heir *ab intestato* according to the provisions of section 980, and following, of the Code of Porto Rico then in force. Upon June 22, 1893, the defendant in error, Sarria, paid into court, where the petition of Maria Belen was then pending, the first installment due, with interest. On November 21, 1893, Maria Belen, by decree of the court, was adjudged heir *ab intestato* of Manuel Sixto, without prejudice to the rights of third parties. On the twenty-fifth of the same month the assets received by the administrator of Manuel Sixto, who had been appointed during the proceeding, and the money paid into court by defendant in error, by order of the court were made over to Maria Belen as sole heir *ab intestato*. On November 24, 1893, the plaintiff in error, Adolfo Sixto, presented to the same court of first instance his petition to be declared the heir of Manuel Sixto, deceased (jointly entitled with Maria Belen), invoking the exercise by the court of "voluntary jurisdiction" under the section of the code whereby Maria Belen had been adjudged heir. To

this petition Maria Belen answered, alleging that she had been duly declared the only heir of Manuel Sixto, and that the plaintiff in error could only contest her right by a "contentious suit" (*expediente contensioso*).

The court sustained this contention, and Sixto appealed, but later abandoned the appeal, and on April 4, 1894, began a suit in the form of a contentious proceeding, making Maria Belen a party defendant, and praying the court to declare him (Adolfo Sixto) an equal heir with her in the estate of Manuel Sixto, and asking the court to issue an order to the registrar of property, requiring him to make a cautionary entry in the register concerning the property affected by this suit, and also requiring the defendant in error to retain, at the disposition of the court, the sums still owing to the estate of Manuel Sixto. On June 2, 1894, a notice was accordingly issued to Sarria and one to the registrar. The one to Sarria was issued on June 5, 1894, and the one to the registrar on June 4, 1894. The defendant, Maria Belen, being notified of these orders, on June 26, 1894, answered the plaintiff's petition, and in her answer prayed that the interlocutory order of June 2, 1894, be vacated and the notices canceled. On August 30, 1894, the prayer of defendant's answer was granted by the court, and orders issued accordingly to the registrar and to Sarria, and notice was given to the solicitor of the plaintiff. On September 1, 1894, the order reached the registrar, and the order of cancellation was made on the books on September 3, 1894. On September 3, 1894, the plaintiff filed a petition for an appeal from the court's order of August 30, 1894, praying that it be allowed "in both effects," that is, (Code, sec. 383), with the effect of a review and stay of proceedings, but the judge granted the same with one effect only, that is, for a review of the judgment. In the appellate court, on November 17, 1894, that court held that the allowance of both effects had been wrongfully denied, and ordered that the appeal be considered as having been taken for both effects. On December 22, 1894, the appellate court granted a further

order, that Sarria, the defendant in error, be notified of his obligation under the decree of June 2, 1894, which order was accordingly issued. On November 29, 1895, the appellate court (audiencia) rendered its decision on the merits of the appeal, and reversed the order of August 30, 1894, and reaffirmed the order of June 2, 1894, in its validity and regularity. The court used the following language:

"That which was ordered in the decree appealed from regarding Mr. Laureano Sarria is hereby set aside, leaving in force the requisition ordered and directed to said Sarria on June 2 by the judge of first instance until the resolution of the pending appeal."

This decision was certified to the court below in January, 1896, and in March following the solicitor of the plaintiff requested the court to notify Sarria and the registrar that the order of June 2, 1894, was still in force, which was accordingly done, and the defendant in error made reply thereto as follows:

" Having received notice that the installment of the mortgage had been transferred to Mr. Antonio Roig, who has recorded said transfer in the registry of property, and supposing that he will proceed to collect the same judicially as he did the previous installment, he is unable to accept the notification, and he will appear before the audiencia in the premises."

The registrar refused to comply with the order for these reasons: " First, because subsequent to the illegal cancellation of the cautionary notice the property as well as the encumbrance had been transferred on the registry; and, second, because the mortgage law contained no provision regarding the form of carrying into effect such an order." Thereafter the plaintiff asked the court for a further order to the registrar, but this was denied.

The case proceeded to proof and argument, and on December 15, 1896, a final decision was rendered, adverse to the plaintiff, from which decree he took an appeal, which was allowed " in both effects." The appeal was also allowed from

the order denying a further order to the registrar. On February 2, 1897, the appellate court consolidated the appeals and ordered the suspension of further proceedings until final decision.

In the meantime, on April 26, 1896, by an order of the court of the first instance, Sarria was allowed to withdraw his deposit of the third installment. The order recited that one Roig had become the purchaser from Maria Belen of the third and fourth installments, and had recovered judgment in the audiencia against Sarria for the third installment, found that Maria Belen had the right to transfer these installments, and ordered a copy of the decree to be placed in the records by the actuary.

Thus the matter remained until after the conclusion of the war with Spain, resulting in a change of sovereignty of Porto Rico.

By the military government, an order was issued abolishing the territorial audiencia, the appellate court aforesaid, creating in its place the District Court of San Juan. On September 29, 1899, that court rendered its final decision upon both appeals, reversing the action of the court below, and deciding the plaintiff to be legally proved the heir of Manuel Sixto. The trial in the United States District Court in the present suit resulted in a verdict and judgment for the defendant.

Mr. N. B. K. Pettingill for plaintiff in error.

There was no appearance or brief for defendant in error.

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

It is evident from the foregoing statement of facts that the controversy, as it appeared in the United States District Court, was resolved into the question whether Adolfo Sixto, who had been duly adjudged the co-heir with Maria Belen of Manuel

Sixto, deceased, was entitled to recover one-half of the amount due on the mortgage debt which the defendant Sarria claimed to have discharged by legal payments. The recovery sought was for one-half of the four installments of purchase money due respectively on the fifteenth day of May in the years from 1893 until 1896, inclusive. The defendant interposed different defenses to different installments of the debt. We will proceed to consider them, together with the charge and rulings of the court concerning the same.

Referring to the first and second installments, we find it to be the contention of the plaintiff in error that Maria Belen, having been adjudged heir *ab intestato* under a decree which expressly reserved the rights of third parties, no payment could have been lawfully made to her as against the rights of the plaintiff in error, and that if any such payment was made it was subject to the risk that the subsequent established rights of the plaintiff in error might entitle him to recover from Sarria one-half of such payments. Upon this subject the court charged the jury:

"On February 15, 1894, she [Maria Belen] having been declared the heir, the entry was made of that fact in the registry (of property). I say to you as a matter of law, that that declaration of her heirship was without prejudice to the rights of third parties—and that meant that if any other person showed himself afterwards to be an heir he was entitled to a proper proportion of the estate, but so far as a collection of debts, and so far as a proper attention to the assets were concerned and the control of them, she became entitled to attend to that."

Upon the same subject the plaintiff in error had requested the court to charge:

"As the *ex parte* decree declaring Belen Sixto the heir of Manuel Sixto expressly saved the rights of third parties, that was notice to the defendant that any payment made to her was made at his peril as against the other true heirs; and, as defendant was not required by any legal authority to pay the

first two payments to Belen Sixto, and as the plaintiff is shown in truth to have been an equal heir with Belen Sixto, the plaintiff is entitled to recover one-half of those two payments."

So far as this contention is concerned, we think the court below was right. The sections of the Code of Porto Rico (War Department translation), under which Maria Belen was declared the heir *ab intestato* of Manuel Sixto, are as follows:

"976. After the measures indispensable for the security of the property prescribed in the foregoing section have been taken, and without prejudice to including in the same proceedings the making of the inventory, the designation of heirs *ab intestato* shall be proceeded with in a separate record.

"977. This designation may also be made at the instance of the interested parties, without the necessity of previously taking the steps mentioned, in cases in which they are not necessary and in which the institution of intestate proceedings is not requested.

"978. Heirs *ab intestato,* who are descendants of the deceased, may obtain a declaration of their rights by proving, with the proper documents or with the evidence obtainable, the death of the person whose estate is in question, their relationship to the same, and with the evidence of witnesses that said person died intestate, and that they, or the persons whom they designate, are his only heirs.

"The services of a solicitor or attorney are not necessary in order to present this claim.

"979. The deputy public prosecutor shall be cited to appear at said proceeding, to whom the record shall afterward be referred for the period of six days for his report thereon.

"Should he find the proof insufficient, a hearing shall be granted to the interested parties in order that they may cure the defect.

"When the deputy public prosecutor requests it, or the judge considers it necessary, the documents presented shall be compared with the originals.

"980. When the foregoing steps have been taken, the judge shall, without further proceedings, make a ruling designating the heirs *ab intestato* should he deem it proper, or he may refuse to make such declaration, reserving the rights of the claimants to institute an ordinary action. This ruling may be appealed from both for review and a stay of proceedings. . . .

"1000. After the declaration of heirs *ab intestato* has been made, by a final judgment or ruling, the proceedings shall be continued according to the procedure prescribed for testamentary proceedings.

"1001. The judge shall order that there be delivered to the heirs instituted all the property, books, and papers of the intestate, and that the administrator render an account of his administration to them, the judicial intervention ceasing."

It is argued that this appointment of the heir *ab intestato* is subject to the limitation that the rights of the heir are not fixed until five years have elapsed from the date of the designation by the court proceedings, and in support of this contention certain articles of the Mortgage Law of Porto Rico are cited:

"2. In the registries mentioned in the preceding article shall be recorded:

"1. Instruments transferring or declaring ownership of realty, or of property rights thereto.

"2. Instruments by which rights of use, use and occupancy, emphyteusis, mortgage, annuity, servitudes, and any others by which states are created, acknowledged modified or extinguished. . . .

"23. The instruments mentioned in articles 2 and 5, which are not duly recorded or entered in the registry, cannot prejudice third persons.

"The record of real property and property rights, acquired through an inheritance or legacy, shall not prejudice third persons until five years have elapsed since the date thereof, excepting in cases of testate or intestate inheritances, legacies and additions thereto, when left to legal heirs.

"381. Property acquired through inheritance or legacy can-

not be cleared until five years have elapsed from the date of their record in the registry."

But we think this limitation of five years was intended to permit such heirs at law or parties beneficially interested in the estate to assert their rights as against the heir and the property in his hands, and to prevent its transfer except subject to the right of such persons to assert their claims within the permitted limitation. We are here dealing with the right to collect the assets, and the Code provides, secs. 1000, 1001, that after the designation of the heir or heirs *ab intestato* by a final judgment or ruling of the court the proceedings shall be continued according to the procedure prescribed for testamentary proceedings, and the judge may order that all the property, books and papers of the intestate be turned over to the heirs, and that the administrator render his account of his administration of the estate, and thereupon judicial intervention shall cease. It seems to us manifest that the effect of these proceedings is to permit the heir *ab intestato*, after such final decision, to receive and collect the estate. It may be that others will establish an interest in the property for which the heir will have to respond, and it is specially provided that, for the purpose of transfer, property shall not be deemed clear until after five years have elapsed. But this does not require that the collection of debts shall be delayed for a like period or that they shall be paid to the legally declared heir or heirs, upon pain of being required to respond to others who may within the limitation permitted establish a right to the property. Such construction would seem to be unreasonable, and we are cited to no authority that goes to that extent. It is opposed to the practice of the civil law upon which the Code of Porto Rico is based, in which system the heir by intestacy corresponded with the common law administrator, except that the Roman heir was entitled to administer both the real and personal estate. Story on Conflict of laws, § 508.

In the present case the first installment was due on May 15,

1893, and was paid into court of first instance according to its order and a receipt given therefor under the seal of the court on June 22, 1893. This was done before any proceedings were instituted by the plaintiff in error. The payment was made under the order of the court, and we see no reason why the defendant in error should not be discharged thereby.

As to the second installment, other considerations apply. Sarria testified that while this installment fell due on May 15, 1894, he paid the same on April 1, 1894, to Maria Belen, which payment, he says, was solemnized by a notarial act duly acknowledged. As to this payment, the court in its charge took the view that the contentious suit of Adolfo Sixto was not commenced until April 4, 1894, of which fact Sarria was not notified until June 5, 1894, and therefore Maria Belen had the right to collect this payment. The suit of April 4, 1894, was the one begun by Adolfo Sixto after the decision against him in the court of first instance, holding that he could only contest the right of Maria Belen by a contentious proceeding, from which the plaintiff in error took an appeal, but abandoned the same, and on April 4, 1894, amended the suit to a contentious proceeding, making Maria Belen a party defendant, and seeking for an order to the registrar to make a cautionary order touching the property in controversy, and also an order to the defendant in error requiring him to retain at the disposition of the court whatever sums he owed to the estate of Manuel Sixto, deceased. On the day of the beginning of this contentious suit, Sarria paid to Maria Belen, anticipating the maturity of the installment by more than a month, the amount which would have fallen due on the fifteenth day of May following.

We think that, in view of the testimony produced, the validity of this payment should have been submitted to the jury under proper instructions. The plaintiff testified that he was known to the defendant, and that the latter was well aware that he was a son of Manuel Sixto, deceased. The proceeding to declare his rights had been begun. It is evident

from a letter written to him on November 11, 1892, by Maria Belen, that she recognized the plaintiff in error as her brother, for in this letter she announces the death of "our beloved father," subscribed herself as "sister," and requests Sixto to come over to Vieques at once, as his presence was necessary in order to collect money coming from the estate. Under these circumstances, the question of whether Sarria had notice of the plaintiff in error's rights and demands, and whether this was a valid payment, or was made in anticipation of the possible claims of Adolfo Sixto, with intent to deprive him of his rights, should have been left to the jury, instead of the instruction given which practically required a finding for the defendant in error.

As to the third and fourth installments, the defendant claims to have paid these to one Roig. It appears that these alleged payments to Roig were evidenced by certain notarial instruments, which became of record in the office of the registrar of deeds, and, as is recited in that record, Roig appears to have been the declared purchaser of the third and fourth installment by assignment from Maria Belen, and the court of first instance, on April 25, 1896, at the instance of Sarria, permitted him to withdraw the third installment, and declared Roig entitled to collect the third and fourth installments. Upon this subject the court charged the jury:

"In this contentious suit by Adolfo Sixto against Belen, this defendant, Sarria, was ordered on June 2, 1894, to pay into court whatever money he might be owing. That order was served on Sarria on June 5, 1894, and afterwards that court decided that Sixto, the plaintiff in this suit, was not entitled to attach this money. He obtained an appeal from that judgment, but not from that portion of it that canceled the annotation made in the registry of deeds of the attachment of that fund. Subsequently, on November 17, 1894, an appeal was allowed in the upper court from that portion of it, but no notice was given as to Sarria, who was merely a garnishee in the suit, and who had received no notice not to pay over

the money until the lower court decided whether he had the right to pay it over. Between the time the court decided the attachment and the time the appeal was allowed in the upper court, Belen Sixto assigned to Roig the third and fourth installments. I say to you, as a matter of law, that there was nothing to hinder her from doing that at that time; she had, in law, the right to do it."

The counsel for the plaintiff requested the court, upon the same subject, to charge:

"As it is shown by the uncontradicted evidence that the judge of the court of first instance of Humacao was entirely without authority or jurisdiction to issue his order on August 30, 1894, directing the registrar to make annotation on his books of said order, said order to the registrar was void and the annotation made by the registrar was void, and the former annotation remained in force, which was notice to all the world, including this defendant, that the plaintiff had an interest in those payments such as might be declared by the court; and the court having afterwards decided that the plaintiff here is entitled to a one-half interest in said estate, the plaintiff is now entitled to recover one-half of the last two payments, with interest."

It appears that Adolfo Sixto was not a party to the suit between Roig and Sarria, in which it is declared that Roig was held entitled to recover the third installment, and if Sarria had notice of the pendency of the suit to establish the rights of Adolfo Sixto in such wise as to be bound by the result thereof, he could not prevent Sixto's recovering an interest in the property by wrongfully paying it over in the proceedings to which the plaintiff in error was not a party. The court below seems to have given its charge upon this subject upon the theory that the order of August 30, 1894, was not appealed from in such wise as to prevent Sarria from paying the third and fourth installments to the assignee Roig, and it is said that he was merely a garnishee in the suit, and had then received no notice not to pay over the money

until the lower court had decided whether he had the right to pay it over. The payment of the third and fourth installments was made to Roig by permitting Sarria, in the court of first instance, to withdraw the installment which he had paid into court under the order of June 2, 1894. These installments were paid to Roig on May 16, 1896, but in the attitude of the suit then pending to establish the rights of Adolfo Sixto, and Sarria's knowledge thereof, could the latter legally make these payments so as to conclude the rights of the plaintiff in error? It is true that the lower court on August 30, 1894, had held in favor of Maria Belen, vacating the notice sent to Sarria and the cautionary notices to the registrar, and the plaintiff in error had prayed an appeal "in both effects," *i. e.*, for a review of the order and a stay of proceedings, but was refused an appeal in the latter aspect, from which refusal he also appealed, and this was the attitude of the case at the time of the alleged purchase by Roig on September 11, 1894. On November 17, 1894, the audiencia considered the application of Sixto for the enlargement of the appeal, and held that such allowance was wrongfully denied in the lower court, and ordered that the appeal be "considered as having been taken for both effects." On January 8, 1895, Sarria was notified of this order, and appeared and asked that a clear and detailed statement be given him "as to what he was to comply with." Thereupon a new explanatory order was directed to Sarria, informing him that the previous requisition meant the ratification of the one previously directed to him by the court, "in order that the sums which he owed from that time to Mr. Manuel Sixto should not be delivered by him except to the court in order to deposit the same in the royal treasury." This order was duly served on Sarria on February 5, 1895.

On November 29, 1895, the audiencia heard the appeal, and, reversing the order of August 30, declared the order of June 2, 1894, in full force, whereby the cautionary entry was ordered to be made by the registrar of property, and the notification

ordered to Sarria to hold the payments on the mortgage or pay the same into the treasury, to abide the order of the court.

The registrar refused to comply, assigning as a reason that the encumbrance had been assigned to third parties and that the mortgage law did not justify such an order. Subsequent proceedings resulted in the final decree of the military court deciding the merits of the controversy in favor of Sixto. The decision of November 29, 1895, was also notified to Sarria, and on May 4, 1896, the entry of the court discloses:

"On May 4, 1896, appeared Mr. Laureano Sarria y Gonzalez and stated: that, having received notice that the installment of the mortgage had been transferred to Mr. Antonio Roig, who has recorded said transfer in the registry of property, and supposing that he will proceed to collect the same judicially, as he did the previous installment, he is unable to accept the notification, and he will appear before the audiencia in the premises."

Over the objection of the plaintiff in error, Sarria was permitted to testify that he paid the installment to Roig by order of the audienca. But the plaintiff in error was not a party to such proceeding, if it had been legally proved, and of course could not be concluded by it. On being notified that the order of June 2, 1894, was in full force, requiring him to hold the funds, while Sarria says he is unable to accept the notification, he declares "he will appear before the audiencia in the premises." Instead of so doing, unless the appearance in the Roig case can be so considered, he made application in the court of first instance for a release of the deposited installment in order to pay it to Roig, and that court made the order, although it had been notified of the decision of the audiencia of November 29, 1895. This order could have no effect on the rights of the plaintiff in error, nor can it protect Sarria, who acted in the face of knowledge of the decision of the higher court instead of appearing in that court at the suit of Sixto, and having the rights of Roig and the contesting heirs determined. We conclude that the plaintiff in error had the right to recover his share of the third and fourth installments,

notwithstanding the alleged transfers and payments to Roig, and the alleged decree of the audiencia in the proceeding to which Sixto was not a party.

For error in the court's charge as to the second, third and fourth installments, the judgment will be reversed and the cause remanded for further proceedings consistent with this opinion.

FULLERTON *v.* TEXAS.

ERROR TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS.

No. 112. Argued December 16, 1904.—Decided January 9, 1905.

It is too late to raise a Federal question by petition for rehearing in the Supreme Court of a State after that court has pronounced its final decision unless it appears that the court entertained the petition and disposed of the question.

The certificate of the presiding judge of the Supreme Court of the State, made after the decision, to the effect that a Federal question was considered and decided adversely to plaintiff in error, cannot in itself confer jurisdiction on this court; and on the face of this record and from the opinions the reasonable inference is that the application for rehearing may have been denied in the mere exercise of discretion, or the alleged constitutional question was not passed on in terms because not suggested until too late.

THE facts are stated in the opinion.

Mr. William W. Griffin, with whom *Mr. A. D. Englesman* was on the brief, for plaintiff in error.

Mr. C. K. Bell, Attorney General of the State of Texas, appeared for defendant in error but did not make any argument or file any brief.

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

Fullerton was charged by information with unlawfully conducting, carrying on and transacting the business of dealing in futures in cotton, grain, etc.; and unlawfully keeping a bucket shop, so called, "where future contracts were then and

there bought and sold with no intention of an actual *bona fide* delivery of the articles and things so bought and sold." He was found guilty as charged, and sentenced to a fine of two hundred dollars and imprisonment for thirty days. The case was carried to the Court of Criminal Appeals of Texas, and judgment affirmed. The court in its opinion stated the contention to be that the evidence did not show a violation of the statute, namely, Art. 377 of the Penal Code; and held on a consideration of the facts that Fullerton had clearly brought himself within and violated the statute. 75 S. W. Rep. 534. Fullerton thereupon moved for a rehearing, which motion was overruled. This application for rehearing assigned, among other grounds, that the statute as construed by the court was in violation of the Constitution of the United States, vesting in Congress the power to regulate commerce among the several States. In overruling the motion, the court delivered a second opinion on the question of the sufficiency of the indictment, which was attacked, not in the motion for rehearing, but in an additional brief presented after the submission of that motion. The court, however, held the indictment good and, after stating that "the motion for rehearing was mainly devoted to an attack on the original opinion wherein the evidence was held sufficient," adhered to that opinion. 75 S. W. Rep. 535. No reference to the Constitution of the United States was made by the court, nor does the record disclose any such reference, except in the petition for rehearing as before stated.

We have repeatedly ruled that it is too late to raise a Federal question by a petition for rehearing in the Supreme Court of a State after that court has pronounced its final decision, although if the state court entertains the petition and disposes of the Federal question, that will be sufficient. *Mallett* v. *North Carolina*, 181 U. S. 589. In that case it was observed: "Had that court declined to pass upon the Federal questions and dismissed the petition without considering them, we certainly would not undertake to revise their action."

Some weeks after the denial of the motion for a rehearing,

this writ of error was allowed by the presiding judge of the Court of Criminal Appeals, who certified that on that motion it was contended "that under the evidence in the cause plaintiff in error was engaged in interstate commerce and commerce between different States within the meaning of article one, section eight, of the Constitution of the United States, and that the statutes of the State of Texas could not make such matters and transactions an offense, and that to do so would violate said constitutional provision." And further "that said contention was duly considered by us and decided adversely to plaintiff in error."

But on the face of the record proper and from the opinions, the reasonable inference is that the court may have denied the application in the mere exercise of its discretion, or declined to pass on the alleged constitutional question, in terms, because it was suggested too late, and nothing is more firmly established than that such a certificate cannot in itself confer jurisdiction on this court. *Henkel* v. *Cincinnati*, 177 U. S. 170; *Dibble* v. *Bellingham Bay Land Company*, 163 U. S. 63.

Writ of error dismissed.

CENTRAL OF GEORGIA RAILWAY COMPANY *v.* MURPHEY.

ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

No. 111. Argued December 16, 1904.—Decided January 9, 1905.

Where the highest court of the State holds that a statute fixing the liability of common carriers applies to shipments made to points without the State, this court must accept that construction of the statute

The police power of the State does not give it the right to violate any provision of the Federal Constitution.

The imposition, by a state statute, upon the initial or any connecting carrier, of the duty of tracing the freight and informing the shipper, in writing, when, where, how and by which carrier the freight was lost, damaged or destroyed, and of giving the names of the parties and their official position, if any, by whom the truth of the facts set out in the information can be established, is, when applied to interstate commerce, a violation of the

commerce clause of the Federal Constitution; and §§ 2317, 2318 of the Code of Georgia of 1895, imposing such a duty on common carriers is void as to shipments made from points in Georgia to other States. *Richmond & Alleghany R. R. Co.* v. *Tobacco Company*, 169 U. S. 311 distinguished.

THE plaintiff in error brings this case here to review the judgment of the Supreme Court of Georgia, affirming a judgment of the trial court, in favor of the defendants in error, for the damages sustained by them on the shipment of certain grapes, as hereinafter more particularly stated. (First reported, 113 Georgia, 514, and again on appeal from judgment on second trial, 116 Georgia, 863.)

The trial court gave judgment for the shippers of the grapes, who were plaintiffs below, for the amount of the difference between the market price of the grapes as shipped in good order and the amount they actually received for the same in their damaged condition, being the sum of $434.55. The action was commenced in the Pike County Court, in the State of Georgia, and the petition averred that on July 31, 1897, the petitioners shipped a carload of grapes from Barnesville, Georgia, consigned to Rocco Brothers, Omaha, Nebraska, by way of the Central of Georgia Railway Company. The freight was to be conveyed by more than two common carriers, the initial carrier being the Central of Georgia Railway Company, and the freight was shipped under a contract of shipment in which it was provided that the responsibility of each carrier should cease upon delivery to the next "in good order." The grapes were greatly damaged on the route between Barnesville and Omaha, and the damage resulted from the negligence of the common carriers on the route. The petitioners applied to the plaintiff in error, the initial carrier on the route, and served it with an application in writing August 20, 1897, in which they requested that the railway company should trace the freight and inform the petitioners, in writing, when, how and by which carrier the freight was damaged, and also that the company should furnish the petitioners the names of the parties and their official position, if any, by whom the truth of the facts set forth in the

information could be established. The railroad company failed to trace the freight and give the information in writing within the thirty days required by law, wherefore the petitioners averred that the railroad company became indebted to the petitioners to the amount of the damage to the grapes as stated.

The plaintiff in error demurred to the petition, the demurrer was overruled, and it then put in an answer denying many of the allegations of the petition. Upon the trial it appeared that the grapes were shipped from Barnesville, Georgia, to Omaha, Nebraska, and they were "routed" by the shippers over the Central of Georgia, then the Western and Atlantic, then the Nashville, Chattanooga and St. Louis, then the Louisville and Nashville, and then the Wabash Railroads. The initial carrier, the plaintiff in error, issued to the shippers, A. O. Murphey and Hunt, a bill of lading for the carload of grapes, which showed the routing as above stated, and the bill was signed by Murphey and Hunt, as the contract between the plaintiff in error and themselves. It contained a promise "to carry (the grapes) to said destination, if on its road, or to deliver to another carrier on the route to said destination, subject in either instance to the conditions named below, which are agreed to in consideration of the rate named." Omaha, Nebraska, is not on the road of the plaintiff in error. Paragraph 5 of the bill of lading, under which the shipment of grapes was made, reads as follows:

"5. That the responsibility, either as common carrier or warehouseman, of each carrier over whose line the property shipped hereunder shall be transported, shall cease as soon as delivery is made to the next carrier or to the consignee; and the liability of the said lines contracted with is several and not joint; neither of the said carriers shall be responsible or liable for any act, omission or negligence of the other carriers over whose line said property is or is to be transported."

The grapes were carried under the contract contained in the bill of lading, and arrived at Omaha, in the State of Nebraska, in a damaged condition.

The law under which the action was brought is found in

sections 2317 and 2318 of the Code of Georgia of 1895. Those sections are set forth in full in the margin.[1]

On the twentieth day of August, 1897, the shippers availed themselves of these provisions of the statute, and duly demanded of the plaintiff in error that it should trace the grapes and inform the shippers, in writing, when, how and by which carrier the grapes were damaged, and the names of the parties and their official position, if any, by whom the truth of the facts set out in the information could be established. They also demanded that the information should be furnished within thirty days from the date of the application. The plaintiff in error, although it endeavored so to do, failed to furnish the information within the time mentioned in the statute. It offered to prove on the trial that the car in which the grapes were originally shipped at Barnesville, on the road of the plaintiff in error, reached Atlanta, Georgia, the end of the line of the plaintiff in error, in due time, and that the grapes were then in good order, and the car was promptly delivered to the next connecting line, that is, the Western and Atlantic Railroad, and by that road it was delivered to the Nashville, Chattanooga and St. Louis Railroad Company, at Nashville, Tennessee, with the grapes in like good order and condition. The evidence was rejected, the court holding that the plaintiff

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[1] SEC. 2317. When any freight that has been shipped, to be conveyed by two or more common carriers to its destination, where, under the contract of shipment or by law, the responsibility of each or either shall cease upon the delivery to the next "in good order" has been lost, damaged or destroyed, it shall be the duty of the initial or any connecting carrier, upon application by the shipper, consignee or their assigns, within thirty days after application, to trace said freight and inform said applicant, in writing, when, where, how and by which carrier said freight was lost, damaged or destroyed, and the names of the parties and their official position, if any, by whom the truth of the facts set out in said information can be established.

SEC. 2318. If the carrier to which application is made shall fail to trace said freight and give said information, in writing, within the time prescribed, then said carrier shall be liable for the value of the freight lost, damaged or destroyed, in the same manner and to the same amount as if said loss, damage or destruction occurred on its line.

in error had failed to comply with the conditions of the statute, and that it was therefore liable for the amount of the damage sustained by the petitioners on whatsoever road the damage actually occurred.

Mr. John I. Hall, with whom *Mr. Henry C. Cunningham, Mr. Lloyd Cleveland* and *Mr. Robert L. Berner* were on the brief, for plaintiff in error:

Section 2317 of the Civil Code of Georgia imposes a burden upon the carrier and interferes with its full freedom to contract with shippers with respect to confining its liability to its own line and is void when applied to interstate commerce. Under the Constitution any person, natural or artificial, may engage in interstate commerce. *Vance* v. *Vandercook Co.*, 170 U. S. 438, 455. The freedom of interstate commerce cannot be affected by state legislation. *Welton* v. *Missouri*, 91 U. S. 282; *Hall* v. *De Cuir*, 95 U. S. 485; *Wabash* v. *Illinois*, 118 U. S. 558; *Railroad Co.* v. *Husen*, 95 U. S. 465, 472; *W. U. Tel. Co.* v. *Pendleton*, 122 U. S. 347; *Fargo* v. *Michigan*, 121 U. S. 230; *Richmond R. R. Co.* v. *Tobacco Co.*, 24 S. E. Rep. 261, distinguished, and see *S. C.*, 169 U. S. 311. Under § 2276, Civil Code of Georgia, 1895, a carrier may by express contract limit its liability to its own line. *Central R. R. Co.* v. *Avant*, 80 Georgia, 195; *Richmond & Danville* v. *Shomo*, 90 Georgia, 496. The requirements of the statute involved are unreasonable and as such interfere with interstate commerce and are void. *C., C. & St. L. R. R.* v. *Illinois*, 176 U. S. 514, and cases cited.

The statute fixes a liability on the carrier without due process of law. *Wallace* v. *Railway Co.*, 94 Georgia, 732. An act of legislature which arbitrarily makes one person liable for the debts or responsible for the acts of another would deprive him of due process of law. *Camp* v. *Rogers*, 44 Connecticut, 291; *Colon* v. *Lisk*, 47 N. E. Rep. (N. Y.) 302; *People* v. *O'Brien*, 18 N. E. Rep. (N. Y.) 692; *Towle* v. *H. Mann*, 53 Iowa, 42; *Ohio R. R. Co.* v. *Lackey*, 78 Illinois, 55; *Beilenberg* v. *Railway Co.*, 20 Pac. Rep. 314. Nor does the statute permit any defense.

Mr. W. W. Lambdin, with whom *Mr. Hoke Smith* was on the brief, for defendants in error.

Doubts are always resolved in favor of the constitutionality of the statute. The violation must be clear and palpable in order for the statute to be held unconstitutional. Cooley's Constitutional Limitations, 6th ed., 216; *Ogden* v. *Saunders*, 12 Wheat. 213, 270; *Munn* v. *Illinois*, 94 U. S. 113, 125; *Cooper* v. *Telfair*, 4 Dall. 14, 19; *Plumley* v. *Massachusetts*, 155 U. S. 461, 479; *Cary* v. *Giles*, 9 Georgia, 253, 258.

Under the facts in this case, the shipment of grapes was damaged by the negligence of one of the carriers, which handled the shipment. *Central &c. Ry. Co.* v. *Murphey*, 113 Georgia, 514, 520.

The initial carrier having failed to trace the freight and give to the shipper the required information, it became "liable for the value of the freight lost, damaged or destroyed in the same manner, and to the same extent as if said loss, damage or destruction occurred on its own line." The law under the facts in this case imputes the negligence to the defendant company, and makes the same, in effect, its negligence. Code of Georgia of 1895, § 2318; case below, 113 Georgia, 514, 520.

This statute was before the state court in *Southern Ry. Co.* v. *Ragsdale*, 119 Georgia, 773, and the ruling made in this case was adhered to. A strong intimation was given in this last case to the effect that if the railroad company should prove that it was impossible for it to trace the freight and give the required information within the time provided, such would be a defense to the action. In the case at bar, however, the court held affirmatively that the facts offered in evidence by the defendant were not sufficient to make out such a defense.

A railroad company is not compelled to make a contract to forward goods beyond its own line. *Coles* v. *Railroad Co.*, 86 Georgia, 251; *A., T. &c. R. R. Co.* v. *Railroad Co.*, 110 U. S. 668, 680. But when it receives goods consigned to a point beyond its own line, it undertakes to transport them to their destination, and if the goods are lost or damaged, it will be

liable therefor, in the absence of a contract otherwise limiting its liability. *Falvey* v. *Railroad Co.*, 76 Georgia, 597; Hutchinson on Carriers, 2d ed., §§ 145, 152. However, it may by express contract, limit its liability to its own line. *Central Ry. Co.* v. *Avant*, 80 Georgia, 195; *R. & D. R. R. Co.* v. *Shomo*, 90 Georgia, 500.

Such being the state of the law in Georgia, and the shipper not being able to hold the carrier with which he dealt liable, on account of the limitations which were put in the contracts of shipment in pursuance of the decisions cited *supra* and the shipper not being able to discover how or where his goods were damaged, and being thus entirely helpless in the premises—all the avenues of information being closed to him—the legislature of Georgia came to his relief and gave him a remedy by enacting the statute under consideration.

The contract under which the goods were shipped in this case was made in Georgia, and is governed by the laws of that State. *Liverpool &c. Co.* v. *Insurance Co.*, 129 U. S. 397.

The defendant railroad company "being affected with a public interest," and being a Georgia corporation, and being clothed with special privileges, is therefore subject to legislative control in the interest of the public. *Munn* v. *Illinois*, 94 U. S. 113; *Ga. R. R. Co.* v. *Smith*, 128 U. S. 174; *Chicago &c. Ry. Co.* v. *Pullman Car Co.*, 139 U. S. 79, 90; *Smyth* v. *Ames*, 169 U. S. 466, 544.

The statute does not violate the commerce clause of the Federal Constitution, nor does it attempt to regulate interstate commerce. States may, in the exercise of their reserved powers, enact laws which, though they incidentally relate to and affect commerce between the States, yet are not to be considered as regulations of that commerce within the meaning of the Constitution of the United States. *Sherlock* v. *Alling*, 93 U. S. 99, 103; *Peik* v. *Chicago &c., Ry. Co. et al.*, 94 U. S. 164; *Bagg* v. *Wilmington &c. Ry. Co.*, 109 N. Car. 279; *Kidd* v. *Pearson*, 128 U. S. 1, 16; *Fry* v. *State*, 63 Indiana, 552; *Williams* v. *Fears*, 179 U. S. 270; *S. C.*, affirming 110 Georgia, 584; *Smith* v. *Ala-*

bama, 124 U. S. 465; *Nashville &c. Ry. Co.* v. *Alabama*, 128 U. S. 96, 100; *Missouri &c. Ry. Co.* v. *Haber*, 169 U. S. 613, 626; *New York &c. R. R. Co.* v. *New York*, 165 U. S. 628; *Richmond &c. R. R. Co.* v. *Patterson Tobacco Co.*, 169 U. S. 311, affirming *S. C.*, 24 S. E. Rep. (Va.) 261; *St. Joseph &c. R. R. Co.* v. *Palmer* (Neb.), 22 L. R. A. 335; *Hart* v. *Railway Co.*, 69 Iowa, 485; *McCann* v. *Eddy*, 133 Missouri, 59; *Missouri &c. Ry. Co.* v. *McCann*, 174 U. S. 580.

The statute in question comports with sound public policy and with responsibility placed upon carriers by the common law and the statutes and decisions of the various States and of the United States. The shipper and the carrier are on an unequal footing, and the carrier is therefore held to rigid responsibility. Code of Georgia of 1895, § 2264; *Central Ry. Co.* v. *Hasselkus*, 91 Georgia, 382; *Penn. R. R. Co.* v. *Hughes*, 191 U. S. 477, 489; *Balt. & Ohio R. R. Co.* v. *Voigt*, 176 U. S. 498, 505; *New York &c. R. R. Co.* v. *Lockwood*, 17 Wall. 357; *Bank of Ky.* v. *Adams Ex. Co.*, 93 U. S. 174; *Railway Co.* v. *Stevens*, 95 U. S. 655; *Missouri &c. R. R. Co.* v. *McCann*, 174 U. S. 580; *Brockway* v. *Express Co.*, 168 Massachusetts, 257; *Ohio &c. Ry. Co.* v. *Tabor*, 98 Kentucky, 503; *Cent. R. R. Co.* v. *Lippman*, 110 Georgia, 665.

The United States Supreme Court will generally adopt the construction placed upon a statute of a State by the court of last resort of such State. *Sioux City Trust Co.* v. *Trust Co.*, 172 U. S. 642; *Postal Tel. Cable Co.* v. *Adams*, 155 U. S. 688; *Geer* v. *Connecticut*, 161 U. S. 519; *Railroad Tax Cases*, 92 U. S. 575.

The statute under consideration facilitates the safe transportation of goods, and is therefore constitutional. *Chicago &c. Ry. Co.* v. *Solan*, 169 U. S. 133.

The regulation of the enjoyment of the relative rights and performance of the duties of all persons within the jurisdiction of a State, belongs primarily to such State under its reserved power to provide for the safety of all persons and property within its limits. *Missouri &c. Ry. Co.* v. *Haber*, 169 U. S. 613,

635; *Lake Shore &c. Ry. Co.* v. *Ohio*, 173 U. S. 299, citing 7 Cush. 53, 85; Cooley's Const. Lim., 6th ed., 715.

Plaintiff in error's contention that the statute deprives it of its property without due process of law, is not well taken. The railroad company was duly served with notice and process and has had its day in court. *Chicago &c. Ry. Co.* v. *Zernicke*, 183 U. S. 582, 587; *Missouri Ry. Co.* v. *Mackey*, 127 U. S. 205; *Minneapolis &c. Ry. Co.* v. *Herrick*, 127 U. S. 210; *Mo. Pac. Ry. Co.* v. *Humes*, 115 U. S. 512; *Walker* v. *Sauvinet*, 92 U. S. 90; *St. Louis &c. Ry. Co.* v. *Mathews*, 165 U. S. 1; *Jones* v. *Brim*, 165 U. S. 180.

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

The Supreme Court of Georgia has held in this case that the statute applies to shipments of freight destined to points outside, as well as to those inside the State, and we must accept that construction of the state statute. The question for us to decide is whether the statute, when applied to an interstate shipment of freight, is an interference with or a regulation of interstate commerce, and therefore void.

We think the imposition upon the initial or any connecting carrier, or the duty of tracing the freight and informing the shipper, in writing, when, where, how and by which carrier the freight was lost, damaged or destroyed, and of giving the names of the parties and their official position, if any, by whom the truth of the facts set out in the information can be established, is, when applied to interstate commerce, a violation of the commerce clause of the Federal Constitution. The Supreme Court of Georgia has held that a carrier has in that State the right to make a contract with the shipper, to limit its liability as a carrier to damage or loss occurring on its own line. *Central Railroad Co.* v. *Avant*, 80 Georgia, 195; *Richmond & Danville Railroad Co.* v. *Shomo*, 90 Georgia, 496.

Whether the State would have the right to prohibit such a

contract with regard to interstate commerce need not therefore be considered. It has not done so, but on the contrary its highest court has recognized the validity of such a contract. Without the provisions of the statute in question, the plaintiff in error would not be liable to the shippers in this case, if, without negligence, they delivered the consignment in good condition to the succeeding carrier. This they offered to prove was the case. But if this statute be valid, this limitation of liability can only be availed of by the railroad company by complying with its provisions. In other words, before it can avail itself of the exemption from liability beyond its own line, provided for by its valid contract, the initial or any connecting carrier must comply with the terms of the statute, and must within thirty days after notification obtain and give to the shipper the information provided for therein. This is certainly a direct burden upon interstate commerce, for it affects most vitally the law in relation to that commerce, and prevents the exemption provided by a legal contract between the parties from taking effect, except upon terms which we hold to be a regulation of interstate commerce. It is said that the reason for the passage of such an act lies in the fact that, as a general rule, shippers under such a contract as the one in question are very much inconvenienced in obtaining evidence of the loss or damage, where it occurred on another road than that of the initial carrier. It is contended that under such contracts, there being great difficulty in identifying the particular carrier upon whose road the loss occurred, it is reasonable to make the initial or other connecting carrier liable therefor, unless such carrier furnish the information provided for in the statute.

We can readily see that a provision, such as is contained in the statute in question, would be a very convenient one to shippers of freight through different States. And a provision making the initial or any connecting carrier liable in any event for any loss or damage sustained by the shipper, on account of the negligence of any one of the connecting lines, would also

be convenient for the shippers; but it would hardly be maintained, when applied to the interstate shipment of freight, that a state statute to that effect would not violate the commerce clause of the Federal Constitution. The provision of this statute, while not quite so onerous, is yet a very plain burden upon interstate commerce. It is also said that it is so much easier for the initial or other connecting carrier to obtain the information provided for in the statute than it is for the shipper, that a statute requiring such information to be obtained under the penalty of such carrier being liable for the damage sustained, ought to be upheld for that very reason.

Assuming the fact that the carrier might more readily obtain the information than the shipper, we do not think it is material upon the question under consideration. We are not, however, at all clear in regard to the fact. The loss or damage might occur on the line of a connecting carrier, outside the State where the shipment was made, (as was the case here), and we do not perceive that the initial carrier has any means of obtaining the information desired, not open to the shipper. The railroad company, receiving the freight from the shipper, has no means of compelling the servants of any connecting carrier to answer any question in regard to the shipment or to acknowledge its receipt by such carrier, or to state its condition when received. And when it is known by the servants of the connecting company that the object of such questions is to place in the hands of the shipper information upon which its liability for the loss or damage to the freight is to be based, it would seem plain that the information would not be very readily given, and the initial or other carrier could not compel it. The effect of such a statute is direct and immediate upon interstate commerce. It directly affects the liability of the carrier of freight destined to points outside the State, with regard to the transportation of articles of commerce; it prevents a valid contract of exemption from taking effect, except upon a very onerous condition, and it is not of that class of state legislation which has been held to be rather an aid to

than a burden upon such commerce. The statute in question prevents the carrier from availing itself of a valid contract, unless such carrier comply with the provisions of the statute by obtaining information which it has no means of compelling another carrier to give, and yet if the information is not obtained the carrier is to be held liable for the negligence of another carrier over whose conduct it has no control. This is not a reasonable regulation in aid of interstate commerce, but a direct and immediate burden upon it.

The case of *Richmond & Allegheny Railroad Co.* v. *Tobacco Company*, 169 U. S. 311, is not an authority against these views, but, on the contrary, it supports and exemplifies them. Section 1295 of the Virginia Code of 1887, was held not to be a regulation of interstate commerce, because it simply established a rule of evidence ordaining the character of proof by which a carrier might show that, although it received goods for transportation beyond its own line, nevertheless, by agreement, its liability was limited to its own line. The statute left the carrier free to make any limitation as to its liability on an interstate shipment, beyond its own line, as it might deem proper, provided only the evidence of the contract was in writing and signed by the shipper. The provision of the Virginia statute that, although the contract in writing provided for therein was made in fact, yet "if such thing be lost or injured such common carrier shall himself be liable therefor, unless, within a reasonable time after demand made, he shall give satisfactory proof to the consignor that the loss or injury did not occur while the thing was in his charge," is a materially different provision from the one under consideration. A provision in a statute may be deemed a reasonable one, and not a regulation of interstate commerce, where the statute simply imposes a duty upon the carrier, when the loss has not happened on the carrier's own line, to inform the shipper of that fact within a reasonable time, and this court has said in the above case that such a provision is manifestly within the power of the State to adopt. This is very different from the duty im-

posed upon the carrier by the statute in question here, which is much more onerous, and imposes a liability, unless the detailed information provided for in the statute is obtained and given to the shipper.

The case of *Chicago, Milwaukee &c. Railway Company* v. *Solan,* 169 U. S. 133, holds the same general principle as that involved in the case just cited. To the same effect are the cases referred to in the opinion of Mr. Justice Gray in the *Solan* case. It is idle to attempt to comment upon the various cases decided by this court relating to this clause of the Federal Constitution. We are familiar with them, and we are certain that our decision in this case does not run counter to the principles decided in any of those cases. The statute here considered we think plainly imposes a burden upon the carrier of interstate commerce and is not an aid to it, but in its direct and immediate effect it is quite the contrary.

The power to regulate the relative rights and duties of all persons and corporations within the limits of the State cannot extend so far as to thereby regulate interstate commerce. The police power of the State does not give it the right to violate any provision of the Federal Constitution. Being of the opinion that the statute in question when applied to an interstate shipment is a regulation of interstate commerce, we must hold the statute, so far as it affects such shipments, to be void on that account. The judgment of the Supreme Court of Georgia is reversed and the case remanded for such further proceedings as may be consistent with this opinion.

Reversed.

UNITED STATES *v.* UNITED VERDE COPPER COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 68. Argued December 2, 1904.—Decided January 9, 1905.

An apt and sensible meaning must be given to words as they are used in a statute and the association of words must be regarded as designed and not as accidental, nor will a word be considered an intruder if the statute can be construed reasonably without eliminating that word.

In the act of June 3, 1878, 20 Stat. 88, c. 150, permitting the use of timber on the public lands for "building, agricultural, mining and other domestic purposes," the word "domestic" is not to be construed as relating solely to household purposes omitting "other" altogether but it applies to the locality to which the statute is directed and gives permission to industries there practiced to use the public timber.

To enlarge or abridge a permission given by Congress to certain specified industries to use the public timber would not be regulation but legislation and under the provisions of the statute of June 3, 1878, 20 Stat. 88, the power given by the Secretary of the Interior to make regulations cannot deprive a domestic industry from using the timber.

THE facts are stated in the opinion.

Mr. Special Assistant Attorney Marsden C. Burch for the United States:

Rule 7 is within the authority granted to the Secretary of the Interior by the act of June 3, 1878. *Nor. Pac. R. R. Co.* v. *Lewis*, 162 U. S. 376; *United States* v. *Williams*, 12 Pac. Rep. (Mont.) 851.

This court has recognized the authority of Congress to grant a privilege or license and to clothe an executive officer with the right to grant or refuse or restrict such permission under such rules and regulations as he may see fit to adopt in view of conditions as they exist from time to time. See *Williams* v. *United States*, 138 U. S. 514, 524; *Field* v. *Clark*, 143 U. S. 649,

680, 692; *Caha* v. *United States*, 152 U. S. 211, 218, 220; *In re Kollock*, 165 U. S. 526; *United States* v. *Ormsbee*, 74 Fed. Rep. 207, 209; *United States* v. *City of Moline*, 82 Fed. Rep. 592, 598; *Wilkins* v. *United States*, 96 Fed. Rep. 837, 839, 841; *United States* v. *Dastervignes et al.*, 122 Fed. Rep. 30; *The Cin. Wil. & Z. Railroad Company* v. *Commissioners of Clinton County*, 1 Ohio St. 77, 87; *Lock's Appeal*, 72 Pa. St. 22; P. F. Smith, 491, 498, 499; *Port Royal Mining Company* v. *Hagood et al.*, 2 Law Rep. Ann. 841, 843, 844.

As to the phrase "and for other purposes," see *United States* v. *Mullan Fuel Co.*, 118 Fed. Rep. 663; Cong. Rec., Part 4, 45th Cong., 2d Sess., p. 3328.

The construction of an act of Congress by those charged with its execution should not be disregarded by the judiciary unless the construction be clearly wrong. *United States* v. *Johnston*, 124 U. S. 236; *Heath* v. *Wallace*, 138 U. S. 573; *Hawley* v. *Diller*, 178 U. S. 476. If there be a doubt as to the meaning of Congress the construction given by the Executive Department should control. *Pennoyer* v. *McConnaughy*, 140 U. S. 1; *United States* v. *Hill*, 120 U. S. 169; *United States* v. *Philbrick*, 120 U. S. 52.

"Roasting" ore is not a "mining" purpose. For definition of "smelt" and "mining," see Standard Dictionary; Century Dictionary; *United States* v. *Richmond Mining Co.*, 40 Fed. Rep. 415; 2 Snyder on Mining Law, § 134. See also act of March 3, 1891.

The statute does not plainly indicate the sense in which Congress used the word "domestic." That word appears to have four possible meanings:

(1) Belonging to the house or household and its relations. (2) Addicted or adapted to family life, etc. (3) Tame. (4) Of or pertaining to one's own State or country. It will be conceded that the sense in which Congress used the word is embraced either in No. 1 or No. 4. But the real intention is rendered obscure by the use of the word "other." The specific enumeration, "building, agricultural, and mining," is of no

value whatever if the word "other" means "local," because Congress could easily have said "for *domestic purposes*" without any specific enumeration. We urge upon the court the simple proposition that Congress used the word "domestic" as belonging to the household.

If the real intention of Congress cannot be ascertained from the act itself, or from the meaning of the words used therein, we urge that the character of the act must be considered and the proper rules of construction applied. The statute is permissive. Statutes which grant property privileges are to be construed most strictly in favor of the Government and a use not unequivocally authorized by the language of the act must be excluded. Sutherland, Stat. Const. § 378; *Slidell* v. *Grandjean,* 111 U. S. 412, 437; *Central Transp. Co.* v. *Pullman Co.,* 139 U. S. 24, 49; *United States* v. *Dastervignes,* 118 Fed. Rep. 199; Endlich, § 354.

Mr. Alfred B. Cruikshank for appellee:

The acts of defendant come well within the permissive provisions of § 24 of the Act of June 3, 1878, c. 150. The phrase "domestic purposes" means the same as "local purposes." For prior judicial constructions of the word "domestic," see *United States* v. *Richmond Mining Co.,* 40 Fed. Rep. 415; *United States* v. *Copper Queen Con. Mining Co.,* 185 U. S. 495. Roasting ore is a mining purpose within the meaning of the act. See Webster; Encyclopedia Brittanica. The statute is remedial and should be liberally construed in favor of the citizen. See Endlich, § 354.

Rule 7 of the Interior Department did not make defendant's acts unlawful.

The rule is to be interpreted as not including the roasting of ore in its prohibition of smelting. The difference between roasting and smelting is not merely technical but substantial. In smelting a chemical change in the ore itself is produced; in roasting there is no such process or result. Smelting includes fusion; roasting does not. For some of the accepted defini-

tions of smelting and roasting, see Webster, Worcester and Standard Dictionaries.

The regulation of the Secretary is illegal and invalid. Cases cited by the Government are inapplicable both as to meaning of phrase "for other purposes" and as to construction of statute.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Action brought by the United States against the appellee, which we shall call the Copper Company, for the sum of $38,976.75, the value of timber cut and removed from certain unsurveyed mineral land in the Territory of Arizona.

The timber or wood was alleged to have been cut by one Rafael Lopez, a resident and citizen of Arizona, and amounted to 6,496⅛ cords, of the value of $6 per cord, or the sum of $38,976.75.

It is alleged that the timber belonged to the United States, and "was used and consumed by the said defendant for the purpose of roasting ore at the United Verde Copper mines, said mines being the property of defendant herein, at Jerome, Yavapai County, Arizona Territory, in violation of the act of Congress of June 3, 1878, 20 Stat. 88, c. 150, and of the rules and regulations of the Secretary of the Interior, promulgated under the authority of said act of Congress."

The Copper Company demurred to the complaint. The demurrer was sustained. The United States refused to amend, and judgment was entered for the Copper Company. It was affirmed by the Supreme Court of the Territory.

Section 1 of the act of June 3, 1878, upon which the action is based, is as follows:

"That all citizens of the United States and other persons, *bona fide* residents of the State of Colorado or Nevada, or either of the Territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho, or Montana, and all other mineral districts of the United States, shall be, and are hereby, authorized and

permitted to fell and remove, for building, agricultural, mining, or other domestic purposes, any timber or other trees growing or being on the public lands, said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry, in either of said States, Territories, or districts of which such citizens or persons may be at the time *bona fide* residents, subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes: *Provided,* The provisions of this act shall not extend to railroad corporations."

Section 2 makes it the duty of registers and receivers to ascertain whether any timber is being cut in violation of the provisions of the act, and, if so, to notify the Commissioner of the General Land Office thereof.

Section 3 makes violations of the act or of the rules and regulations made by the Secretary of the Interior misdemeanors, punishable by fine, not exceeding $500, "to which may be added imprisonment for any term not exceeding six months."

Among the regulations promulgated by the Secretary of the Interior were the following:

"4. The uses for which the timber may be felled or removed are limited by the wording of the act to 'building, agricultural, mining, or other domestic purposes.'

"5. No timber is permitted to be felled or removed for purposes of sale or traffic, or to manufacture the same into lumber or for any other use whatsoever, except as defined in section 4 of these rules and regulations.

* * * * * * * *

"7. No timber is permitted to be used for smelting purposes, smelting being a separate and distinct industry from that of mining.

* * * * * * * *

"10. These rules and regulations shall take effect February 15, 1900, and all existing rules and regulations heretofore

prescribed under said act by this department are hereby rescinded."

The contention of the United States is that roasting ore is smelting, and that smelting is not a purpose permitted by the act of Congress, and is besides forbidden by the regulations of the Secretary of the Interior.

Roasting ore is defined by the Supreme Court of the Territory in its opinion as follows:

"It is a matter of common knowledge that in this Territory the roasting of ore at the mines from which it is taken is ordinarily accomplished by piling the ore and the wood mingled with it in piles in the open air, and by igniting the wood the fire is communicated to the sulphurous or other combustible ingredients in the ore, and thus by the heat generated by its own combustion and that of the wood mingled with it, the volatile substances are driven off in vapor, smoke, and gases from the ore thus treated. By this treatment the ores that are extremely sulphide or highly charged with other volatile substances are relieved from a large portion thereof, and are the more readily treated by smelting or other processes of reduction, and besides require less fluxing material for such reduction, and are also lighter in weight, and for that reason when shipped to other points for smelting or further treatment of any kind cost less for freight."

The court distinguished this process from smelting, and decided that it is, in practice, a part of mining. It is a step, the court reasoned, in the extraction of the ore from the mine, and the separation of the ore from the rock enclosing it. Roasting ore, therefore, is preparation for smelting, but not smelting, which, according to all of the definitions, is something more than melting—it is obtaining the metal by heat and such reagents as develop it. Roasting is done crudely in the open air by burning wood and ore mingled in a pile. Smelting is the function of an organized plant. But roasting ore, regarding the production of metal only is a preliminary step to smelting, and counsel for the Government makes much of

that circumstance. If this were all that is necessary to consider, the deduction would be easy that wood used for roasting ores is used for smelting purposes.

But the dependence of industries, one upon another, does not make them the same, and the division of labor between them is not as marked in new as in old communities, having a more varied industrial development. Regarding, therefore, the conditions which existed in the mining States and Territories, roasting ore was more naturally a part of mining than of smelting. The assignment, however, is unimportant in the view we take of the statute, and whether roasting ore be considered a part of mining or of smelting, the use of timber for it has the sanction of the statute.

The statute provides "that all citizens of the United States . . . shall be and are hereby authorized and permitted to fell and remove for building, agricultural, mining, or other *domestic* purposes, any timber . . ." The special enumeration of industries is "building, argicultural, and mining." But the permission of the statute is not confined to these. It extends to "other domestic purposes." The limitation of the other purposes is in the word "domestic."

Counsel for the Government recognizes this, and substitutes for "domestic" the word "household," and contends that the word "other" should be treated as an intruder and eliminated from the statute, and making the latter read that timber may be felled for "building, agricultural, mining or *domestic* purposes." But we are not permitted to take such liberty with the statute, if "domestic" has a meaning consistent with the intentional use of the word "other." It has such meaning. It may relate, it is true, to the household. But, keeping its idea of locality, it may relate to a broader entity than the household. We may properly and accurately speak of domestic manufactures, meaning not those of the household, but those of a county, state or nation, according to the object in contemplation. So in the statute the word "domestic" applies to the locality to which the statute is directed, and

gives permission to the industries there practiced to use the public timber. This definition of "domestic" gives the word an apt and sensible meaning, and we must regard the association of the word "other" with it as designed, not as accidental.

The statute was passed on in *United States* v. *Richmond Mining Co.*, 40 Fed. Rep. 415, in 1889. In that case the United States sued in replevin for 10,000 bushels of charcoal made from wood which was cut on mineral land in the State of Nevada. The Richmond Mining Company was engaged in the business of mining, purchasing and reduction of ores, and bought the charcoal "to be used in the reduction of ores and refining the product thereof." The court held that such use was a domestic purpose within the meaning of the statute. The court said that if reducing ores by melting or furnace process, and refining the bullion, is not properly a part of mining, "it is certainly incident to it, and closely connected with it." The court, however, did not dwell on that point, but put its judgment in favor of the mining company upon the ground that reducing ores was "a domestic industry of the highest importance to the miner and to the public," and was within "the benefits conferred by the statute." It will be observed that the industry which was given the benefits of the statute was more than smelting in the strictest sense, and the decision was acquiesced in for eleven years by the Interior Department. It was a rule of rights and conduct for that time, and its overturn might involve civil liability for acts which were done under the sanction of the statute as judicially construed. We should hesitate, therefore, to reverse that construction, even if it were more doubtful than it is.

But the Government relies on the rules and regulations of the Secretary of the Interior, promulgated under, as it is contended, the authority of the statute since *United States* v. *Richmond Mining Co.* was decided. No. 7 of those regulations provides that "no timber is permitted to be used for smelting purposes, smelting being a separate and distinct industry from that of mining." By this the Secretary of the Interior may

have intended to supersede the ruling in *United States* v. *Richmond Mining Co.*, but to which industry the roasting of ore shall be assigned the Secretary does not say, and the considerations which we have expressed apply as well to the regulation as to the statute. But there is a more absolutely fatal objection to the regulation. The Secretary of the Interior attempts by it to give an authoritative and final construction of the statute. This, we think, is beyond his power. Smelting may be a separate industry from mining, but that does not deprive it of the license given by the statute. As we have already said, the general clause, "*other domestic purposes*" is as much a grant of permission to the industries designated by it to use timber as though they had been especially enumerated, and their rights are as inviolable as the rights of the industries which are enumerated. The industries meant by the general clause may receive indeed limitation from those enumerated; in other words, be limited to the conditions existing in the mining States and Territories when the statute was enacted, but there can be no doubt that smelting has such relation. If rule 7 is valid, the Secretary of the Interior has power to abridge or enlarge the statute at will. If he can define one term, he can another. If he can abridge, he can enlarge. Such power is not regulation; it is legislation. The power of legislation was certainly not intended to be conferred upon the Secretary. Congress has selected the industries to which its license is given, and has entrusted to the Secretary the power to regulate the exercise of the license, not to take it away. There is, undoubtedly, ambiguity in the words expressing that power, but the ambiguity should not be resolved to take from the industries designated by Congress the license given to them or invest the Secretary of the Interior with the power of legislation. The words of the statute are that the felling and use of timber by the industries designated shall be "subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, *and for other purposes.*"

The ambiguity arises from the words which we have italicized. They express a purpose different from the protection of the timber and undergrowth, but they cannot, we repeat, be extended to grant a power to take from the industries designated, whether by the general clause or the specific enumeration, the permission given by Congress.

Judgment affirmed.

Mr. Justice Brown, dissenting.

I am unable to concur in the construction put by the court upon the statute of June 3, 1878. Bearing in mind that the policy of the Government has been to preserve its rapidly diminishing areas of forest lands for the benefit of the whole people, any statute which permits timber to be cut by individuals should be narrowly construed.

In my view, the license given to citizens of the United States and residents of the States and Territories named, "to fell and remove, for building, agricultural, mining or other domestic purposes," timber and trees growing upon the public lands should be confined to timber intended to be used for structural or household purposes, and not be extended so far as to authorize the consumption of timber in manufacturing or other business operations. The word "building" explains itself. "Agriculture" would include timber used for houses, barns, tools, furniture and fences. The word "mining" was doubtless intended to include not only the buildings necessary for mining operations, but such timber as is used in shoring up the walls of the mine, and perhaps also in operating the hoisting engines, but not that used for consumption in the treatment of ores.

It is true the words "other domestic purposes" are susceptible of two constructions. The word "domestic," when used in connection with the words commerce, manufactures or industries, is significant of locality, and is contradistinguished from foreign, but when used in connection with the

word "purposes" it is most nearly analogous to "household." The difficulty with the former construction is that it practically liberates the word from all restrictions. If it be construed as referring to locality, what is the locality to which it should be confined? Is it the immediate neighborhood, township, county or State, or may it be given the same construction as given to it in connection with the words commerce or manufacturing, and be extended to the whole United States? If either of these constructions were possible, it would result in the destruction of all timber standing upon public mineral lands, as well as in an unfair discrimination against those less favorably situated, who are compelled to pay for the fuel consumed in the treatment of ores. I do not think the word "other" can be used as an enlargement of the word "domestic," and that it should be confined, as are the preceding words, to timber used for other analogous structural purposes and for household consumption—in short, to other purposes domestic in their character.

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

I am authorized to state that MR. JUSTICE HARLAN and MR. JUSTICE PECKHAM concur in this dissent.

UNION STOCK YARDS COMPANY OF OMAHA *v.* CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY.

CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 100. Argued December 14, 15, 1904.—Decided Jauuary 9, 1905.

A railroad company delivered a car with imperfect brakes to a terminal company; both companies failed to discover the defect which could have been done by proper inspection; an employé of the terminal company, who

was injured as a direct result of the defective brake, sued the terminal company alone and recovered. In an action brought by the terminal company against the railroad company for the amount paid under the judgment: *Held* that:

As both companies were wrongdoers, and were guilty of a like neglect of duty in failing to properly inspect the car before putting it in use, the fact that such duty was first required of the railroad company did not bring the case within the exceptional rule which permits one wrongdoer, who has been mulcted in damages, to recover indemnity or contribution from another, on the ground that the latter was primarily responsible.

THIS case comes here on the certificate of the United States Circuit Court of Appeals for the Eighth Circuit. The facts embodied therein are: The Circuit Court of the United States, sitting at Omaha, Neb., sustained a demurrer to the petition of the plaintiff in error against the defendant in error. The facts stated in the petition, in substance, are as follows:

"The plaintiff, The Stock Yards Company, is a corporation which owns stock yards at South Omaha, Nebraska, railroad tracks appurtenant thereto, and motive power to operate cars for the purpose of switching them to their ultimate destinations in its yards from a transfer track which connects its tracks with the railways of the defendant, The Burlington Company. The Burlington Company is a railroad corporation engaged in the business of a common carrier of freight and passengers. The defendant places the cars destined for points in the plaintiff's yards on the transfer track adjacent to the premises of the plaintiff, and the latter hauls them to their points of destination in its yards for a fixed compensation, which is paid to it by the defendant. The plaintiff receives no part of the charge to the shipper for the transportation of the cars, but the defendant contracts with the shipper to deliver the cars to their places of ultimate destination in the plaintiff's yards and receives from the shipper the compensation therefor. The defendant delivered to the plaintiff upon the transfer track a refrigerator car of the Hammond Packing Company, used by the defendant to transport the meats of that company, to be delivered to that company by the plaintiff in its stock yards. This car was in bad order, in

that the nut above the wheel upon the brake staff was not fastened to the staff, although it covered the top of the staff and rested on the wheel as though it was fastened thereto, and this defect was discoverable upon reasonable inspection. The plaintiff undertook to deliver the car to the Hammond Company and sent Edward Goodwin, one of its servants, upon it for that purpose, who, by reason of this defect, was thrown from the car and injured while he was in the discharge of his duty. He sued the plaintiff and recovered a judgment in one of the District Courts of Nebraska for the damages which he sustained by his fall, on the ground that it was caused by the negligence of the Stock Yards Company in the discharge of its duty of inspection to its employé. This judgment was subsequently affirmed by the Supreme Court of Nebraska, *Union Stock Yards Co.* v. *Goodwin,* 57 Nebraska, 138, and was paid by the plaintiff."

Upon this certificate the Circuit Court of Appeals propounds the following question:

"Is a railroad company which delivers a car in bad order to a Terminal Company, that is under contract to deliver it to its ultimate destination on its premises for a fixed compensation to be paid to it by the railroad company, liable to the Terminal Company for the damages which the latter has been compelled to pay to one of its employés on account of injuries he sustained, while in the customary discharge of his duty of operating the car, by reason of the defect in it, in a case in which the defect is discoverable upon reasonable inspection?"

Mr. Frank T. Ransom for plaintiff in error:

Both plaintiff and defendant were liable to plaintiff's employé for the injuries he received. *Pennsylvania R. R. Co.* v. *Snyder,* 55 Ohio St. 342; *Moon* v. *Nor. Pac. R. R. Co.,* 46 Minnesota, 106; *Teal* v. *Am. Min. Co.,* 87 N. W. Rep. 837; *Hoye* v. *Gt. Northern Ry. Co.,* 120 Fed. Rep. 712; *Heaven* v. *Pender,* 11 Q. B. Div. 506; *Elliott* v. *Hall,* 15 Q. B. Div. 315; *Railroad Co.* v. *Booth,* 98 Georgia, 20; *Horne* v. *Meakin,* 115 Massachusetts,

326; *Thrussell* v. *Hannyside*, 20 Q. B. Div. 315; *Sawyer* v. *Railroad Co.*, 35 N. W. Rep. 671; *Glynn* v. *Railroad Co.*, 175 Massachusetts, 510.

The defendant was guilty of the original wrongful act from which the damages arose, and but for its breach of a duty it owed plaintiff the injury would not have resulted; the rule, therefore, that there can be no redress (indemnity or contribution) between joint tort-feasors, is not applicable to the facts stated, but the exception to that rule, which is, that where one of several persons answerable for a negligent act or condition which he has not joined in or created has been compelled to respond in damages for such act or condition, he may have redress against the others, is applicable to the facts stated in the question. *Gray* v. *Boston Gas Light Co.*, 114 Massachusetts, 149; *Lowell* v. *B. & L. Ry. Co.*, 23 Pick. 24; Cooley on Torts, 1st ed., 144; Bishop on Non-contract Law, §§ 56, 535; footnote to *Centerville* v. *Cook*, 16 Am. St. Rep. 254, citing *Akerman* v. *Miller*, 2 Ohio St. 203; *Adamson* v. *Jarvis*, 4 Bin. 66; *Betts* v. *Gibbons*, 2 Ad. & E. 57; *Farwell* v. *Becker*, 129 Illinois, 261; *Minneapolis Mill Co.* v. *Wheeler*, 31 Minnesota, 121.

While between willful wrongdoers there can be no contribution where the tort is one by construction, the case is not covered by the rule. Story on Partnership, § 220; *Vandiver* v. *Pollak*, 19 L. R. A. 628.

The rule that wrongdoers cannot have contribution or redress against each other is confined to cases where the plaintiff is presumed to have known he was doing a wrongful act. *Block* v. *Estes*, 92 Missouri, 318; *Scofield* v. *Gaskill*, 60 Georgia, 277; *Owen* v. *McGehee*, 61 Alabama, 440; *Armstrong Co.* v. *Clarion Co.*, 66 Pa. St. 218; *Jacobs* v. *Pollard*, 10 Cush. 287; Cooley on Torts, 148; Pollock on Torts, 171; *Horback* v. *Elder*, 18 Pa. St. 33; *Farwell* v. *Becker*, 129 Illinois, 261.

Nor does the rule apply to a person made a wrongdoer by inference of law. *Merryweather* v. *Nixon*, 2 Smith's Leading Cases, 456; *Pearson* v. *Skelton*, 1 M. & W. 504; *Adamson* v. *Jarvis*, 4 Bin. 66; Note in 16 Am. St. Rep. 257, *Johnson* v.

Torpy, 35 Nebraska, 604; *S. C.*, 43 Nebraska, 882; *Ankeny* v. *Moffett*, 37 Minnesota, 109.

Mr. Charles J. Greene for defendant in error:

Every company is bound to know the actual condition of each car it receives, hauls or uses, and the appliances attached to it, whether it does or does not inspect it, and without regard to its ownership or its source and destination. It was the duty of the plaintiff, before accepting the car in question, or directing its servants to handle it, to discover the defect in the brake, if the defect were open to reasonable inspection. *Railroad Company* v. *Mackey*, 157 U. S. 72; *Railroad Company* v. *Smock*, 23 Colorado, 456; *Railroad Company* v. *Penfold*, 57 Kansas, 148; *Railroad Company* v. *Williams*, 95 Kentucky, 199; *Railroad Company* v. *Reagan*, 96 Tennessee, 128; *Railroad Company* v. *Merrill* (Kan.), 70 Pac. Rep. 358, 362.

A railroad company using cars and appliances of other companies is charged, as to its employés, with the same duty to inspect as if the cars were its own. *Stock Yards Company* v. *Goodwin*, 57 Nebraska, 138; *S. C.*, 57 N. W. Rep. 357; *Eddy* v. *Prentice*, 8 Tex. Civ. App. 58; *S. C.*, 27 S. W. Rep. 1063; *Jones* v. *Shaw*, 16 Tex. Civ. App. 290; *S. C.*, 41 S. W. Rep, 690; *Felton* v. *Bullard*, 94 Fed. Rep. 781; *N. O. & N. E. Ry. Co.* v. *Clements*, 100 Fed. Rep. 415.

A railway company which undertakes to haul foreign cars and has an opportunity to inspect them, is negligent if it fails to discover and repair dangerous defects in the coupling apparatus, brakes or any of the other appliances, where such defects are open to a reasonable inspection. *Mackey* v. *Railroad Company*, 19 D. C. App. 282; *Railroad Company* v. *Williams*, 95 Kentucky, 199; *Mateer* v. *Railroad Company*, 15 S. W. Rep. 970; *Bender* v. *Railroad Company*, 177 Missouri, 240; *Jones* v. *Railroad Company*, 20 R. I. 210.

The general duty which rests upon a railroad company to exercise reasonable care in the inspection of cars to be handled by its employés, is not restricted in the case of foreign cars,

to such as are to be sent out over its own roads, but governs as to all such cars which its employés are handling, though only in its switch yards, and for the purpose of being loaded and returned to another road. *Railway Company* v. *Archibald*, 170 U. S. 665; *Railroad Company* v. *Penfold*, 57 Kansas, 148.

A railway company which delivers a defective freight car to a connecting line is not liable in damage to an employé of the latter, who is injured by reason of such defect, after the car has been inspected by the company receiving it. The loss of control over the car and over the servants having it in charge relieves the delivering company from responsibility to the employés of the receiving company. *M., K. & T. R. R. Co.* v. *Merrill*, 70 Pac. Rep. 358; *Sawyer* v. *Railway Company*, 38 Minnesota, 103; *Wright* v. *Canal Co.*, 40 Hun, 343; *Mackin* v. *Railroad Company*, 135 Massachusetts, 201; *Winterbottom* v. *Wright*, 10 M. & W. 109, 114; *Clifford* v. *Atlantic Cotton Mills*, 146 Massachusetts, 47; *Heizer* v. *Manufacturing Co.*, 110 Missouri, 605.

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

We take it that this inquiry must be read in the light of the statement accompanying it. While instruction is asked broadly as to the liability of the railroad company to the terminal company, for damages which the latter has been compelled to pay to one of its own employés on account of injuries sustained, it is doubtless meant to limit the inquiry to cases wherein such recovery was had because of the established negligence of the terminal company in the performance of the specific duty stated and which it owed to the employé. For it must be taken as settled that the terminal company was guilty of negligence after it received the car in question, in failing to perform the duty of inspection required of it as to its own employé. The case referred to in the certificate, *Union Stock Yards Co.* v. *Goodwin*, 57 Nebraska, 138, is a final adjudication between the terminal company and the employé,

and it therein appears that the liability of the company was based upon the defective character of the brake, which defect a reasonably careful inspection by a competent inspector would have revealed, and it was held that in permitting the employé to use the car without discovering the defect the company was rendered liable to him for the damage sustained. We have, therefore, a case in which the question of the plaintiff's negligence has been established by a competent tribunal, and the inquiry here is, may the terminal company recover contribution, or, more strictly speaking, indemnity, from the railroad company because of the damages which it has been compelled to pay under the circumstances stated?

Nor is the question to be complicated by a decision of the liability of the railroad company to the employé of the terminal company, had the latter seen fit to bring the action against the railroad company alone, or against both companies jointly. There seems to be a diversity of holding upon the subject of the railroad company's liability, under such circumstances, in courts of high authority.

In *Moon* v. *Northern Pacific Railroad Company*, 46 Minnesota, 106, and *Pennsylvania Railroad Company* v. *Snyder*, 55 Ohio St. 342, it was held that a railroad company was liable to an employé of the receiving company who had been injured on the defective car while in the employ of the latter company when under a traffic arrangement between the companies, the delivering company had undertaken to inspect the cars upon delivery, and, as in the *Moon* case, where there was a joint inspection by the inspectors of both companies. This upon the theory that the negligence of the delivering company, when it was bound to inspect before delivery, was the primary cause of the injury, notwithstanding the receiving company was also guilty of an omission to inspect the car, before permitting the employé to use the same.

A different view was taken in the case of *Glynn* v. *Central R. R. Co.*, 175 Massachusetts, 510, in which the opinion was delivered by Mr. Justice Holmes, then Chief Justice of Massa-

chusetts, in which it was held that, as the car after coming into the hands of the receiving company and before it had reached the place of the accident, had crossed a point at which it should have been inspected, the liability of the delivering company for the defect in the car, which ought to have been discovered upon inspection by the receiving company, was at an end. A like view was taken by the Supreme Court of Kansas in the case of *M., K. & T. R. R. Co.* v. *Merrill*, 70 Pac. Rep. 358, reversing its former decision in the same case reported in 61 Kansas, 671. But we do not deem the determination of this question necessary to a decision of the present case.

Coming to the very question to be determined here, the general principle of law is well settled that one of several wrongdoers cannot recover against another wrongdoer, although he may have been compelled to pay all the damages for the wrong done. In many instances, however, cases have been taken out of this general rule, and it has been held inoperative in order that the ultimate loss may be visited upon the principal wrongdoer, who is made to respond for all the damages, where one less culpable, although legally liable to third persons, may escape the payment of damages assessed against him by putting the ultimate loss upon the one principally responsible for the injury done. These cases have, perhaps, their principal illustration in that class wherein municipalities have been held responsible for injuries to persons lawfully using the streets in a city, because of defects in the streets or sidewalks caused by the negligence or active fault of a property owner. In such cases, where the municipality has been called upon to respond because of its legal duty to keep public highways open and free from nuisances, a recovery over has been permitted for indemnity against the property owner, the principal wrongdoer, whose negligence was the real cause of the injury.

Of this class of cases is *Washington Gas Light Co.* v. *District of Columbia*, 161 U. S. 316, in which a resident of the city of Washington had been injured by an open gas box, placed and

maintained on the sidewalk by the gas company for its benefit. The District was sued for damages, and, after notice to the gas company to appear and defend, damages were awarded against the District, and it was held that there might be a recovery by the District against the gas company for the amount of damages which the former had been compelled to pay. Many of the cases were reviewed in the opinion of the court, and the general principle was recognized, that notwithstanding the negligence of one, for which he has been held to respond, he may recover against the principal delinquent where the offense did not involve moral turpitude, in which case there could be no recovery, but was merely *malum prohibitum*, and the law would inquire into the real delinquency of the parties, and place the ultimate liability upon him whose fault had been the primary cause of the injury. The same principle has been recognized in the Court of Appeals of the State of New York in *Oceanic Steam Nav. Co.* v. *Compania Transatlantica Espanola*, 134 N. Y. 461, the second proposition of the syllabus of the case being:

"Where, therefore, a person has been compelled, by the judgment of a court having jurisdiction, to pay damages caused by the negligence of another, which ought to have been paid by the wrongdoer, he may recover of the latter the amount so paid, unless he was a party to the wrong which caused the damage."

In a case cited and much relied upon at the bar, *Gray* v. *Boston Gas Light Co.*, 114 Massachusetts, 149, a telegraph wire was fastened to the plaintiff's chimney without his consent, and, the weight of the wire having pulled the chimney over into the street, to the injury of a passing traveler, an action was brought against the property owner for damages, and notice was duly given to the gas company, which refused to defend. Having settled the damages at a figure which the court thought reasonable, the property owner brought suit against the gas company, and it was held liable. In the opinion the court said:

"When two parties, acting together, commit an illegal or wrongful act the party who is held responsible for the act cannot have indemnity or contribution from the other, because both are equally culpable or *particeps criminis*, and the damage results from their joint offense. This rule does not apply when one does the act or creates the nuisance, and the other does not join therein, but is thereby exposed to liability and suffers damage. He may recover from the party whose wrongful act has thus exposed him. In such cases the parties are not in *pari delicto* as to each other, though as to third persons either may be held liable."

In a later case in Massachusetts, *Boston Woven Hose Co.* v. *Kendall*, 178 Massachusetts, 232, it was held that a manufacturer of an iron boiler known as a vulcanizer, which had been furnished upon an order which required a boiler which would stand a pressure of one hundred pounds to the square inch, which order was accordingly accepted, the manufacturer undertaking to make the boiler in a good and workmanlike manner, but which because of a defect in that the hinge of the door was constructed in such a way that it did not press tight enough against the face of the boiler to stand a pressure of 75 pounds, at which pressure the packing blew out and allowed the naphtha vapor to escape, was liable for the damages which the hose company had been compelled to pay to one of its employés injured by the accident, although the defect might have been discovered upon reasonable inspection by the hose company. In that case the boiler was sold upon a warranty. As was said by Mr. Chief Justice Holmes, delivering the opinion of the court:

"The very purpose of the warranty was that the boiler should be used in the plaintiff's works with reliance upon the defendants' judgment in a matter as to which the defendants were experts and the plaintiff presumably was not. Whether the false warranty be called a tort or a breach of contract, the consequences which ensued must be taken to have been contemplated and was not too remote. The fact that the reliance

was not justified as toward the men does not do away with the fact that the defendants invited it with notice of what might be the consequences if it should be misplaced, and there is no policy of the law opposed to their being held to make their representations good."

Other cases might be cited, which are applications of the exception engrafted upon the general rule of non-contribution among wrongdoers, holding that the law will inquire into the facts of a case of the character shown with a view to fastening the ultimate liability upon the one whose wrong has been primarily responsible for the injury sustained. In the present case there is nothing in the facts as stated to show that any negligence or misconduct of the railroad company caused the defect in the car which resulted in the injury to the brakeman. That company received the car from its owner, the Hammond Packing Company, whether in good order or not the record does not disclose. It is true that a railroad company owes a duty of inspection to its employés as to cars received from other companies as well as to those which it may own. *Baltimore & Potomac Railroad Co.* v. *Mackey,* 157 U. S. 72. But in the present case the omission of duty for which the railroad company was sought to be held was the failure to inspect the car with such reasonable diligence as would have discovered the defect in it. It may be conceded that the railroad company having a contract with the terminal company, to receive and transport the cars furnished, it was bound to use reasonable diligence to see that the cars were turned over in good order, and a discharge of this duty required an inspection of the cars by the railroad company upon delivery to the terminal company. But that the terminal company owed a similar duty to its employés and neglected to perform the same to the injury of an employé, has been established by the decision of the Supreme Court of Nebraska already referred to.

The case then stands in this wise: The railroad company and the terminal company have been guilty of a like neglect of duty in failing to properly inspect the car before putting it in

use by those who might be injured thereby. We do not perceive that, because the duty of inspection was first required from the railroad company, the case is thereby brought within the class which holds the one primarily responsible, as the real cause of the injury, liable to another less culpable, who may have been held to respond for damages for the injury inflicted. It is not like the case of the one who creates a nuisance in the public streets; or who furnishes a defective dock; or the case of the gas company, where it created the condition of unsafety by its own wrongful act; or the case of the defective boiler, which blew out because it would not stand the pressure warranted by the manufacturer. In all these cases the wrongful act of the one held finally liable created the unsafe or dangerous condition from which the injury resulted. The principal and moving cause, resulting in the injury sustained, was the act of the first wrongdoer, and the other has been held liable to third persons for failing to discover or correct the defect caused by the positive act of the other.

In the present case the negligence of the parties has been of the same character. Both the railroad company and the terminal company failed by proper inspection to discover the defective brake. The terminal company, because of its fault, has been held liable to one sustaining an injury thereby. We do not think the case comes within that exceptional class which permits one wrongdoer who has been mulcted in damages to recover indemnity or contribution from another.

For the reasons stated, the question propounded will be answered in the negative.

SLAVENS *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 228. Argued December 7, 8, 1904.—Decided January 9, 1905.

Under the mail contract in this case, which was made in pursuance of the Postal Laws and Regulations, and after the service had materially decreased by changed methods of transporting mail and the Postmaster General had offered the contractor, who had refused to accept it, the remaining work at a lower compensation, it was within the power of the Postmaster General to put an end to the contract by order of discontinuance, allowing one month's pay as indemnity, and to relet the remaining service; the power to terminate the contract on allowing a month's pay as indemnity was not predicated on an abandonment of the entire service.

While the provisions in a similar contract that the contractor should perform without additional compensation all new or changed service that the Postmaster General should order, might not be construed as extending to services of different character and not within the terms of the contract, where the changed service is to take the mail to and from street cars, met at crossings, instead of landings and stations, it comes within the power reserved to the Postmaster General and the contractor is not entitled to additional compensation therefor.

In the absence of authority shown, a local postmaster has no power or authority to contract in respect to mail messenger service, and is not the agent of nor can he bind the Government for that purpose, and if a contractor performs services which he protests against as not being within his contract, solely on the postmaster's order, he is not entitled to extra compensation therefor after his protest has been sustained and the service let to others.

THE appellant filed his petition in the Court of Claims to recover for the alleged wrongful termination of certain mail contracts in the cities of Boston, Brooklyn and Omaha; and, also, for extra services performed in connection therewith. The Court of Claims, in disposing of the case, made separate findings of fact and conclusions of law. The findings of fact may be abridged for the purpose of this case, reference being made for fuller details to the findings in the Court of Claims. 38 C. Cl. 574. In pursuance of an advertisement for proposals for transporting the mails—"covered regulation wagon, mail,

messenger and mail station service"—the appellant entered into contracts for four years each for the cities of Boston and Brooklyn, and two years for the city of Omaha. The Boston and Brooklyn contracts began on July 1, 1893, and the Omaha contract on July 1, 1894. Compensation for the Boston contract was at the rate of $49,516 per annum; for the Brooklyn contract, $18,934 per annum, and for the Omaha contract at $3,780 per annum. During the terms of the Boston and Brooklyn contracts the Postmaster General determined to carry certain of the mails within the district contracted for on electric street railway lines. In both cases the appellant was offered the privilege of continuing the contract for the reduced service, but refused to do so in each case. The Postmaster General terminated the Boston and Brooklyn contracts, above referred to, the former on February 1, 1896, the latter on March 1, 1896, acting, as he avers, under the authority vested in him by law and the contract between the parties, but not because of any negligence or default on the part of the contractor. He afterwards relet the same service, as thus reduced, to another contractor, for the remaining period of the contract of the seventeen months of the Boston contract, at the compensation of $37,000 per annum. The difference between the contract price and the amount it would cost the appellant to furnish the service in Boston during said seventeen months would be $18,884.14. The service of the Brooklyn contract for the remaining period of sixteen months was let to another contractor at a compensation of $9,720 per annum. The court did not find the amount of the loss to the appellant by reason of the termination of this contract. The contracts contained certain stipulations, as set forth in the opinion.

The contracts covered certain specified stations, landings and mail stations from which the contractor was required to carry the mail, and during the terms of such contracts he was required to perform certain services, which he alleges to be extra services, and for which he was entitled to extra compensation—in the Boston contract, carrying the mails from the gen-

eral post office in the city of Boston to the stopping places of the street car lines of the railway company from May 1, 1895, until February 1, 1896. Also, carrying the mails between the Back Bay post office and the Brookline office, a distance of from two and a half to three miles, which services were not included in the terms of the contract, but which he was required to perform by the postmaster of the city of Boston, against his protest. The contractor did not protest to the Postmaster General or any officer of the Post Office Department until August 14, 1899. Whereupon the Postmaster General dispensed with the service by the appellant, and entered into a contract with another contractor to perform the service.

Under the Brooklyn contract, which contained specifications as to the places between which the mail had to be carried during the term of the contract, the contractor was required to perform service between the Brooklyn post office and the mail routes established on the street car lines, and between the motor routes and the mail stations. Under the Omaha contract appellant was required, in addition to the places specifically named in the contract, to carry the mail to and from street cars of the Omaha Street Railway at its crossings. It also appears that under the three contracts the new service required, in lieu of the service specified in the contract, was much less in mileage required than was the service stipulated by the original contract. The Court of Claims dismissed the petition, 38 C. Cl. 574, and the claimant appeals to this court.

Mr. A. A. Hoehling, Jr., for appellant.

Mr. Special Attorney Joseph Stewart, with whom *Mr. Assistant Attorney General Pradt* was on the brief, for the United States.

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

From the foregoing statement of facts it is evident that the

case resolves itself into three propositions: (1) Can the appellant recover for the alleged wrongful termination of his contracts by the Postmaster General? (2) Under the contracts were the services performed in carrying mails from the street cars, at the places designated, extra services for which compensation outside of the contract should be awarded? (3) Under the Boston contract did the service required in carrying the mails to and from Brookline constitute extra service, for which compensation should be awarded?

To determine the first proposition it is essential to have in mind certain provisions of the statute, the preliminary notice to bidders, and, most important of all, the terms of the contract itself. In the notice to bidders it is said:

"There will be no diminution of compensation for partial discontinuance of service or increase of compensation for new, additional or changed service that may be ordered during the contract term; but the Postmaster General may discontinue the entire service on any route whenever the public interest, in his judgment, shall require such discontinuance, he allowing, as full indemnity to the contractor, one month's extra pay."

In the contract it is stipulated:

"It is hereby stipulated and agreed by the said contractor and his sureties that the Postmaster General may change the schedule and termini of the route, vary the routes, increase, decrease, or extend the service thereon, without change of pay; and that the Postmaster General may discontinue the entire service whenever the public interest, in his judgment, shall require such discontinuance; but for a total discontinuance of service the contractor shall be allowed one month's extra pay as full indemnity."

Section 817, Revised Statutes, Postal Laws and Regulations, 1887, provides:

"The Postmaster General may discontinue or curtail the service on any route, in whole or in part, in order to place on the route superior service, or whenever the public interests,

in his judgment, shall require such discontinuance or curtailment for any other cause, he allowing as full indemnity to the contractor one month's extra pay on the amount of service dispensed with, and a *pro rata* compensation for the amount of service retained and continued."

Under the power supposed to be conferred upon him by the terms of the contract, made in pursuance of the preliminary advertisement and the authority vested in him by the Postal Laws and Regulations, above cited, the Postmaster General, having decreased the service under the contract, by reason of the introduction of the method of carrying the mails on the street railways, until the service required originally would be much more than paid for by the compensation agreed upon, discontinued the original service, and, the contractor declining to perform the work remaining at the lower compensation, put an end to the contract by an order of discontinuance, allowing the contractor one month's extra pay as full indemnity. It is contended by the appellant that this contract, properly construed, while it permits the Postmaster General to make changes in the schedule and termini of the route, to reduce the same, to increase, decrease or extend the service, without change of pay, does not confer the right to cancel the contract except upon abandoning the entire service, which may be done with the allowance of one month's extra pay to the contractor. But, it is insisted, so long as any part of the service remains to be performed, it is not within the power of the Postmaster General to put an end to the service of the contractor and relet a part of it to another, substituting a different character of service for a part of the field theretofore covered by the contract. In other words, it is contended that the total discontinuance of service, which only can terminate the contract, must not leave any service to be performed in the district covered.

We cannot accede to this narrow construction of the powers given the Postmaster General by the terms of this contract. He is given general power to increase, decrease or extend the

service contracted for, without change of pay. Furthermore, whenever the public interests in his judgment require it, he may discontinue the entire service. We think the advertisement and the regulations under which this contract was made and the contract as entered into were intended to permit the Postmaster General, when in his judgment the public interest requires it, to terminate the contract, and if a service of a different character has become necessary in his opinion, to put an end to the former service upon the stipulated indemnity of one month's extra pay being given to the contractor. It is not reasonable to hold that the power given to the Postmaster General for the public interest can only be exercised when the mail service in the district is to be entirely abandoned. In the present case the contract was for mail service in three cities of importance, two of them among the large cities of the country, and all of them thriving and growing communities. It is hardly possible that the parties, in making this contract, could have had in view a time when the mail service would be dispensed with. On the other hand, the condition which the contract contemplated, and which in fact arose, made it desirable to extend to this district the use of street railways to carry the mails, with which to improve the facilities for mail delivery.

The authority given to the Postmaster General is broad and comprehensive, requiring him to exercise his judgment to end the service, and thereby terminate the contract, whenever the public interest shall demand such a change. In that event the contractor takes the risk that the exercise of this authority might leave him only the indemnity stipulated for—one month's extra pay. We are not called upon to say in this case that the Postmaster General, merely for the purpose of reletting the contract at a lower rate, may advertise and relet precisely the same service for the purpose of making a more favorable contract for the Government, no change having arisen in the situation except the desire for a better bargain. And it may readily be conceived that in some instances there

may be such a diminution of the service contracted for in the district, by reason of the substitution of new and improved methods, as will render the compensation agreed upon altogether disproportionate to the services left to be rendered, and thereby invoking the authority of the Postmaster General to exercise the power reserved to him to terminate the contract. In the present case the findings of fact do not disclose a case of the arbitrary exercise of power. A new means of service within the district by means of the street railway was deemed by the Postmaster General to be required in the public interest. This necessitated the cutting down of the former service to make way for the new, and the Postmaster General exercised the power given him under the contract, and put an end to the service and the contract. If the contention of the appellant is to be sustained, while in the present case the street railway service was not a large proportion of the total service required, the same argument, carried to its legitimate conclusion, would prevent the Postmaster General from taking advantage of this stipulation, although it was manifest that a large proportion, maybe practically all, of the service could be better rendered to the public by substituting the new method, leaving only a small part of the old service to be rendered. In this contingency, as construed by the appellant, the contract price must still be paid, notwithstanding the changed conditions. These contracts were made for a term of years; two for four years and one for two years. It is insisted that the construction contended for by the Government practically puts the contractor into the power of the Postmaster General, and makes the stipulation, in substance, an agreement upon his part to do whatever that officer may require. The obvious answer to this contention is that the contractor is not obliged to carry on the contract when the Postmaster General elects to cancel it. Such action puts an end to the obligations of the contractor as well as the Government. Under the postal regulations, it appears that the contractor is given the opportunity to perform the reduced service at a lower rate. This he was not obliged

to do, and, in the present case, declined to undertake. Our conclusion is that, acting in good faith, of which there is every presumption in favor of the conduct of so important a department of the Government, the Postmaster General may, as was done in this case, discontinue the service, and thereby put an end to the contract when the public interest, of which he is the sole judge, authorizes such action.

This view of the contract renders it unnecessary to consider at length the provisions of section 817 of the Postal Laws and Regulations, above quoted. It is urged that this section applies more particularly to star route and steamboat service, but the provisions of the law are broad and comprehensive, and not limited by the terms of the act to such specific service, but the power is given the Postmaster General whenever, in his judgment, the public interest shall require, to discontinue or curtail the same, giving the contractor as indemnity one month's extra pay. Speaking of the action, authorized under section 263 of the former rules and regulations, this court, in *Garfielde* v. *United States*, 93 U. S. 242, 246, said:

"There was reserved to the Postmaster General the power to annul the contract when his judgment advised that it should be done, and the compensation to the contractor was specified. An indemnity agreed upon as the amount to be paid for cancelling a contract, must, we think, afford the measure of damages for illegally refusing to award it."

And upon similar contract stipulations this court in *Chicago & Northwestern Railway Co.* v. *United States*, 104 U. S. 680, 684, said:

"It is true, that under this reservation the Postmaster General would be authorized to discontinue the entire service contemplated by the contract, and the practical effect of that would be to terminate the contract itself, on making the indemnity specified."

As to the other claim for extra services: In the stipulation of the contracts, it appears that the contractor was required to perform all new or additional or changed covered wagon

mail station service that the Postmaster General should order, without additional compensation, whether caused by change of location of post office, stations or landings, or by the establishment of others than those existing at the time of the contract, or rendered necessary in the judgment of the Postmaster General from any cause, and that officer has the right to change the schedule, vary the routes, increase, decrease or extend the service without change of pay. It is insisted that these stipulations, properly construed, permit the Postmaster General to require only additional service of the same kind as that stipulated for, and that the carrying of the mails from street cars, where the same might be ordered to be met at crossings, was a new and different kind of service, and was not a change caused by a different location of a post office, station or landing within the meaning of the contract. But we think this is too narrow a construction of the terms of the agreement. Strictly speaking, the carrying of the mails from the street cars at the crossings is not taking them from the stations, but it practically amounts to the same thing. It imposes no additional burden upon the contractor; indeed, the findings of fact show that it greatly decreased his burden by lessening the number of miles of carrying required. We think this change of service was fairly within the power reserved to the Postmaster General, and the right given to him to designate such changes in the service as the public interest might require in the performance of this contract. It is true that if these services were not within the terms of the contract, and if they were of a different character, the fact that they greatly decrease the burden of the contractor might not require a disallowance of the claim for extra services. But we think the services were within the contract, fairly construed, and do not entitle the contractor to extra compensation.

In reference to the services rendered in Boston, required by the postmaster, between Back Bay station, in Boston, and the Brookline post office outside the limits of the city of Boston and not within the terms of the contract, it does not appear

that the requirement of such service was made, except by the postmaster of the city of Boston, who had no authority, so far as we can discover, to require such service. When the claimant protested to the Postmaster General he was promptly relieved from the service, and another contract was made for the performance of the same.

It is said that this claim is in all respects like the one sustained by this court in *United States* v. *Otis*, 120 U. S. 115, where the contractor was allowed extra compensation for carrying the mails across the Hudson River from the Pennsylvania Railway depot at the foot of Cortlandt street, New York, to the depot of the same line in Jersey City, N. J., when the contract required him to carry the mails only to and from the depots in New York. In the opinion in that case Mr. Justice Blatchford pointed out that the United States directed the performance of the service. Presumably this was done by some one having authority of the United States. In this case the Court of Claims has held, as we think rightly, that the postmaster, having no power or authority to contract in respect to the mail messenger service, was not the agent of the Government for such service, and could not bind the Government by his knowledge or acts in respect thereto. *Roberts* v. *United States*, 92 U. S. 41, 48; *Hume* v. *United States*, 132 U. S. 406; *Whitsell* v. *United States*, 34 C. Cl. 5. As the additional service in this case was not required by the authorized agent of the Government, we think the contractor is not entitled to extra compensation therefor.

Finding no error in the proceedings of the Court of Claims, its decision is

Affirmed.

TRAVIS *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 84. Argued December 7, 8, 1904.—Decided January 9, 1905.

Slavens v. *United States*, p. 229, *ante*, followed.

THE facts are stated in the opinion.

Mr. A. A. Hoehling, Jr., for appellant.

Mr. Special Attorney Joseph Stewart, with whom *Mr. Assistant Attorney General Pradt* was on the brief, for the United States.

MR. JUSTICE DAY delivered the opinion of the court.

This case was argued with *Slavens* v. *United States*, No. 228, just decided. It involves the same question as to the right of the Postmaster General to terminate a mail contract. The Court of Claims dismissed the petition. 38 C. Cl. 590. For the reasons stated in the opinion in the *Slavens* case, the judgment of the Court of Claims is

Affirmed.

MADISONVILLE TRACTION COMPANY *v.* SAINT BERNARD MINING COMPANY.

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

No. 362. Submitted November 28, 1904.—Decided January 16, 1905.

In regard to the removal of cases the following principles have been settled: If the case be a removable one, that is, if the suit, in its nature, be one of which the Circuit Court could rightfully take jurisdiction, then

upon the filing of a petition for removal, in due time, with a sufficient bond, the case is, in law, removed, and the state court in which it is pending will lose jurisdiction to proceed further, and all subsequent proceedings in that court will be void.

After the presentation of a sufficient petition and bond to the state court in a removable case, it is competent for the Circuit Court, by a proceeding ancillary in its nature—without violating § 720, Rev. Stat., forbidding a court of the United States from enjoining proceedings in a state court—to restrain the *party* against whom a cause has been legally removed from taking further steps in the state court.

If upon the face of the record, including the petition for removal, a suit does not appear to be a removable one, then the state court is not bound to surrender its jurisdiction, and may proceed as if no application for removal had been made.

Under the judiciary act of 1887, 1888, a suit cannot be removed from a state court unless it could originally have been brought in the Circuit Court of the United States.

A State cannot by any statutory provisions withdraw a suit in which there is a controversy between citizens of different States from the cognizance of the Federal courts.

A proceeding brought by a Kentucky railroad company in the County Court under §§ 835–839, Kentucky Statutes, to condemn lands for a public use, valued at over $2,000, belonging to a corporation which is a citizen of another State, is a suit involving a controversy to which the judicial power of the United States extends within the meaning of the judiciary clauses of the Constitution and of which the Circuit Court has original cognizance under § 1 of the judiciary act of 1887 and may be removed to the Circuit Court of the United States.

In the exercise of the jurisdiction conferred upon it of controversies between citizens of different States, a Circuit Court of the United States is for every practical purpose a court of the State in which it sits and will enforce the rights of the parties according to the law of that State taking care, as a state court must, not to infringe any right secured by the Constitution and the laws of the United States. And in a case of condemnation it would proceed under the sanction of, and enforce, the state law so far as it was not unconstitutional.

It is fundamental in American jurisprudence that private property cannot be taken by the Government, National or state, except for purposes which are of a public character, although such taking be accompanied by compensation to the owner.

It is for the State, primarily and exclusively, to declare for what local public purposes private property, within its limits, may be taken upon compensation to the owner, as well as to prescribe a mode in which it may be condemned and taken. But the State may not prescribe any mode of taking private property for a public purpose and of ascertaining the compensation to be made therefor, which would exclude from the

jurisdiction of a Circuit Court of the United States a condemnation proceeding which in its essential features is a suit involving a controversy between citizens of different States.

THE facts are stated in the opinion.

Mr. David W. Fairleigh and *Mr. N. T. Crutchfield* for appellant.

Mr. E. G. Sebree and *Mr. C. Waddill* for appellee.

MR. JUSTICE HARLAN delivered the opinion of the court.

The Madisonville Traction Company, a Kentucky corporation, having by its charter authority to construct an electric railroad, filed its application in the County Court of Hopkins County, in that Commonwealth, to condemn for its use certain lands belonging to the Saint Bernard Mining Company, a Delaware corporation engaged in mining coal—the Traction Company being styled in the application as plaintiff and the Mining Company as defendant.

The application was made under the Kentucky Statutes relating to the condemnation of lands. The nature of those proceedings, whether judicial or not, appears from certain provisions of those statutes which may be summarized as follows:

Any company authorized to construct a railroad, if "unable to contract with the owner of any land or material *necessary for its use* for the purpose thereof," may file in the office of the clerk of the County Court a description of such land or material, and have commissioners appointed to assess the damages which the owner is entitled to receive. Kentucky Stat. § 835.

The commissioners are required to make their award of damages in writing, giving the names of the owners, and whether non-residents of the State, infants, of unsound mind, or married women. Kentucky Stat. § 836.

It is made the duty of the clerk of the court, upon application

of the company, to issue process against the owners to show cause why the report should not be confirmed, and make such orders as to non-residents and persons under disability as are required by the Civil Code of Practice in actions against them in the Circuit Court. Kentucky Stat. § 837.

At the first regular term, "after the owners shall have been summoned the length of time prescribed by the Civil Code of Practice before an answer is required," the court must examine the report and pass upon it. Kentucky Stat. § 838.

If exceptions are filed by either party, a jury must be empanelled to try the issue of fact, and judgment rendered in conformity to the verdict, if sufficient cause to the contrary be not shown. Either party may appeal to the Circuit Court, the appeal to be tried *de novo*.

Upon the confirmation of the report of the commissioners or the assessment of damages by the court, as provided, and the payment to the owners of the amount due, as shown by the report of the commissioners when confirmed, or as shown by the judgment of the court when the damages are assessed by it, and all costs adjudged to the owner, the railroad company becomes entitled to take possession of the land and material, and to use the same for the purpose for which it was condemned as fully as if the title had been conveyed to it. But when an appeal is taken from the judgment of the County Court by the company it is not to be entitled to take possession of the land or material condemned until it pays into court the damages assessed and all costs. Kentucky Stat. § 839.

The commissioners appointed by the County Court, in the above proceeding, awarded $100 as damages to be paid to the Mining Company.

Process having issued, the Mining Company, before any action was taken upon the report, filed its petition and bond for the removal of the case into the Circuit Court of the United States, alleging, among other things, that the value of the matter in dispute, exclusive of interest and costs, exceeded $2,000. The petition for removal distinctly alleged, as the

ground of removal, that the two companies were corporations of different States.

The sufficiency of the bond was not disputed. But the County Court refused to recognize any right of removal, and the Kentucky corporation was about to proceed in the prosecution of its case in that court, despite the application for removal. Thereupon the Delaware corporation filed in the Circuit Court of the United States a complete transcript of the proceedings in the state court.

Subsequently the present original suit in equity was instituted in the Federal court by the Mining Company against the Traction Company. The bill, repeating the allegations in the petition for removal as to the diverse citizenship of the two corporations, showed that, notwithstanding what had been done to have the cause removed, from the state court, the Traction Company was about to proceed to have the lands condemned in the case instituted in the County Court. Among other things the bill alleged that plaintiff denied the right of the Traction Company to have the lands in question condemned, and averred that the report of the commissioners was insufficient in law; that the commissioners acted improperly, unfairly and unfaithfully in their viewing of the land, in the preparation of their report and in awarding damages; that $100 was wholly inadequate as compensation, and was assessed and given under the influence of passion and prejudice, or some other illegal motive; that the land sought to be taken was worth, intrinsically, a great deal more than that amount; that the incidental damages done to the property of plaintiff in the construction of the road, (which damages under the laws of Kentucky the said commissioners should have taken into consideration and assessed, but did not, § 836,) exceeded $2,000; that the plaintiff's property and business will not be benefited in the least degree by the construction or prudent operation of the railroad; and that "it is proposed to deprive it of over nine acres of its land, which through its location is valued at and is worth over $2,500, and is so situated that such

deprivation will irreparably injure and damage its remaining land."

The relief asked in the present suit was that the Traction Company be restrained and enjoined from further prosecuting the case in the County Court or taking any further steps therein.

The Traction Company demurred to the bill, one of the grounds of demurrer being that the Circuit Court was without jurisdiction or authority, under the Constitution and laws of the United States, to grant the injunction asked for, or any other relief. The Circuit Court sustained its jurisdiction and overruled the demurrer. The Traction Company stood by its demurrer, and a final decree was entered enjoining that company from any further prosecution of the case in the County Court.

It has been observed that the parties to the proceeding in the County Court are corporations, and therefore each is to be deemed, for the purpose of suing and being sued in the Federal court, a citizen of the State by whose laws it was created. The questions presented by the record are these: Was the proceeding in the state court a suit or controversy to which the judicial power of the United States extends? If a suit or controversy, was it removable to the Circuit Court of the United States? If removable, was it, in law, removed, and was it competent for that court, after the removal of the case, to enjoin the Traction Company from further proceeding in the state court?

We recognize the importance of these questions, and have given them the fullest consideration.

Certain principles, relating to the removal of cases, have been settled by former adjudications. They are:

1. If a case be a removable one, that is, if the suit, in its nature, be one of which the Circuit Court could rightfully take jurisdiction, then upon the filing of a petition for removal, in due time, with a sufficient bond, the case is, in law, removed, and the state court in which it is pending will lose jurisdiction to proceed further, and all subsequent proceedings in that court will be void. *Railroad Company* v. *Mississippi*, 102

U. S. 135, 141; *Railroad* v. *Kontz*, 104 U. S. 5, 14; *Steamship Company* v. *Tugman*, 106 U. S. 118, 122; *St. Paul & Chicago Ry. Co.* v. *McLean*, 108 U. S. 212, 216; *Crehore* v. *Ohio &c. Railway Co.*, 131 U. S. 240, 243; *Kern* v. *Huidekoper*, 103 U. S. 485, 493.

2. After the presentation of a sufficient petition and bond to the state court in a removal case, it is competent for the Circuit Court, by a proceeding ancillary in its nature—without violating section 720 of the Revised Statutes, forbidding a court of the United States from enjoining proceedings in a state court—to restrain the *party* against whom a cause has been legally removed from taking further steps in the state court. *French, Trustee,* v. *Hay*, 22 Wall. 238, 252; *Dietzsch* v. *Huidekoper*, 103 U. S. 494, 496, 497; *Moran* v. *Sturges*, 154 U. S. 256, 270. See also, *Sargent* v. *Holton*, 115 U. S. 348; *Harkrader* v. *Wadley*, 172 U. S. 148, 165; *Gates* v. *Bucki*, 53 Fed. Rep. 961; *Texas & Pacific Ry. Co.* v. *Kuteman*, 54 Fed. Rep. 547; *In re Whitelaw*, 71 Fed. Rep. 733, 738; *Iron Mountain R. R. Co.* v. *Memphis*, 96 Fed. Rep. 113; *James* v. *Central Trust Co.*, 98 Fed. Rep. 489.

3. It is well settled that if, upon the face of the record, including the petition for removal, a suit does not appear to be a removable one, then the state court is not bound to surrender its jurisdiction, and may proceed as if no application for removal had been made. *Stone* v. *South Carolina*, 117 U. S. 430, 432; *Carson* v. *Hyatt*, 118 U. S. 279, 281; *Marshall* v. *Holmes*, 141 U. S. 589, 595; *Burlington &c. Railway Co.* v. *Dunn*, 122 U. S. 513, 515.

So that the fundamental question here is whether the case, brought in the County Court, was a removable one. If it was, then the decree of the Circuit Court, restraining the Traction Company from taking further steps in the local court, after the removal of the case to the Federal court, was right; but if the case was not a removable one, then the decree was erroneous.

The rule is now settled that, under the judiciary act of 1887, 1888, a suit cannot be removed from a state court, unless

it could have been brought originally in the Circuit Court of the United States. *Tennessee* v. *Union & Planters' Bank*, 152 U. S. 454; *Mexican Nat. R. R.* v. *Davidson*, 157 U. S. 201; *Metcalf* v. *Watertown*, 128 U. S. 586; *Minnesota* v. *Northern Securities Co.*, 194 U. S. 48.

Why could not the proceeding instituted in the County Court have been brought originally in the Federal court? The case, as made in the County Court, was, beyond question, a judicial proceeding; it related to property rights; the parties are corporate citizens of different States; and the value of the matter in dispute exceeded the amount requisite to give jurisdiction to the Circuit Court. It was therefore a proceeding embraced by the very words of the Constitution of the United States which declares that the "judicial power shall extend . . . to controversies . . . between citizens of different States," as well as by the act of 1887 (§ 1), which declares "that the Circuit Courts of the United States shall have *original* cognizance, concurrent with the courts of the several States, of *all* suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, . . . in which there shall be a controversy between citizens of different States." In view of these explicit provisions it is clear that the proceeding in the County Court was a suit or controversy within the meaning both of the Constitution and of the judiciary act. We could not hold otherwise without overruling former decisions of this court. Let us see whether this be not so.

Referring to the clause of the Constitution defining the judicial power of the United States, Chief Justice Marshall, speaking for the court in *Osborn* v. *Bank of the United States*, 9 Wheat. 738, 819, said: "This clause enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it, by a party

who asserts his rights in the form prescribed by law. It then becomes a case, and the Constitution declares, that the judicial power shall extend to all cases arising under the Constitution, laws and treaties of the United States."

In *Kohl* v. *United States*, 91 U. S. 367, 376, which was a suit in the Circuit Court of the United States to condemn lands for a public building, this court, speaking by Mr. Justice Strong, said: "It is difficult then, to see why a proceeding to take land in virtue of the Government's eminent domain, and determining the compensation to be made for it, is not, within the meaning of the statute, a suit at common law, when initiated in a court. It is an attempt to enforce a legal right."

Two cases very much in point are *Boom Co.* v. *Patterson*, 98 U. S. 403, and *Searl* v. *School District No. 2*, 124 U. S. 197.

Boom Co. v. *Patterson* was a case of condemnation under a statute authorizing a County District Court to appoint commissioners to appraise the value of the property to be taken. The local statute provided that if the appraisement was not satisfactory, the matter could be brought before the court, where the issues of fact would be tried by a jury, unless a jury was waived. It was a case of diverse citizenship, and, upon the petition of the defendant, a citizen of another State, it was removed from the inferior local court to the Circuit Court of the United States. One question was whether the case was, in its nature, excluded from the jurisdiction of the Federal court. Referring to the contention that the proceeding to take private property for public use was an exercise by the State of its sovereign right of eminent domain, and with its exercise the United States, a separate sovereignty, had no right to interfere by any of its departments, this court, speaking by Mr. Justice Field, said: "But notwithstanding the right is one that appertains to sovereignty, when the sovereign power attaches conditions to its exercise, the inquiry whether the conditions have been observed is a proper matter for judicial cognizance. If that inquiry take the form of a proceeding *before the courts* between parties—the owners of the land on the one side, and

the company seeking the appropriation on the other,—there is *a controversy which is subject to the ordinary incidents of a civil suit,* and its determination derogates in no respect from the sovereignty of the State." Again in the same case: "It has long been settled that a corporation will be treated, where contracts or rights of property are to be enforced by or against it, as a citizen of the State under the laws of which it was created, within the clause of the Constitution extending the judicial power of the United States to controversies between citizens of different States. *Paul* v. *Virginia,* 8 Wall. 177. And in *Gaines* v. *Fuentes,* 92 U. S. 20, it was held that a controversy between citizens is involved in a suit whenever any property or claim of the parties, capable of pecuniary estimation, is the subject of litigation and is presented by the pleadings for judicial determination. Within the meaning of these decisions, we think the case at bar was properly transferred to the Circuit Court, and that it had jurisdiction to determine the controversy."

Searl v. *School District No. 2* was also a proceeding for the condemnation of private property to public use for school purposes. It was commenced by petition filed in a County Court, a subordinate tribunal of one of the counties of Colorado. The local statute authorized the compensation to be fixed by a jury of six freeholders, with a right of appeal. The question in the case was as to the removability of the case from the County Court to the Federal Court. This court, speaking by Mr. Justice Matthews, said: "Such a proceeding, according to the decision of this court in *Kohl* v. *United States,* 91 U. S. 367, is a suit at law within the meaning of the Constitution of the United States and the acts of Congress conferring jurisdiction upon the courts of the United States." After referring to prior cases, including *Boom Co.* v. *Patterson,* the opinion proceeds: "The fact that the Colorado statute provides for the ascertainment of damages by a commission of three freeholders, unless at the hearing a defendant shall demand a jury, does not make the proceeding *from its commencement* any the

less *a suit* at law within the meaning of the Constitution and acts of Congress and the previous decisions of the court. . . . It is an adversary judicial proceeding from the beginning. The appointment of commissioners to ascertain the compensation is only one of the modes by which it is to be determined. The proceeding is, therefore, a suit at law from the time of the filing of the petition and the service of process upon the defendant." 124 U. S. 199, 200.

It will be observed from an examination of the *Searl* case that this court cited with approval *Colorado Midland Railway Co.* v. *Jones*, 29 Fed. Rep. 193, and the *Mineral Range Railroad Co.* v. *Detroit & Lake Superior Copper Co.*, 25 Fed. Rep. 515. Those cases fully sustain the proposition that the case brought in the state court was a suit within the meaning of the Constitution and the judiciary act.

In the first one named, which was a proceeding under a local statute in an inferior state tribunal for the condemnation of lands for the use of a railway company, Mr. Justice Brewer, then Circuit Judge, after referring to the local statute under which the company proceeded and to *Boom Co.* v. *Patterson*, and *Searl* v. *School District*, held the case to be removable, although the proceedings for condemnation were somewhat different from those in an ordinary trial, saying: "I do not suppose that a State can, by making special provisions for the trial of any particular controversy, prevent the exercise of the right of removal. If there was no statutory limitation, the legislature could provide for the trial of many cases by less than a common law jury, or in some other special way. But the fact that it had made such different and special provisions would not make the proceeding any the less a trial, or such a suit as, if between citizens of two States, could not be removed to the Federal courts. If this were possible, then the only thing the legislature of a State would have to do to destroy the right of removal entirely would be to simply change and modify the details of procedure."

In *Mineral Range R. Co.* v. *Detroit & Lake Superior Copper*

Co., Mr. Justice Brown, then District Judge, after referring to *Boom Co.* v. *Patterson*, and many other adjudged cases, said: "But conceding that if the only question in this case were the amount of damages to be paid by the railroad company, the jurisdiction of this court would be sustained by the authorities above cited, it is insisted that these cases are inapplicable, because by the statute of this State the jury or commissioners must pass upon the question of the necessity for taking the property, as well as the amount of damages to be awarded. But we think that, in this particular, counsel overlook the distinction between the *power* to condemn, which confessedly resides in the State, and *proceedings* to condemn, which the State has delegated to its *courts*. The proceeding is certainly not deprived of its character as a suit by reason of its taking cognizance of this additional question; and *if it be a suit*, the right of removal attaches. Whenever a right is given by the law of a State, and the courts of such State are invested with the power of enforcing such right, the proceeding may be removed to a Federal court if the other requisites of removability exist." 25 Fed. Rep. 520.

In the more recent case of *Smith* v. *Adams*, 130 U. S. 167, 173, Mr. Justice Field, speaking for the court and referring to the clauses of the Constitution and the statutes relating to the judicial power and the courts of the United States, said: "By those terms are intended the claims or contentions of litigants brought before the courts for adjudication by regular proceedings established for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim or contention of a party takes such a form that the judicial power is capable of acting upon it, then it has become a case or controversy."

It may be here said that the provisions of the local statutes of condemnation, referred to in the above cases, are substantially the same as those in the Kentucky statutes.

We cannot doubt, in view of the authorities, that the case presented in the County Court was a "suit" or "controversy

between citizens of different States," within the meaning of the Constitution and the laws of the United States. It was, as already said, a judicial proceeding initiated in a tribunal which constitutes a part of the judicial establishment of Kentucky, as ordained by its constitution, Const. Kentucky, § 140; and the court, although charged with some duties of an administrative character, is a judicial tribunal and a court of record. *Fletcher* v. *Leight*, 4 Bush, 303; *Pennington* v. *Woolfolk*, 79 Kentucky, 13.

Are the above cases inapplicable by reason of their having been decided prior to the passage of the judiciary act of 1887, 1888 limiting the right of removal to suits of which the Circuit Courts of the United States could take original cognizance? Clearly not. The difference between that act and the act of 1875 is wholly apart from the present discussion; for, both acts gave the Circuit Courts *original* jurisdiction of *all* suits, having the requisite amount in dispute, and in which there was a controversy between citizens of different States. So that what was a suit or controversy to which, by reason of diverse citizenship, the judicial power of the United States extended under the act of 1875, must be deemed a suit under the act of 1887, 1888. The only effect of the latter act, so far as the present question is concerned, was to restrict the right of removal from the state court to cases of which the Circuit Court could take original cognizance. And the present case, being a suit involving a controversy between citizens of different States, is manifestly of that character.

It is said, however, that when it is proposed to take private property for public purposes, the question of appropriation is one primarily and exclusively for the State to determine.

There ought not to be any dispute, at this day, in reference to the principles which must control in all cases of the condemnation of private property for public purposes. It is fundamental in American jurisprudence that private property cannot be taken by the Government, National or state, except for purposes which are of a public character, although such

taking be accompanied by compensation to the owner. That principle, this court has said, grows out of the essential nature of all free governments. *Loan Association* v. *Topeka*, 20 Wall. 655; *Cole* v. *La Grange*, 113 U. S. 1, 6. If the purpose be public the taking may be outright, provided reasonable, certain and adequate provision is made, at the time of appropriation, to ascertain and secure the compensation to be made to the owner. *Cherokee Nation* v. *Southern Kansas Railway Co.*, 135 U. S. 641, 659; *Sweet* v. *Rechel*, 159 U. S. 380, 399; *Western Union Tel. Co.* v. *Pennsylvania R. R. Co. et al*, 195 U. S. 540. Any state enactment in violation of these principles is inconsistent with the due process of law prescribed by the Fourteenth Amendment. *C., B. & Q. R. R. Co.* v. *Chicago*, 166 U. S. 226; *San Diego Land &c. Co.* v. *National City*, 174 U. S. 739, 754; *Smyth* v. *Ames*, 169 U. S. 466, 525. The position taken by the highest court of Kentucky on this general subject appears from *Tracy* v. *Elizabethtown &c. R. R. Co.*, 80 Kentucky, 259, 265. It was there said: "It is erroneous to suppose that the legislature is beyond the control of the courts in exercising the power of eminent domain, either as to the nature of the use or the necessity to the use of any particular property. For if the use be not public, or no necessity for the taking exists, the legislature cannot authorize the taking of private property against the will of the owner, notwithstanding compensation may be required."

Speaking generally, it is for the State, primarily and exclusively, to declare for what local public purposes private property, within its limits, may be taken upon compensation to the owner, as well as to prescribe a mode in which it may be condemned and taken. But the State may not prescribe any mode of taking private property for a public purpose and of ascertaining the compensation to be made therefor, which would exclude from the jurisdiction of a Circuit Court of the United States a condemnation proceeding which in its essential features is a suit involving a controversy between citizens of different States. "A State cannot," this court has said,

"tie up a citizen of another State, having property rights within its territory invaded by unauthorized acts of its own officers to suits for redress in its own courts." *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 391.

Now, it is true that the Circuit Court could not have the property in question condemned for local public purposes, if the State had not previously, by statute, authorized its condemnation. After the removal of a case of condemnation from a state court the Federal court would proceed under the sanction of state legislation. It would enforce the state law, unless that law authorized the appropriation of private property for purposes that were not really of a public nature. So far as authority to take the property for local public purposes was concerned, the Circuit Court could not enforce any other than the state law. It would respect the sovereign power of the State to define the legitimate public purposes for which private property may be taken, upon compensation to the owner being made or secured. But at the same time it could enforce, as of course it must, the authority of the Supreme Law of the Land, which expressly extends the judicial power of the United States to all suits involving controversies between citizens of different States, and which also, by statute, gives the Circuit Courts of the United States, without qualification, jurisdiction of such controversies. A State cannot by any statutory provisions withdraw from the cognizance of the Federal courts a suit or judicial proceeding in which there is such a controversy. Otherwise the purpose of the Constitution in extending the judicial power of the United States to controversies between citizens of different States would thereby be defeated. If the judiciary act of Congress admitted of the case in the County Court being brought within the original cognizance of the Circuit Court, that is an end of the matter, although it be a case of the appropriation of private property to public uses under the authority of the State. Under any other view a State, by its own tribunals, could deprive citizens of other States of their property by condem-

nation, without giving them an opportunity to protect themselves, in a National court, against local prejudice and influence.

It may, however, be urged that the Delaware corporation can be fully protected by the state court in its rights of property, because, if any Federal right be denied it, the authority of this court can be invoked upon writ of error to the highest court of the State. But the question whether the property is authorized by the local statute to be condemned, as well as the question of the amount of compensation to the owner, could not come here by writ of error from the state court. Such questions would not ordinarily involve a Federal right. In the present case the commissioners reported the damages to be only $100; whereas, the owner alleges that the amount awarded was grossly inadequate, practically confiscatory. That question, as well as the question whether the statute authorized the Traction Company to take the property, the Delaware corporation is constitutionally entitled, as between it and the Kentucky corporation, by reason of the diverse citizenship of the parties, to have determined upon their merits in a court of the United States, in which, presumably, it will be protected against local prejudice or influence. The Circuit Court, recognizing the right of the Traction Company to appropriate the land in question, if necessary for its purposes, could do all that is required by the Kentucky statute, and meet fully the ends of justice. Besides, a court always looks to substance and not to mere forms. Mere forms are not of vital consequence in cases of condemnation. *Kohl* v. *United States*, 91 U. S. 367, 375; *United States* v. *Jones*, 109 U. S. 513, 519.

It is suggested that the state legislature might have consummated the taking of the property of the Delaware corporation by means of a non-judicial tribunal, and thus left open simply the question of compensation to the owner of the property taken. We do not perceive that this suggestion is at all material in the present discussion; for, the State has

chosen to provide for the taking by means of what is conceded to be a suit in one of its judicial tribunals. It is, in effect, conceded that the Circuit Court may be given jurisdiction of the question of compensation. But the contention is, that in no case can the judicial power of the United States be invoked until the question of taking is consummated by a proceeding in the particular local tribunal designated by the State. This view, it is supposed, finds support in the cases in which it has been held that an original suit directly against a State, or a suit against an officer of the State which, by reason of the particular relief sought, is in effect a suit against the State, may be limited by the State to suits brought in one of its own courts. *Smith* v. *Reeves,* 178 U. S. 436. This illustration is wide of the mark; for, the mandate of the Constitution of the United States (11th Amendment) is 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;" whereas, the judicial power of the United States and the original jurisdiction of the Circuit Courts, whatever may be ordained by state legislation, extends to suits in which there is a controversy between citizens of different States. The exercise by the Circuit Courts of the United States of the jurisdiction thus conferred upon them is pursuant to the Supreme Law of the Land, and will not, in any proper sense, entrench upon the dignity, authority or autonomy of the States; for each State, by accepting the Constitution, has agreed that the courts of the United States may exert whatever judicial power can be constitutionally conferred upon them. In the exercise of that power a Circuit Court of the United States, sitting within the limits of a State and having jurisdiction of the parties, is, for every practical purpose, a court of that State. Its function, under such circumstances, is to enforce the rights of parties according to the law of the State, taking care, always, as the state courts must take care, not to infringe any right secured by the Constitution and the

laws of the United States. It should, however, be remarked that there is nothing in the Kentucky statute which indicates any purpose on the part of the legislature of that Commonwealth to fly in the face of the above cases or to evade the principles announced in them. It is not to be implied from the statute in question that the State intended to exclude or supposed that it could exclude from the Federal courts jurisdiction of any suit to which the judicial power of the United States extended.

It was said that if the case was a removable one the time for removal was after it was taken by appeal to the state Circuit Court, where it could be tried *de novo*. There is nothing in the act of 1887, 1888 which sustains this view. Was the case, as it was in the County Court, a suit in which there was a controversy between corporations of different States? If so, the right of removal was perfect under the act of 1887, 1888. Under the Kentucky statute the condemning party was entitled, even after appeal to the Circuit Court, to pay into court the damages assessed in the County Court, and before the case was concluded in the Circuit Court to take possession of the land and oust the owner. Kentucky Stat. § 839; 80 Kentucky, 259, 265. Clearly, the owner was not bound to wait until the proceedings in the County Court were concluded, or until he was put out of possession before exercising his right of removal, if the case was a removable one.

We hold that as the proceeding in the County Court was a suit involving a controversy between corporate citizens of different States, it was one of which the Circuit Court of the United States could have taken original cognizance, under the judiciary act, and it was, therefore, a removable case. And being a removable case, it is to be regarded as having been removed upon the filing of the petition and accompanying bond for removal; in which event, it was competent for the Circuit Court, having thus acquired jurisdiction of the subject matter, and of the parties, to enjoin the Traction Company from proceeding further in the state court.

For the reasons stated, the decree of the Circuit Court awarding the injunction must be affirmed.

It is so ordered.

MR. JUSTICE HOLMES, dissenting.

I regret that I am unable to agree with the decision of the court. The question on which I differ is whether a proceeding for the taking of land by eminent domain, authorized by the State of Kentucky to be begun in the Courts of Kentucky, can be begun in the Circuit Court of the United States, whenever one of the parties is a citizen of another State. Of course, I am speaking of the proceeding for the taking of the land, not of that for compensation, to which I shall refer later. The argument which does not command my assent, stated in a few words, is that such a proceeding in such a case is a controversy between citizens of different States, and therefore by the very words of the Constitution must be within the jurisdiction of the United States courts. It seems to me that this is rather too literal a reading, and, on the whole, is a sacrifice of substance to form.

The fundamental fact is that eminent domain is a prerogative of the State, which on the one hand may be exercised in any way that the State thinks fit, and on the other may not be exercised except by an authority which the State confers. The taking may be direct, by an act of the Legislature. It may be delegated to a railroad company, with a certain latitude of choice with regard to the land to be appropriated. It may be delegated subject to the approval of a legislative committee or of a board other than a court. When the State makes use of a court, instead, for instance, of a railroad commission, the character of the proceeding is not changed. The matter still is wholly within its sovereign control. The State may intervene after the proceedings have been begun, and take the land. It may direct the entry of a decree of condemnation. An illustration of its continuing power may be seen in *In re Northamp-*

ton, 158 Massachusetts, 299. The matter of grade crossings had been referred by the Legislature of Massachusetts to the courts, and a petition was pending for the abolition of certain grade crossings in Northampton. The case had been sent to commissioners, and they had reported. Pending a motion to confirm their report the Legislature passed an act forbidding a change in that case without the consent of the city council. It was held that, as the whole subject was originally within the control of the Legislature, it did not cease to be so by being referred to the courts, and the act was sustained.

A further illustration, and one in which substance has prevailed over form, is to be found in the case of suits by citizens of another State against officers of a State. In form such suits are controversies between citizens of different States and within the jurisdiction of the United States Courts. But if, in substance, they have the effect of suits against a State, the jurisdiction is denied. And the decisions do not stop there, but when the State has waived its immunity, as it may, and has given permission to a suit against the officer in a state court, it still is held that, although there is a controversy between citizens of different States which thus has become subject to litigation, that litigation must be confined to the courts which the State has named. Yet there is no doubt that, with the State's consent, its officers, or the State itself, could be sued in the courts of the United States. *Smith* v. *Reeves*, 178 U. S. 436; *Chandler* v. *Dix*, 194 U. S. 590.

It seems to me that, if a State authorizes a taking to be acccomplished by certain machinery, the United States has no constitutional right to intervene and to substitute other machinery because the State has chosen to use its law courts rather than a legislative committee and thus to give to the exercise of its sovereign power the external form of a suit at law. It seems to me plain that the exercise of that power depends wholly on the State, may be limited as the State chooses, and cannot be carried further than the State has authorized in terms. Suppose that a proceeding for taking land is removed

to the United States Court contrary to the legislation of the State, by whose authority, I ask myself, is a subsequent taking to be decreed? It is open to any one who can think it to say that the attempt to use the state courts to the exclusion of the United States courts makes the taking void, but I cannot understand how a taking unauthorized by the State can be good. If I am right in supposing that the State has an absolute right to limit the exercise of eminent domain as it sees fit, then, so far as the construction of the Kentucky statute is concerned, I need only invoke the cases last cited, to show that the statute imports that the State meant to confine the proceedings to its own courts. Certainly it does not purport to authorize them elsewhere, and that is enough. *Smith* v. *Reeves*, 178 U. S. 436, 445; *Chandler* v. *Dix*, 194 U. S. 590, 592. The difference between myself and the majority is not merely on the construction of the Kentucky statutes. If that were all I should not express my dissent. But the difference as to construction is a consequence and incident of a difference on the far more important question of power. Of course, what I have said is without prejudice to the possibility that in case a question of rights under the Constitution of the United States should arise and be carried to the highest court of the State, it might be brought here by writ of error, as was said by Mr. Justice Harlan in *Smith* v. *Reeves*. I do not go into that, as it is immaterial now.

It is said that the question which I am discussing has been settled by the adjudications of this court. I do not think so. The only cases that have any bearing are *Boom Co.* v. *Patterson*, 98 U. S. 403, and *Searl* v. *School District No. 2*, 124 U. S. 197. In the former of these cases Mr. Justice Field states in the most explicit way that at the stage the case had reached when it was removed from the state court the compensation to be paid the owner of the land was the only question open. I have no criticism to make on that case. It seems to me to favor my views throughout. I think it very possible that after the title to property has been taken, if the question of com-

pensation still is unsettled, that may be a controversy within the meaning of the Constitution. The sovereign power of the State is at an end, and the former owner has a right under the Fourteenth Amendment of the Constitution of the United States to get his pay.

Boom Co. v. *Patterson* was followed by *Searl* v. *School District No. 2,* seemingly without noticing the distinction that in the latter case the property had not yet been appropriated. There was no serious reasoning in the case, and I should think it a most inadequate justification for trenching upon the powers of the States, even if it were strictly in point. It arose, however, under the former statute as to removals, which did not limit them to cases which could have been begun in the United States courts. Whether I should think that a sufficient distinction if that case were before me now I shall not consider—but I feel warranted in believing that no one who took part in that decision imagined that he was establishing the doctrine now laid down or any principle broad enough to cover the present case. I cannot think that even Mr. Justice Matthews would have denied that the day after removal the State could have withdrawn the power to condemn the land and left the court in the air, or could have condemned the land pending the proceedings without paying them the slightest regard. If the State did retain those powers, I think it no less retained the *delectus personarum* and the right to confine its authority, while it left it outstanding, to the persons of its choice.

I wish to add only that I am not aware of any limitations in the Constitution of the United States upon a State's power to condemn land within its borders, except the requirements as to compensation. All that was decided in *Loan Association* v. *Topeka,* 20 Wall. 655, and *Cole* v. *La Grange,* 113 U. S. 1, was that the constitutions of certain States did not authorize the taking of private property for a private use. But if those decisions had been rested on the Fourteenth Amendment, which they were not, and in my opinion could not have been,

I do not perceive that they have any bearing upon what I have said or upon the case at bar.

I am authorized to say that the CHIEF JUSTICE, MR. JUSTICE BREWER and MR. JUSTICE PECKHAM concur in this dissent.

COOK v. MARSHALL COUNTY, IOWA.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

No. 98. Argued December 9, 12, 1904.—Decided January 16, 1905.

The term original package is not defined by statute and while it may be impossible to judicially determine its size or shape, under the principle upon which its exemption while an article of interstate commerce is founded, the term does not include packages which cannot be commercially transported from one State to another.

While a perfectly lawful act may not be impugned by the fact that the person doing it was impelled thereto by a bad motive, where the lawfulness or unlawfulness of the act is made an issue, the intent of the actor may be material in characterizing the transaction, and where a party, in transporting goods from one State to another, selects an unusual method for the express purpose of evading or defying the police laws of the latter State the commerce clause of the Federal Constitution cannot be invoked as a cover for fraudulent dealing.

This court adheres to its decision in *Austin* v. *Tennessee*, 179 U. S. 343, that small pasteboard boxes each containing ten cigarettes, and sealed and stamped with the revenue stamp, whether shipped in a basket or loosely, not boxed, baled or attached together, and not separately or otherwise addressed but for which the express company has given a receipt and agreement to deliver them to a person named therein in another State, are not original packages and are not protected under the commerce clause of the Federal Constitution from regulation by the police power of the State.

A classification in a state taxation statute in which a distinction is made between retail and wholesale dealers is not unreasonable and § 5007, Iowa Code, imposing a tax on cigarette dealers is not invalid as denying equal protection of the laws to retail dealers, because it does not apply to jobbers and wholesalers doing an interstate business with customers outside of the State.

THIS was a petition by the owner and the tenant of a certain

room in the city of Marshalltown, Iowa, addressed to the board of supervisors, for the remission of a tax of $300, imposed upon the business of selling cigarettes, which business was carried on by Charles P. Cook, one of the plaintiffs in error. The petition being denied, an appeal was taken to the District Court, where a demurrer was interposed, which was sustained by that court, and an appeal taken to the Supreme Court, where the judgment of the District Court was affirmed. 119 Iowa, 384.

Mr. Junius Parker, with whom *Mr. W. W. Fuller* and *Mr. Frank S. Dunshee* were on the brief, for plaintiffs in error:

There is a distinguishing difference between *Austin* v. *Tennessee*, 179 U. S. 343, and this case in that in the *Austin* case many parcels were aggregated, and thrown into an open basket and so carried. Thus associated in their carriage they could not be segregated after arrival so to make each an original package. Immunity is given to original packages alike to the retailer and wholesaler. Nor will immunity given to a large package be denied to a small one on account of its size. Cigarette packages vary as to size. The ordinary original package of cigarettes is frequently of the size of the packages in this case. The fact that the manufacturer hoped to be able to introduce cigarettes in these packages into Iowa without violating the state statute does not deprive him of the protection of the interstate commerce provisions of the Federal Constitution.

Under *Austin* v. *Tennessee*, *supra*; *Brown* v. *Maryland*, 12 Wheat. 419; *Bowman* v. *Railroad Co.*, 125 U. S. 465; *Leisy* v. *Hardin*, 135 U. S. 100; *Vance* v. *Vandercook*, 170 U. S. 438; *Rhodes* v. *Iowa*, 170 U. S. 412, and *Schollenberger* v. *Pennsylvania*, 171 U. S. 1, cigarettes that are manufactured without the State of Iowa are, from the time they are put in transit until the importer in Iowa breaks the original package, or after he has himself disposed of such original package, under the exclusive regulation of Congress. This power of regulation

includes the power to absolutely prohibit this interstate traffic in them, *Lottery Case,* 188 U. S. 321. While this *status* continues and this authority of Congress may be exercised, the legislature of Iowa is as utterly powerless to regulate such transit and first disposition—if made before breaking of original package—as it would be powerless to regulate affairs in Illinois or Nebraska, or any other adjacent or non-adjacent State.

Congress has not legislated in regard to trade in cigarettes and this silence means that the trade so far as it is interstate and under congressional control shall be free and unrestrained. *Robbins* v. *Shelby Taxing District,* 120 U. S. 489, 493.

These cigarettes were in packages prescribed by the internal revenue law and were original packages entitled to immunity from state regulation. *Washington* v. *Coovert,* unreported, but see 164 U. S. 702; *In re Minor,* 69 Fed. Rep. 233; *The McGregor Case,* 76 Fed. Rep. 956. If a legislature may prohibit sale of cigarettes it may prohibit that of coffee. Tiedeman on Police Power, 2. Only where Congress abdicates its power may the States control a traffic as is the case in regard to liquor. Wilson Act construed in *In re Rahrer,* 140 U. S. 545; *Gibbons* v. *Ogden,* 9 Wheat. 1, 190. The state statute involved is void as it amounts to a denial of equal protection of the laws. The classification excepting jobbers and wholesalers doing an interstate business with customers outside the State is arbitrarily unequal and unjust. *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 540; *Cotting* v. *Stockyards Co.,* 183 U. S. 79, 112. Section 5007, Iowa Code, is also void as against the owner as a taking of property without due process of law in that it fixes a lien and a personal judgment without any sort of notice against the owner of the real estate in which the cigarettes are sold. *McMillan* v. *Anderson,* 95 U. S. 37, and *Hagar* v. *Reclamation District,* 111 U. S. 701, distinguished. A party leasing a building for building purposes has no knowledge that it may be used for a sale in violation of the statute. *McBride* v. *State,* 70 Mississippi, 516; as to what is due process of law,

see *Low* v. *Kansas*, 163 U. S. 81; *Hurtado* v. *California*, 110 U. S. 516.

Mr. F. E. Northup for defendant in error in this case and *Mr. Henry Jayne* for defendant in error in No. 150, argued simultaneously herewith.[1]

Section 5007, Code of Iowa, is not void as an attempt to regulate interstate commerce.

Whatever article of commerce is recognized as fit for barter or sale, when its manufacture is made subject to Federal regulation and taxation, must be regarded as a legitimate article of commerce although it may be within the police power of the States. *In re Rahrer*, 140 U. S. 559; *Brown* v. *Maryland*, 12 Wheat. 419; *Leisy* v. *Hardin*, 135 U. S. 100; *Austin* v. *Tennessee*, 101 Tennessee 563. And if Congress authorizes its importation, no State can prohibit its introduction. *License Cases*, 5 How. 504.

A State, however, is not bound to furnish a market for such articles, or to abstain from passing any law which may be necessary or advisable to guard the health or morals of its citizens, although such law may discourage importations or diminish profits of the importer. *Boston Beer Co.* v. *Kansas*, 97 U. S. 25; *Mugler* v. *Kansas*, 123 U. S. 623; *Foster* v. *Kansas*, 112 U. S. 201.

Police power may be lawfully resorted to for the purpose of preserving public health, safety and morals; a large discrimination is necessarily vested in the legislature to determine what the public interests require and what measures are necessary for the protection of such interests. Cases *supra* and *Holden* v. *Hardy*, 169 U. S. 366, 392; *Barbmeyer* v. *Iowa*, 18 Wall. 129; *Powell* v. *Pennsylvania*, 127 U. S. 678; *Plumley* v. *Massachusetts*, 155 U. S. 161; *Vanderbilt* v. *Adams*, 7 Cow. (N. Y.) 349; *Wilson* v. *Blackbird &c. Co.*, 2 Peters, 245; *Sherlock* v. *Alling*, 93 U. S. 99; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196; *Mo. Pac. Ry. Co.* v. *Finley*, 38 Kansas, 550;

[1] See *Hodge* v. *Muscatine County*, *post*, p. 276.

Kimmish v. *Ball*, 129 U. S. 217; *Waterbury* v. *Newton*, 50 N. J. L. 534.

A State cannot prohibit the sale of articles of lawful commerce, when imported, by the importer, when such articles do not become a part of the common mass of property within the State, and so long as they remain in the original packages in which they were imported. *Leisy* v. *Hardin*, 135 U. S. 100; *Schollenberger* v. *Pennsylvania*, 171 U. S. 1; *Bowman* v. *Chicago &c. Ry. Co.*, 125 U. S. 465; *State* v. *Winters*, 25 Pac. Rep. 237; *May* v. *New Orleans*, 178 U. S. 496. But the original package must be of such form and size as is so used by producers or shippers for the purpose of securing both convenience in handling and security in transportation of merchandise between dealers, *in the ordinary course of actual commerce*. *Commonwealth* v. *Schollenberger*, 156 Pa. St. 201; *McGregor* v. *Cone*, 104 Iowa, 465.

Where the mode of putting up a package is not adapted to meet the requirements of interstate commerce, but those of an unlawful domestic retail trade, the dealer will not be protected on the ground that he is selling an original package. *Austin* v. *Tennessee*, 101 Tennessee, 563; *Commonwealth* v. *Bisham*, 138 Pa. St. 639; *Haley* v. *Nebraska*, 42 Nebraska, 556; *S. C.*, 60 N. W. Rep. 962; *Commonwealth* v. *Fisherman*, 128 U. S. 687; *Commonwealth* v. *Paul*, 170 Pa. St. 284; *State* v. *Chapman*, 47 N. W. Rep. 411. The size of the package is immaterial where *bona fide* transactions are carried on. 5 How. 608; *Commonwealth* v. *Zelt*, 138 Pa. St. 615; *Austin* v. *Tennessee*, 101 Tennessee, 563; *S. C.*, 179 U. S. 343.

Section 3392, Rev. Stat., as to size of cigarette packages is for the purpose solely of taxation and the better enforcement of the internal revenue law.

The court must consider in determining this question that the transaction was not in good faith, and the packages were not shipped in the usual and ordinary manner and according to the customary usages of trade and commerce.

The act should not be held unconstitutional unless it is a

clear usurpation of prohibited power. Objections as to the policy of the act cannot be considered. *People* v. *Jackson Co.*, 9 Michigan, 285; *New Orleans G. L. Co.* v. *Louisiana L. & H. Co.*, 115 U. S. 650; Black on Const. Prohib. § 62; Cases reported in 58 California, 635; 2 Iowa, 280; 13 Minnesota, 341, 349; 68 N. Y. 381; 30 Iowa, 9; 61 Am. Dec. 338, *n.*; 6 Am. Ency. Law, 2d ed., 921, *n.*; 20 Iowa, 338; 22 Atl. Rep. 923; 33 Hun, 279; 80 Missouri, 678; 20 Florida, 522; 9 Indiana, 380; 15 Texas, 311; 74 Am. Dec. 522; 61 Am. Dec. 331 *n.*; 15 Iowa, 304; 2 Iowa, 165.

The statute is not unconstitutional as applying more than one subject or covering matters not within its scope. *Duensing* v. *Roby*, 142 Indiana, 168; *Perry* v. *Gross*, 41 N. W. Rep. 799; *Larne* v. *Tiernan*, 110 Illinois, 173. It is not unconstitutional because not uniform in operation between jobbers and wholesalers doing interstate business and citizens of the State. See original package cases cited *supra;* nor does it deprive any one of his property without due process of law. *Smith* v. *Skow*, 97 Iowa, 640; *Hodge* v. *Muscatine County*, 96 N. W. Rep. (Iowa) 969.

The power to tax is inherent in the Government. It is a legislative power and is limited only by constitutional provisions, subject thereto, it extends to everything and everybody, as the legislature may see fit to apply it. Courts cannot control its exercise, unless such exercise conflicts with constitutional limitations. 25 Am. & Eng. Ency. Law, 18, and cases cited; *Ferry* v. *Deneen*, 82 N. W. Rep. (Iowa) 424; 27 Iowa, 28; 76 Illinois, 561; 52 Wisconsin, 53; *Hagar* v. *Reclamation Dist.*, 111 U. S. 701.

The power to impose privilege and occupation taxes exists independently and concurrently in the state and Federal government, subject to constitutional restrictions. Being in the discretion of the legislature, it may select some for this purpose and exempt others, and select the mode in which taxes shall be levied. 25 Am. & Eng. Ency. Law, 21 *n.*, 479, 481, 492; *Ward* v. *Maryland*, 12 Wall. 418; 5 How. 504; *License Tax Cases*, 5 Wall. 71; 69 Illinois, 80; U. S. Const. Art. I, § 9,

par. 5; 60 Am. Dec. 581; 133 Massachusetts, 161; 62 Pa. St. 491; 89 Georgia, 639; 33 Fed. Rep. 121.

The demand made for money under the police power is secondary to the police regulation out of which the demand grows; while in the case of taxation the principal object is revenue. This distinction is not to be lost sight of, even though the procedure for collection may be similar in both cases. 46 Michigan, 183; 46 Illinois, 392; Cooley on Taxation, 2d ed., 586; 11 Johns, 77; *License Cases*, 5 Wall. 462.

A tax imposed both for regulation and revenue is not for that reason invalid. *Hodge* v. *Muscatine County*, 96 N. W. Rep. 968; 2 Desty on Taxation, 1384.

An occupation charge is different from a general tax, and the constitutional provisions that all taxes shall be equal and uniform apply only to general taxation. It is sufficient if all in the same class are taxed alike. 49 California, 557; 102 Illinois, 560; 11 Ohio St. 449; 46 N. J. Eq. 270; 62 Pa. St. 491; 4 Texas, 137; 6 Wall. 606; 82 N. W. Rep. 424; 29 Wisconsin, 592; 84 Maine, 215; 81 Virginia, 473; 66 N. W. Rep. 893.

In passing upon the mulct liquor law the Supreme Court of Iowa held that such tax was a charge for carrying on the business and acted the same upon all persons and property coming within its provisions; that as the law was general in its scope and provisions, all persons liable thereunder must appear and pay the tax without notice, and that notice was "no more necessary to the property owner than in cases of taxes generally." *Re Smith*, 73 N. W. Rep. 605; *Smith* v. *Skow*, 66 N. W. Rep. 893.

The tax is also a penalty and rules governing ordinary taxes do not govern. *Ferry* v. *Deneen*, 82 N. W. Rep. 424.

The meetings of the board of revision are fixed by law and of these all persons must take notice. *Palmer* v. *McMahon*, 133 U. S. 660; *Glidden* v. *Harrington*, 189 U. S. 255; *Davidson* v. *New Orleans*, 96 U. S. 97; *McMillan* v. *Anderson*, 95 U. S. 37.

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

This case involves the constitutionality of section 5007 of the Iowa Code, imposing a tax of $300 per annum upon every person, and also upon the real property and the owner thereof, whereon cigarettes are sold or kept for sale. The section is printed in full in the margin.[1]

The facts of the case were that the plaintiff, Charles P. Cook, carried on a retail cigar and tobacco store upon premises leased by him from his co-plaintiff. Cook ordered his cigarettes of the American Tobacco Company, at St. Louis. They were delivered to an express company, and brought by such company from St. Louis, or other places outside of the State of Iowa, directly to the place of business of the plaintiff, in small pasteboard boxes, containing ten cigarettes each, each package being sealed and stamped with the revenue stamp. These packages were shipped absolutely loose, and were not boxed, baled, wrapped or covered, nor were they in any way attached together. Nothing appears in the record to indicate the means used in transporting these cigarettes from the factory of the manufacturer to the place of business of the retail dealer, and we are left to infer that they were shoveled into and out of a car, and delivered to plaintiffs in that condition. The pack-

[1] SEC. 5007. Tax on sale.—There shall be assessed a tax of three hundred dollars per annum against every person, partnership or corporation, and upon the real property, and the owner thereof, within or whereon any cigarettes, cigarette paper or cigarette wrapper, or any paper made or prepared for the use in making cigarettes, or for the purpose of being filled with tobacco for smoking, are sold or given away, or kept with the intent to be sold, bartered or given away, under any pretext whatever. Such tax shall be in addition to all other taxes and penalties, shall be assessed, collected and distributed in the same manner as the mulct liquor tax, and shall be a perpetual lien upon all property both personal and real used in connection with the business; and the payment of such tax shall not be a bar to prosecution under any law prohibiting the manufacturing of cigarettes, or cigarettes paper or selling, bartering or giving away the same. But the provisions of this section shall not apply to the sales by jobbers and wholesalers in doing an interstate business with customers outside of the State.

ages were not separately or otherwise addressed, but at the time they were delivered to the express company the driver gave a receipt showing the number of packages and the name of the person to whom they were to be sent, retaining a duplicate himself.

The constitutionality of the act as applied to the plaintiffs was attacked upon two grounds:

(1) That it was an attempt to interfere with the power of Congress to regulate commerce between the States.

(2) That it denied to the plaintiffs the equal protection of the laws.

The argument of the plaintiffs is the same as that which was pressed upon our attention a few years ago in *Austin* v. *Tennessee*, 179 U. S. 343, that the packages of ten cigarettes were each the original packages in which these cigarettes were imported from other States, and that under the decisions of this court in *Brown* v. *Maryland*, 12 Wheat. 419; *Leisy* v. *Hardin*, 135 U. S. 100, and *Shollenberger* v. *Pennsylvania*, 171 U. S. 1, they were entitled to the immunities attaching to original packages. We reviewed these and a large number of other cases in our opinion, and came to the conclusion that these boxes were in no just sense original packages within the spirit of the prior cases, and that their shipment in this form was not a *bona fide* transaction, but was merely a convenient subterfuge for evading the law forbidding the sale of cigarettes within the State. This case differs from that only in the fact that in the *Austin* case the packages were thrown loosely into baskets, which were shipped on board the train and carried to Austin's place of business. These baskets, it is argued, might have been considered as the original packages.

This difference, however, was not insisted upon as distinguishing the two cases in principle. Indeed it was admitted to be one not of "great magnitude or seeming legal significance." The main argument of the plaintiffs was frankly addressed to a reconsideration of the principle involved in the *Austin* case, and a reinsistence upon the position there taken,

that the packages in which the cigarettes were actually shipped must govern, and that we cannot look to the motives which actuated such shipment, or to the fact that ordinary importations of cigarettes were made in boxes containing a large number of these so-called original packages. We have carefully reconsidered the principle of that case, and, without repeating the arguments then used in the opinions, we have seen no reason to reverse or change the views there expressed.

The term original package is not defined by any statute, and is simply a convenient form of expression adopted by Chief Justice Marshall in *Brown* v. *Maryland*, to indicate that a license tax could not be exacted of an importer of goods from a foreign country who disposes of such goods in the form in which they were imported. It is not denied that in the changed and changing conditions of commerce between the States, packages in which shipments may be made from one State to another may be smaller than those "bales, hogsheads, barrels or tierces," to which the term was originally applied by Chief Justice Marshall, but whatever the form or size employed there must be a recognition of the fact that the transaction is a *bona fide* one, and that the usual methods of interstate shipment have not been departed from for the purpose of evading the police laws of the States.

In *Leisy* v. *Hardin*, 135 U. S. 100, quarter barrels, and even one-eighth barrels and cases of beer, were recognized as original packages or kegs, though the size of such packages and the usual methods of transporting beer do not seem to have been made the subject of discussion. There is nothing in the opinion to indicate that it was not legitimate to ship beer in kegs of this size. So, too, in *Shollenberger* v. *Pennsylvania*, oleomargarine transported and sold in packages of ten pounds weight was recognized as *bona fide*, but it was expressly found by the jury in that case that the package was an original package, as required by the act of Congress, and was of such "form, size and weight as is used by producers or shippers for the purpose of securing both convenience in handling and security in trans-

portation of merchandise between dealers in the ordinary course of actual commerce, and the said form, size and weight were adopted in good faith, and not for the purpose of evading the laws of the Commonwealth of Pennsylvania, said package being one of a number of similar packages forming one consignment, shipped by the said company to the said defendant." While it may be impossible to define the size or shape of an original package, the principle upon which the doctrine is founded would not justify us in holding that any package which could not be commercially transported from one State to another as a separate importation could be considered as an original package.

But it is insisted with much earnestness that in determining the lawfulness of sales in original packages we are bound to consider that package as original in which the articles were actually shipped, particularly where Congress, for the purpose of taxation, has prescribed a certain size of package to be separately stamped, and that we have no right to look beyond the letter of the term and inquire into the motives which dictated the size of the packages in each case. This argument was also made in the *Austin* case, was considered at some length, and held to be unsound. In delivering the opinion we said (p. 359): "The real question in this case is whether the size of the package in which the importation is actually made is to govern; or, the size of the package in which *bona fide* transactions are carried on between the manufacturer and the wholesale dealer residing in different States. We hold to the latter view. The whole theory of the exemption of the original package from the operation of state laws is based upon the idea that the property is imported in the ordinary form in which, from time to time immemorial, foreign goods have been brought into the country."

While it is doubtless true that a perfectly lawful act may not be impugned by the fact that the person doing the act was impelled thereto by a bad motive, yet where the lawfulness or unlawfulness of the act is made an issue the intent of the

actor may have a material bearing in characterizing the transaction. We have had frequent occasions to treat of this subject in passing upon the validity of legislative acts or municipal ordinances. So where the lawfulness of the method used for transporting goods from one State to another is questioned, it may be shown that the intent of the party concerned was not to select the usual and ordinary method of transportation, but an unusual and more expensive one, for the express purpose of evading or defying the police laws of the State. If the natural result of such method be to render inoperative laws intended for the protection of the people, it is pertinent to inquire whether the act was not done for that purpose, and to hold that the interstate commerce clause of the Constitution is invoked as a cover for fraudulent dealing, and is no defense to a prosecution under the state law.

The power of Congress to regulate commerce among the States is perhaps the most benign gift of the Constitution. Indeed it may be said that without it the Constitution would not have been adopted. One of the chief evils of the confederation was the power exercised by the commercial States of exacting duties upon the importation of goods destined for the interior of the country or for other States. The vast territory to the west of the Alleghenies had not yet been developed or subdivided into States, but the evil had already become so flagrant that it threatened an utter dissolution of the confederacy. The article was adopted that all of the States of the Union might have the benefit of the duties collected at the maritime ports, and to relieve them from the embarrassing restrictions imposed upon the internal commerce of the country. But the same policy which authorizes the use of this power as a shield to protect commerce from the vexatious interference of the States forbids its employment as a sword to assail measures designed for the preservation of the public health, morals, and comfort. States may differ among themselves as to the necessity and scope of such measures, but so long as they are adopted in good faith, with an eye single to the

public welfare, they are as much entitled to the recognition of the general Government as if they were uniformly adopted by all the States.

While this court has been alert to protect the rights of non-resident citizens and has felt it its duty, not always with the approbation of the state courts, to declare the invalidity of laws throwing obstacles in the way of free intercommunication between the States, it will not lend its sanction to those who deliberately plan to debauch the public conscience and set at naught the laws of a State. The power of Congress to regulate commerce is undoubtedly a beneficent one. The police laws of the State are equally so, and it is our duty to harmonize them. Undoubtedly a law may sometimes be successfully and legally avoided if not evaded, but it behooves one who stakes his case upon the letter of the Constitution not to be wholly oblivious of its spirit. In this case we cannot hold that plaintiffs are entitled to its immunities without striking a serious blow at the rights of the States to administer their own internal affairs.

2. The argument that section 5007 of the Iowa Code denies to the plaintiffs the equal protection of the laws is based upon an alleged discrimination arising from the final sentence that "the provisions of this section shall not apply to the sales by jobbers and wholesalers in doing an interstate business with customers outside of the State."

We are referred in this connection to a series of well-known cases arising under the anti-trust laws of the several States, to the effect that laws against combinations in trade must be uniform in their application as applied to all persons within the same general class. The leading case upon this point is *Connolly* v. *Union Sewer Pipe Company,* 184 U. S. 540, where a law of Illinois against combinations to regulate prices and productions, and create restrictions, was held to be invalid by reason of the exemption of agricultural productions or live stock while in the hands of the producer or raiser.

A similar case is that of *Cotting* v. *Kansas City Stock Yards*

Co., 183 U. S. 79, wherein a statute of Kansas regulating the prices to be paid for the use of public cattle stock yards was held invalid by reason of the fact that it was intended to apply only to the stock yards of Kansas City, and not to other companies or corporations engaged in like business in other portions of the State.

These cases, however, have but limited application to laws imposing taxes, where the right of classification is held to permit of discrimination between different trades and callings when not obviously exercised in a spirit of prejudice or favoritism. *Kentucky Railroad Tax Cases*, 115 U. S. 321; *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283; *American Sugar Refining Company* v. *Louisiana*, 179 U. S. 89; *Bell's Gap Railroad Company* v. *Pennsylvania*, 134 U. S. 232.

This distinction was recognized by Mr. Justice Harlan in *Connolly* v. *Union Sewer Pipe Company*, on page 562, wherein it is said "a State may in its wisdom classify property for purposes of taxation, and the exercise of its discretion is not to be questioned in a court of the United States, so long as the classification does not invade rights secured by the Constitution of the United States." It can scarcely be doubted that, if the *Connolly* case had dealt with the subject of taxation, a discriminative tax upon producers of agricultural products, either greater or less than that imposed upon other manufacturers or producers, might have been held valid without denying to either party the equal protection of the laws. The holding in that case was simply that, considering that the object of the statute was to prevent combinations of capital or skill for certain purposes, the exemption of farmers was based upon no sound distinction, and rendered the law invalid as to other classes included within it.

There is a clear distinction in principle between persons engaged in selling cigarettes generally or at retail, and those engaged in selling by wholesale to customers without the State. They are two entirely distinct occupations. One sells at retail, and the other at wholesale one to the public generally,

and the other to a particular class; one within the State, the other without. From time out of mind it has been the custom of Congress to impose a special license tax upon wholesale dealers different from that imposed upon retail dealers. A like distinction is observed between brewers and rectifiers, wholesale and retail dealers in leaf tobacco and liquors, manufacturers of tobacco and manufacturers of cigars, as well as peddlers of tobacco. It may be difficult to distinguish these several classes in principle, but the power of Congress to make this discrimination has not, we believe, been questioned.

Why the legislature should have made the distinction found in section 5007 is not entirely clear, but it probably arose from the belief that the imposition of a license tax upon wholesale exporters of cigarettes would be as much an interference with interstate commerce as the imposition of a similar tax upon importers from abroad was held to be in *Brown* v. *Maryland*. We are satisfied the section is not open to the objection of denying to the dealers in cigarettes the equal protection of the laws.

The judgment of the Supreme Court is, therefore,

Affirmed.

MR. JUSTICE WHITE, concurring.

The only difference between this and the *Austin* case is that in this no basket was used to hold the many small packages shipped at one and the same time to the same person. In my opinion, such fact is not sufficient to take the case out of the reach of the reasoning stated by me for concurring in the decree in the *Austin* case. For the reasons given for my concurrence in that case I concur in the judgment rendered in this.

THE CHIEF JUSTICE, MR. JUSTICE BREWER and MR. JUSTICE PECKHAM dissented.

HODGE *v.* MUSCATINE COUNTY, IOWA.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

No. 150. Argued December 9, 12, 1904.—Decided January 16, 1905.

If the taxpayer be given an opportunity to test the validity of a tax at any time before it is made final, either before a board having *quasi* judicial character, or a tribunal provided by the State for that purpose, due process is not denied, and if he does not avail himself of the opportunity to present his defense to such board or tribunal, it is not for this court to determine whether such defense is valid.

A State may reserve to itself the right to tax or prohibit the sale of cigarettes, and while this court is not bound by the construction given to a statute by the highest court of the State as to whether a tax is or is not a license to sell it will accept it unless clearly of the opinion that it is wrong.

Section 5007, Iowa Code, imposing a tax against every person and upon the real property and the owner thereof whereon cigarettes are sold does not give a license to sell cigarettes, nor is it invalid as depriving the owner of the property of his property without due process of law, because it does not provide for giving him notice of the tax, §§ 2441, 2442, Iowa Code, providing for review with power to remit by the board of supervisors.

Whether or not a state statute violates the state constitution in not stating distinctly the tax and the object to which it is to be applied is a local and not a Federal question.

A tax to carry on a business may be made a lien on the property whereon the business is carried and the owner is presumed to know the business there carried on and to have let the property with knowledge that it might be encumbered by a tax on such business.

THIS was a petition in the District Court by the owner and tenant of certain real estate in Muscatine, used for a tobacconist's shop, to enjoin the defendants from assessing and collecting a tax of $240, upon the ground of the unconstitutionality of the law.

Demurrers were interposed to the petition and to certain amendments thereto, which were sustained, the bill dismissed, and an appeal taken to the Supreme Court of Iowa, which affirmed the judgment of the court below. 121 Iowa, 482.

Mr. Junius Parker, with whom *Mr. Frank S. Dunshee* and *Mr. W. W. Fuller* were on the brief, for plaintiffs in error.[1]

Mr. Henry Jayne for defendant in error.[1]

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

This case involves the same questions as those just disposed of in *Cook* v. *Marshall County*, and in addition thereto the point is made that the laws of Iowa deny to the owner of property leased for the sale of cigarettes due process of law.

To answer satisfactorily the question thus presented, it is necessary to consider the laws of Iowa respecting the tax upon cigarette dealers, and the methods of enforcing the same.

By section 5006 a fine and imprisonment are imposed for selling cigarettes.

By section 5007, printed in full in the *Marshall County* case,[2] a tax of $300 per anuum is assessed "against every person . . . and upon the real property, and the owner thereof," whereon cigarettes, etc., are sold, or kept with intent to be sold, with a provision that "such tax shall be in addition to all other taxes and penalties, shall be assessed, collected and distributed in the same manner as the mulct liquor tax, and shall be a perpetual lien upon all property both personal and real used in connection with the business; and the payment of such tax shall not be a bar to prosecution under any law prohibiting" the selling of cigarettes.

This assessment is made collectible as is a similar charge made upon dealers in liquor as follows:

By section 2433 the assessor makes quarterly returns to the auditor of the persons liable to the tax, and a description of the real property whereon the business has been carried.

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[1] Argued simultaneously with No. 98, *Cook* v. *Marshall County*; for abstract of arguments see p. 262, *ante*.

[2] See p. 268, *ante*.

By section 2436 the charge is made payable in quarterly installments, and shall be a lien upon the real property.

By section 2437 the auditor certifies quarterly to the county treasurer a list of the names returned to him by the assessor, with a description of the names of the tenant and owner.

By section 2438 the county treasurer enters upon the mulct tax book a quarterly installment of the tax as a lien and charge upon the real property.

By section 2439, if the tax is not paid within a month, it shall be considered delinquent and be collectible as other delinquent taxes.

By section 2440 the treasurer may collect the same, after it has become delinquent, by seizing and selling any personal property.

By section 2441 application may be made to the board of supervisors to remit the tax by petition duly verified and filed with the county auditor eight days before the time set for the consideration of the case, notice of which must be served upon the county attorney.

By section 2442 the owner of the property may be heard in support of his application. A majority of the board determines whether the tax shall stand or be remitted, and either party may take an appeal to the District Court.

These are all of the provisions of the law material to be considered.

We do not deem it necessary to affix a definition to the charge imposed by section 5007. It is certainly not an ordinary license tax, as the payment of such tax is no bar to a prosecution for selling cigarettes under section 5006. In *Smith* v. *Skow*, 97 Iowa, 640, it is said, in speaking of the mulct liquor tax, to which this is analogous, that though called a tax in the statute, it is not in fact a tax as we usually use the word. "It is in reality a charge or license for carrying on the business of vending liquors, which charge is made by statute a lien upon all property, both real and personal, used or connected with the business." In *Ferry* v. *Deneen*, 82 N. W. Rep. 424, it is

observed by the same court, "it is apparent, taking all the provisions of this act together, that the amount imposed, while called a 'tax,' is at the same time a penalty."

But in the opinion of the court in the case under consideration, the charge imposed by section 5006 is said to be "clearly not a license, for it does not grant permission to do an act which, without such permission, would be invalid. . . . It is manifestly a tax upon the traffic which the legislature saw fit to impose, not for the purpose of giving countenance to the business, but as a deterrent against engaging therein. . . . Indeed, we think it may fairly be said to be a tax upon the business. That a tax is imposed for the double purpose of regulation and revenue is no reason for declaring it invalid. . . . Being a tax, it was competent for the legislature to prescribe the proceedings and processes for its collection."

This being the latest expression of opinion of the Supreme Court of Iowa, we accept it for the purposes of this case. If it be not a construction binding upon us, it is, at least a construction which we ought to follow, unless we are clearly of opinion that it is wrong.

In the case of *McBride* v. *State*, 70 Mississippi, 716, cited by plaintiffs, it was held that a statute providing that a person selling liquor unlawfully should be subject to pay, "where the offense is committed," the sum of $500, and should also be liable to a "criminal prosecution," imposed a penalty and not a tax, and that a proceeding to collect such penalty by distress was unconstitutional; but a distinction was drawn in that case between a penalty and a tax, and it was intimated that a proceeding by distress to collect a tax would not be open to a like objection.

It is not easy to draw an exact line of demarkation between a tax and a penalty, but in view of the fact that the statute denominates the assessment a "tax," and provides proceedings appropriate for the collection of a tax, but not for the enforcement of a penalty, and does not contemplate a criminal prosecution, we cannot go far afield in treating it as a tax

rather than a penalty. Section 5006 does indeed impose a penalty, but section 5007 imposes a tax, with an additional provision that the payment of the tax shall not absolve the party from the penalty. It would be a distortion of the words employed to speak of section 5007 as imposing an additional penalty. The act itself provides in terms that such tax shall be an addition to all other taxes *and penalties*, and elaborate provision is made for its enforcement. The mere fact that the charge, whatever it may be, is made a lien upon the real estate and a personal claim against the landlord indicates that it is the nature of a tax rather than a penalty.

There is no conflict between the two sections, the State reserving to itself an election to proceed under the one or the other. If Congress may provide that a license granted by it to sell liquors shall not be construed to authorize the sale of such liquors when prohibited by the laws of the State, as was held by this court in *McGuire* v. *Commonwealth*, 3 Wall. 387; *The License Tax Cases*, 5 Wall. 462; *Commonwealth* v. *Crane*, 158 Massachusetts, 218; *Pervear* v. *Commonwealth*, 5 Wall. 475, we see no reason why the State itself may not exercise the same power and reserve to itself the right to tax or prohibit, as in individual cases it may see fit.

2. Coming now to the provisions for its enforcement, it is entirely clear that, as to the person actually carrying on the business, no notice of the assessment or levy of the tax is necessary. If the person carries on the business, the imposition of the tax follows as a matter of course. There is no discretion as to the amount. *McMillen* v. *Anderson*, 95 U. S. 37; *Hagar* v. *Reclamation District*, 111 U. S. 701; *Turpin* v. *Lemon*, 187 U. S. 51; *In re Smith*, 104 Iowa, 199.

It was within the power of the legislature to make the tax a lien upon the property whereon the business was carried. If general taxes upon real estate and specific taxes for improvements thereto, including pavements, sidewalks, sewers, the opening of streets and keeping them clean, may be made liens upon the property affected, it is difficult to see why a tax

upon the business carried on upon such property may not be made a lien as well as a claim against the owner. The owner is not only chargeable with a knowledge of the law in respect thereto, but he is presumed to know the business there carried on, and to have let the property with knowledge that it might become encumbered by a tax imposed upon such business. *Sheldon* v. *Van Buskirk*, 2 N. Y. 473; *Brown Shoe Co.* v. *Hunt*, 103 Iowa, 586; *Polk Co.* v. *Hierb*, 37 Iowa, 361; *State* v. *Snyder*, 34 Kansas, 425; *Hardten* v. *State*, 32 Kansas, 637; *Sears* v. *Cottrell*, 5 Michigan, 251; *Walderon* v. *Lee*, 5 Pick. 323; *Spencer* v. *M'Gowen & Shepard*, 13 Wend. 256; *Simpson* v. *Serviss*, 2 Ohio Circuit Decisions, 246.

Acts of Congress impressing liens upon real estate for taxes or penalties arising from business illegally carried on there, have been the frequent subject of controversy in this court.

Conceding that the landowner is entitled to notice before he can be personally liable, or before his property can be impressed with a lien, we are of opinion that he is protected by sections 2441 and 2442, which permit him to make application at the meeting of the board of supervisors next following the listing of the property, the sessions of which board are fixed by law, Iowa Code, sec. 412, to remit the tax. This application may be made at any time after the property has been assessed, upon eight days' notice being given to the county attorney. Witnesses are examined under oath before the board, which determines by a majority vote whether the tax shall stand or be remitted. If the petition be denied, the owner of the property can appeal to the District Court for a judicial determination of his liability. This is sufficient. If the taxpayer be given an opportunity to test the validity of the tax at any time before it is made final, whether the proceedings for review take place before a board having a *quasi* judicial character, or before a tribunal provided by the State for the purpose of determining such questions, due process of law is not denied. It was held by this court in *Pittsburg &c. Ry. Co.* v. *Backus*, 154 U. S. 421, 426, that a hearing before

judgment, with full opportunity to present the evidence and the arguments which the party deems important, is all that can be adjudged vital. See also *King* v. *Mullins*, 171 U. S. 404.

In the amendment to the petition in this case the landowner states that she had no knowledge whatever that her real estate was being used for the sale of cigarettes until after the assessment was levied, and never consented to the same; that she resides in Illinois, and rented the property through an agent, who had had no knowledge himself of the sale of cigarettes upon the premises. There is no allegation, however, that she did not have knowledge within ample time to make application to the board of supervisors for the remission of the tax. If such application had been made, it would have been the duty of the board to take the matter into consideration and determine whether her want of knowledge would justify the remission of the tax. It is not for us to determine whether the defense be a valid one, since, having the opportunity to make it, she declined to do so.

The question is made whether section 5007 violates the constitution of Iowa in not stating distinctly the tax and the object to which it is to be applied, but as this is purely a local question, we are not called upon to consider it.

Affirmed.

The Chief Justice, Mr. Justice Brewer and Mr. Justice Peckham dissented.

BURTON v. UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

No. 343. Argued November 30, December 1, 1904.—Decided January 16, 1905.

A Senator of the United States was indicted and tried in the Eastern District of Missouri for a violation of § 1782, Rev. Stat., the indictment averring that he had rendered services for a certain corporation before the Post Office Department in matters in which the United States was interested, that is, whether a "fraud order" should issue against such corporation, and that he had received payment at St. Louis therefor. The defendant denied that the United States was interested in the matters referred to in the indictment within the meaning of § 1782, Rev. Stat., or that he had rendered any service in violation thereof, and alleged that the services which he had rendered to, and had been paid for by, the corporation, were those of general counsel, and not connected with the "fraud order." It was proved without contradiction that the compensation he received under certain counts was sent to him from St. Louis and received by him in Washington in the form of checks on a St. Louis bank which he deposited in his bank in Washington, receiving credit therefor at once, and which checks were subsequently paid in due course. On the trial the jurisdiction of the court was denied, the offense, if any there was, having been committed at Washington and not at St. Louis, and the defendant also asserted his privilege from arrest under § 6, Art. I of the Constitution. The court held that the privilege from arrest was waived and submitted to the jury whether there was any agreement by which the place of payment of the checks was St. Louis and not Washington: *Held* that,

The facts alleged in the indictment showed a case that is covered by the provisions of § 1782, Rev. Stat.

Whether a Senator of the United States has waived his privilege from arrest and whether such privilege is personal only or given for the purpose of always securing a representation of his State in the Senate are not frivolous questions; and, if properly raised in the court below and denied, this court has jurisdiction to issue the writ of error directly to the District Court, and then to decide the case without being restricted to the constitutional question.

It is not the habit of this court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.

The deposit of checks in a bank and drawing against them by a customer constitutes the relation of debtor and creditor and the bank becomes the

absolute owner of the checks so deposited, and not the agent of the customer to collect them; this relation is not, in the absence of any special agreement, affected by the right of the bank against the customer, and his liability therefor, in case the checks are not paid.

The payment of the checks to defendant in this manner was a payment at Washington, and if any crime was committed it was not at St. Louis, and, in view of the evidence, it was error to submit to the jury any question as to where the payment was made, and those counts in the indictment which were based on allegations of payments in St. Louis should have been dismissed as the court had no jurisdiction thereover.

This is not the case of the commencement of a crime in one district and its completion in another so that the court in either district would have jurisdiction under § 731, Rev. Stat.

Certain of defendant's requests to charge which were allowed were referred to as mere abstract propositions of law and not otherwise specifically charged; after having been out thirty-eight hours the jurors returned and were instructed by the court in relation to their duty as jurors, and the foreman having stated in answer to questions of the court that they stood eleven to one, the court charged that it was their duty to agree if possible. Counsel then asked the court to instruct that defendant's requests to charge which had been allowed were as much a part of the charge as that which emanated from the court. This was refused. *Held:*

Error, and, under the circumstances of this case, it was a matter of right, and not of discretion, that the jury should be charged as to the character of the requests.

When a jury is brought before the court because unable to agree, it is not material for the court in order to instruct it as to its duty and the propriety of agreeing to understand the proportion of division of opinion, and the proper administration of the law does not require or permit such a question on the part of the presiding judge.

THE plaintiff in error having been convicted in the District Court of the United States for the Eastern District of Missouri of a violation of the Revised Statutes of the United States, sec. 1782, (1 U. S. Comp. Stat., p. 1212), and set forth in the margin,[1] has brought the case here directly from that court by writ of error.

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[1] 1 U. S. Comp. Stat. 1212.

SEC. 1782. No Senator, Representative, or Delegate, after his election and during his continuance in office, and no head of a Department, or other officer or clerk in the employ of the Government, shall receive or agree to receive any compensation whatever, directly or indirectly, for any services rendered, or to be rendered, to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation,

The defendant was a member of the Senate of the United States, representing the State of Kansas. The indictment under which he was tried contained nine counts. The first count, after averring that the defendant was a Senator from the State of Kansas, averred that on the twenty-sixth day of March, 1903, he received at St. Louis, Missouri, from the Rialto Grain and Securities Company $500 in money, as compensation for his services theretofore on November 22, 1902, and on divers other days between that day and the twenty-sixth day of March, 1903, rendered for the company before the Post Office Department of the United States, in a certain matter then and there pending before that Department, in which the United States was directly interested, that is to say: Whether the company had violated the provisions of section 5480 of the Revised Statutes of the United States, in that the company had through its officers devised a scheme and artifice to defraud, which was to be effected through correspondence by means of the post office establishment of the United States, and whether the correspondence of the company at St. Louis, Mo., should not be returned with the word "Fraudulent" plainly written or stamped upon the outside, as authorized by law. It also averred that the services rendered by defendant to the company consisted in part of visits to the Postmaster General, the chief inspector, and other officers of the Post Office Department, and of statements made to the Postmaster General, the chief inspector, and other officers, which visits and statements made by the defendant were made with a view and for the purpose of inducing the Postmaster General, the chief inspector, and other officers to decide the question then pending before

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arrest, or other matter or thing in which the United States is a party, or directly or indirectly interested, before any Department, court-martial, Bureau, office, or any civil, military, or naval commission whatever. Every person offending against this section shall be deemed guilty of a misdemeanor, and shall be imprisoned not more than two years, and fined not more than ten thousand dollars, and shall, moreover, by conviction therefor, be rendered forever thereafter incapable of holding any office of honor, trust, or profit under the Government of the United States.

the Post Office Department in a way favorable to the Rialto Company. The second count of the indictment was the same as the first, except that it averred the United States was "indirectly," instead of "directly," interested in the question as to whether or not a "fraud" order should be issued. Upon the third count the jury rendered a verdict of not guilty. Upon the fourth and fifth counts the Government entered a *nolle prosequi*. The third, fourth and fifth counts concededly charged but one offense, which was the same as that charged in the first and second counts, and all of these counts were based upon the payment of $500 in cash to defendant at St. Louis on the twenty-sixth of March, 1903. The sixth count averred the receipt by defendant at the city of St. Louis, in the State of Missouri, of a check for the payment of $500, which was received by the defendant on the twenty-second of November, 1902, the check being drawn upon the Commonwealth Trust Company of St. Louis, payable to the order of the defendant and by him duly indorsed, and such check was paid by the trust company to defendant at St. Louis, as compensation for his services to the company between November 22, 1902, and March 26, 1903, before the Post Office Department, in a matter in which the United States was directly interested. The count then contained the same averments of the character of the question pending before the Post Office Department as are set forth in the first count. The seventh count is the same as the sixth, except that it averred the making of a check and the payment thereof to the defendant on December 15, 1902, at the city of St. Louis, in the State of Missouri, for the sum of $500; all other averments being the same as the sixth count. The eighth count averred the giving of a check for the sum of $500 on January 22, 1903, at the city of St. Louis, in the State of Missouri, in payment of services of the same nature as stated in the sixth and seventh counts. The ninth count is the same as the sixth, seventh and eighth, except that it averred the receipt of a check by the defendant, dated Ferbuary 16, 1903, at the city of St. Louis, in the State of Missouri, for the same

class of services and upon the same matter then pending before the Post Office Department. The defendant demurred to the indictment on the ground that it stated no crime, and that it showed that the United States had no interest, direct or indirect, in the matter before the Post Office Department, inasmuch as the interest of the United States, under the statute, must be either a pecuniary or property interest, which may be favorably or unfavorably affected by action sought or taken in the given matter pending before the Department. The demurrer was overruled, and the defendant then pleaded not guilty.

Mr. John F. Dillon and *Mr. Frederick W. Lehmann*, with whom *Mr. Harry Hubbard*, *Mr. John M. Dillon* and *Mr. W. H. Rossington* were on the brief, for plaintiff in error:

The United States was not "directly or indirectly interested" in the question whether a fraud order should issue against the Rialto Grain and Securities Company; and, therefore, the court should have sustained the demurrer to the indictment, or should have granted the motion in arrest of judgment, or should have directed a verdict for defendant, and should not have instructed that the United States was "interested" as alleged in the indictment. For legislative history of Rev. Stat. § 1782, see Cong. Globe, Part I, 1st Sess., Debates on Sen. Bill 28, 38th Cong., 1863, 1864, pages 93, 460, 555, 559, 561, 714, 2773, and act as passed Ch. 119, Appx. Cong. Globe, 177.

Section 1782 does not say or mean things in which the people of the United States are interested, but things in which the United States, meaning the United States, as a Government, is interested.

The kind of interest of the United States which is meant in § 1782 is shown by the things which the statute specifically mentions, and the "other matters or things" referred to are matters or things in which the United States has a similar interest, under the principle of *ejusdem generis* and *noscitur a sociis*. Lord Tenterden's Rule, 21 Am. & Eng. Ency. of Law,

1012; *Alabama* v. *Montague*, 117 U. S. 602, 610. Such interest must be visible, demonstratable and capable of proof. *Northampton* v. *Smith*, 11 Metcalf, 390, 395; *McGrath* v. *People*, 100 Illinois, 464; *Evans* v. *Eaton*, 7 Wheat. 356; *State* v. *Sutton*, 74 Vermont, 12; *Foreman* v. *Marianna*, 43 Arkansas, 324; *Taylor* v. *Commissioners*, 88 Illinois, 526; *C., B. & Q. R. R. Co.* v. *Kellogg*, 54 Nebraska, 138; *Sauls* v. *Freeman*, 24 Florida, 209; *Bowman's Case*, 67 Missouri, 146.

Section 1782 is a criminal statute and is to be interpreted as such. The court should not seek to include therein anything not included unquestionably in the statute. *United States* v. *Wiltberger*, 5 Wheat. 76; *United States* v. *Sheldon*, 2 Wheat. 119; *United States* v. *Morris*, 14 Peters, 464; *United States* v. *Clayton*, 2 Dillon, 218.

There was no evidence establishing defendant's guilt as to any of the offenses charged in the indictment or of any offense whatever, and the court erred in refusing to direct a verdict of not guilty as to each count.

There was no testimony that the Senator had done anything violative of the statute in his Department or in the inconsequential supplemental talk. The testimony shows affirmatively that the charge that he tried to prevent the fraud order is not true. The letters and telegrams show that they had no reference to any fraud order.

The employment and actual services rendered by Senator Burton as general counsel had no relation to any matter charged in the indictment, and were not prohibited by § 1782, and were paid for by his monthly salary as general counsel.

The payments made by the four checks to Senator Burton were made in Washington and not in St. Louis, and the court in St. Louis had, under the Constitution, no jurisdiction of the alleged offenses based on the checks, as set forth in the sixth, seventh, eighth and ninth counts.

The four checks, when they were paid in St. Louis, belonged neither to Burton nor to the Riggs National Bank of Washington, but in the instance of each check to a subsequent in-

dorsee, which was the owner of the check, and payment to such subsequent indorsee was not payment either to Burton or to the Riggs Bank. Neither the Riggs Bank nor any other bank was agent of Burton. *Craigie* v. *Hadley*, 99 N. Y. 131; *Metropolitan National Bank* v. *Loyd*, 90 N. Y. 530; *Bank of Republic* v. *Millard*, 10 Wall. 152; *Thompson* v. *Riggs*, 5 Wall. 663; *Marine Bank* v. *Fulton Bank*, 2 Wall. 252; *Phœnix Bank* v. *Risley*, 111 U. S. 125; *Scammon* v. *Kimball*, 93 U. S. 362. *St. Louis &c. Ry. Co.* v. *Johnston*, 133 U. S. 566, distinguished.

The title to the check passed under commercial usage absolutely to the Riggs Bank and absolutely to each indorsee. The resolution of the New York Clearing House, June 4, 1896, had for its object to prevent indorsements "for collection" and to transfer absolute ownership. *Evansville Bank* v. *German American Bank*, 155 U. S. 556; *Commercial Bank* v. *Armstrong*, 148 U. S. 50.

If the Riggs National Bank of Washington was the agent of Burton to collect the checks, then the subsequent indorsees of said checks, if they were agents at all, were the agents of the Riggs National Bank and not of Burton. *Hoover* v. *Wise*, 91 U. S. 308, 313; *Exchange Bank* v. *Third Nat. Bank*, 112 U. S. 276, citing *Van Wart* v. *Woolley*, 3 B. & C. 439; *Tradesman's Bank* v. *Third National Bank*, 112 U. S. 293.

The court should have directed an acquittal as there was no proof of *venue*. *Stone* v. *State*, 105 Alabama, 60; *Randolph* v. *State*, 100 Alabama, 139; *Justice* v. *State*, 99 Alabama, 180; *Childs* v. *State*, 55 Alabama, 28; *Clark* v. *State*, 46 Alabama, 307. An indictment can be found only in that county in which the crime has been committed. Stephen, Dig. Law Crim. Proc. 47; *Rex* v. *Jones*, 6 C. & P. 137; 4 Black. Com. 303; 1 Chitty Crim. Law, 189; 2 Hale P. C. 163; 2 Hawk. P. C., Ch. 25, §§ 24, 35, 51; Const. U. S., Art. III, § 2, cl. 3, and 6th Amendment; Story on Const. § 1775; 2 Tucker, Const. 678; *Callan* v. *Wilson*, 127 U. S. 540; 12 Cyc. Law & Pro. 229, 239; Rev. Stat. § 731.

There can be no implied or constructive presence under the Constitution. *United States* v. *Burr*, 4 Cranch. Appx. 470.

The common law principle as to the local jurisdiction in respect of criminal offenses was adopted by the Constitution of the United States, substituting "State" and "State and district" for county.

The court erred in trying the defendant, a Senator of the United States, when the Senate was in session, and also in pronouncing judgment and sentence of fine and imprisonment against him, to be executed at a time when the Senate was in session. Const. U. S., Art. I, § 6; Story, Const. §§ 856–862, and authorities there cited.

This immunity from arrest is not personal, but belongs to the office of Senator for the benefit of the Government, the State of Kansas and of his constituents, and the defendant could not waive it, even if he had consented or attempted to do so. The record shows no such waiver in fact or in law, and the court had no power to *try* the cause while the Senate was in session.

The defendant's supposed waiver, whatever its legal effect, could, in any event, extend no further than the period during which the defendant failed to set up his constitutional immunity, and after March 29, 1904, the court had no power to pronounce the judgment and sentence of April 6, 1904, the Senate being then in session.

The proceedings involve the Constitution, or application of the Constitution, within the meaning of § 5 of the act of March 3, 1891, and a writ will lie direct to this court. The trial and judgment are in conflict with the immunity of a Senator from imprisonment during the session. 2 Paterson Liberty of the Subject, 140, 188 *et seq.;* Rev. Stat. § 727; May's Const. Hist. II, ch. VII, 4th ed. 3, and ch. XI; 3 Stubb's Const. Hist. 538; Cooley's Const. Lim., 6th ed., 160; Jefferson's Parl. Man. § 3, on Privilege; Yonge's Const. Hist. 370; Lord Campbell's Speeches, 179; 2 Hardcastle's Life, 1 Campbell, 188. As to what a defendant in a criminal prosecution may waive, see

Hopt v. *Utah*, 110 U. S. 574, 579; *Thompson* v. *Utah*, 170 U. S. 343, 353; *Schick* v. *United States*, Harlan, J.'s, dissent, 195 U. S. 65.

Evidence was improperly admitted and the trial court did not by its charge and instructions to the jury cure the error which it made in the admission of improper evidence; but, on the contrary, confirmed such error. It also erred in its additional charge to the jury after they had come back for further instructions as well as in its original charge and instructions. First, in its instructions on propositions of law, and also in depriving the defendant of his constitutional right to have the question of his guilt of the charge laid in the indictment tried and decided by the jury. *United States* v. *Burr*, Appendix 4 Cranch. 470; and Second, in coercing the jury into rendering a verdict of guilty.

It is error to instruct so that the instruction implies that the court requires a conviction. *Hodges* v. *The State*, 15 Georgia, 117, 121.

Mr. Solicitor General Hoyt for the United States:

No constitutional question is presented or was saved so as to justify direct review in this court unless the court think fit to issue certiorari.

There are four important questions in the case: (1) Was there any proceeding pending before the Post Office Department in which the United States was interested? (2) Did the accused render services with the intent to influence the Department in such proceeding, and did he receive compensation therefor? (3) Did the trial court have jurisdiction? (4) Did the accused waive his privilege as Member of Congress, and was it competent for him to do so?

I. The power of Congress to legislate, and the authority of the Postmaster General under legislation are very broad, and the Postmaster General acts well within his established powers when he institutes a fraud order inquiry. Art. I, sec. 8, cl. 8, Constitution; §§ 396, 3929, 5480, Rev. Stat.; § 44, Postal Laws

and Reg.; *Public Clearing House* v. *Coyne*, 194 U. S. 497; *Bates & Guild Co.* v. *Payne*, 194 U. S. 106; *In re Rapier*, 143 U. S. 110.

No branch of any executive department more closely affects the people than the postal service and the United States is interested in a fraud order inquiry both because its revenue and property rights are affected, and because its intangible functions and responsibilities constitute an interest within the meaning of the law. The United States is vitally interested to protect the people against a fraudulent use of the mails, and to prevent the dissemination of the "literature" of a fraudulent scheme. As to the broad scope of the Government's "interest" as *parens patriæ*, see *United States* v. *Bunting*, 82 Fed. Rep. 883, 884; *Palmer* v. *Colladay*, 18 D. C. App. 426; *Tyner* v. *United States*, 32 Wash. Law Rep. 258; *Curley* v. *United States*, 130 Fed. Rep. 1, 3–9.

II. Under the proved facts as to services to the Rialto Company, especially when they are regarded together and consecutively, there can be no doubt that services were rendered and compensation received in violation of the statute.

III. The last payment was made in cash to the accused at St. Louis, and that is sufficient to sustain the judgment. *Claassen* v. *United States*, 142 U. S. 140; *Evans* v. *United States*, 153 U. S. 584, 595; *Goode* v. *United States*, 159 U. S. 669; *Putnam* v. *United States*, 162 U. S. 687; *Rice* v. *Ames*, 180 U. S. 371. But the counts on the checks are good. The Government proved a custom and usage prevailing in Washington of regarding such checks as collection items, although because of a customer's good standing immediate credit might be given, such items being subject to immediate charge back if returned unpaid. The checks were not purchased by the bank; they were collected for Burton and paid to him at St. Louis. This question of purchase or collection was submitted to the jury under proper instructions. *Ward* v. *Smith*, 7 Wall. 447; *Dodge* v. *Savings & Trust Co.*, 93 U. S. 379; *Evansville Bank* v. *German American Bank*, 155 U. S. 556, and cases cited;

Scott v. *Ocean Bank*, 23 N. Y. 289; *St. Louis & S. F. Ry. Co.* v. *Johnston*, 133 U. S. 566. Authorities cited by plaintiff in error distinguished.

Section 731, Rev. Stat., supports the jurisdiction below, because at all events the offense as well as the process of payment was completed at St. Louis. That statute is constitutional. *In re Palliser*, 136 U. S. 257; *Horner* v. *United States*, 143 U. S. 207; *Putnam* v. *United States*, 162 U. S. 687. Where an offense is begun in one district and completed in another it can be tried in the latter district.

IV. The accused was not arrested. That is the only privilege, exemption from arrest. It applies only to arrests in civil proceedings and not to indictable offenses. It was promptly waived. It is purely personal and may be waived. Arts. of Confed., Art. V; Bill of Rights of 1689, Stubbs, Select Charters of Const. History, 2d ed., Oxford, Clarendon Press, pp. 523–525; Art. I, sec. 6, cl. 1, of the Constitution; *Coxe* v. *McClenachan*, 3 Dall. 478; 1 Bl. Com. 164, 165; Bowyer's Com. on Const. Law of England, 82–84; Hallam's Const. Hist., vol. III, pp. 379 *et seq.;* Salk. 505; *Stockdale* v. *Hansard*, 9 Ad. and El. 225; 1 Wm. & M. § 2, c. 2; 12 & 13 Wm. III, c. 3; 11 Geo. II, c. 24; 10 Geo. III, c. 50; 1 Jac. I, c. 13; Viner's Abridgment, vol. II, p. 36; *Bartlett* v. *Hebbes*, 5 Term Rep. 686; *Geyer's Lessee* v. *Irwin*, 4 Dall. 107; I Story on the Const. § 865.

This privilege is not like the right of trial by jury, which is a universal mandate to guard a system of jurisprudence and protect all the people, and therefore because of the public interest in the principle can only be waived and modified under certain peculiar conditions and situations. *Hopt* v. *Utah*, 110 U. S. 574. When there is no constitutional mandate and no public policy prohibiting, an accused may waive any privilege which he is given the right to enjoy. *Schick* v. *United States; Broadwell* v. *United States*, 195 U. S. 65. Constituents are interested in being represented in the legislature at all times during a session, but they are also interested in being properly

represented, and a man under indictment is not fit to represent them. The public is thus interested in having the privilege waived and the charge determined as promptly as possible. Waiver is requisite for another reason; it is an unwritten law of the Senate that it refrains from action within its own power to discipline or expel, provided only that a member under indictment does not appear in the Senate while such charge in the courts is undetermined in his favor. In that case two courses only are open, either to waive the privilege and proceed to trial on the member's initiative, or else resign and give the electors the opportunity to select a fit representative.

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

Counsel for defendant base their right to obtain a direct review by this court of the judgment of conviction in the District Court of Missouri upon the contention that the case involves the construction and application of the Constitution of the United States in several particulars. They insist that under Article 3, section 2, of the Constitution, and also under the Sixth Amendment of the same, the defendant was entitled to be tried by a jury of the State or district in which the crime alleged against him in the indictment was committed. This question arises by reason of those counts of the indictment which charge the receipt by defendant of various checks therein set forth, at St. Louis, in the State of Missouri, while the evidence in the case shows, without contradiction, that the checks were received in the city of Washington, D. C., and payment thereof made to defendant by one of the banks of that city. Counsel contended that if any crime were committed by the receipt of these checks and the payment thereof to the defendant (which is denied), that crime was committed in Washington and not in Missouri, and that it did not come within section 731 of the Revised Statutes of the United States, pro-

viding that when an offense against the United States is begun in one judicial circuit and completed in another it shall be deemed to have been committed in either, and may be dealt with, etc., in either district, in the same manner as if it had been actually and wholly committed therein. Counsel for defendant also contend that the case involves the construction and application of section 6 of Article I of the Constitution of the United States, providing that Senators and Representatives shall, in all cases except treason, felony and breach of the peace, be privileged from arrest during their attendance at the sessions of their respective houses and in going to and returning from the same. These questions were raised in the court below. Whether the defendant waived his alleged privilege of freedom from arrest as Senator would probably depend upon the question whether the offense charged was in substance a felony, and if so, was that privilege a personal one only, and not given for the purpose of always securing the representation of a State in the Senate of the United States. However that may be, the question is not frivolous, and in such case the statute grants to this court jurisdiction to issue the writ of error directly to the District Court, and then to decide the case without being restricted to the constitutional question. *Horner* v. *United States, No. 2,* 143 U. S. 570. It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case. Having jurisdiction to decide all questions in the case on this writ of error, we deny the motion for a certiorari, and proceed to an examination of the record.

First. The question of the construction of the statute upon which this indictment was framed is the first to arise. Upon that question a majority of the court (Mr. Justice Harlan, Mr. Justice Brown, Mr. Justice McKenna, Mr. Justice Holmes and Mr. Justice Day concurring) are of opinion that the facts alleged in the indictment show a case that is covered by the provisions of the statute, while the Chief Justice, Mr. Justice Brewer, Mr. Justice White and the writer of this opinion

dissent from that view, and are of opinion that the statute does not cover the case as alleged in the indictment.

Second. Assuming that the statute applies to the facts stated in the indictment, a further question arises upon the general merits of the case, whether there was sufficient evidence of guilt to be submitted to the jury, and a majority of the court (the same Justices concurring) are of opinion that there was, or are not prepared to say there was not, and the same minority dissent from that view and are of opinion that there was no evidence whatever upon which to found a verdict of conviction.

There are, however, other questions remaining, which we now proceed to discuss on the theory that the statute covers the case.

Third. The sixth, seventh, eighth and ninth counts of the indictment aver the receipt by the defendant of the different checks described, at the city of St. Louis, in the State of Missouri, and the payment of the money thereon to the defendant at St. Louis, in that State, as compensation for services theretofore performed by the defendant for the Rialto Company. It may be assumed that on the facts averred in these various counts in the indictment upon the checks, each of them was good. It turned out, however, on the trial that these averments of the place where the different checks were received and paid were not true; but, on the contrary, the evidence was wholly undisputed that each of them was received by the defendant in the city of Washington, D. C., and by him there indorsed and deposited with the Riggs National Bank of Washington, D. C., and that they were afterwards duly paid by the Commonwealth Trust Company at St. Louis, Missouri; that the amount of each was in each instance immediately credited by the Riggs National Bank to the account of the defendant with the bank, and the cashier testified that the defendant had the right, immediately after the credit was made, to draw out the whole, or any portion thereof, without waiting for the payment of the check at St. Louis.

There was no oral or special agreement made between the defendant and the bank at the time when any one of the checks was deposited and credit given for the amount thereof. The defendant had an account with the bank, took each check when it arrived, went to the bank, indorsed the check which was payable to his order, and the bank took the check, placed the amount thereof to the credit of the defendant's account, and nothing further was said in regard to the matter. In other words, it was the ordinary case of the transfer or sale of the check by the defendant and the purchase of it by the bank, and upon its delivery to the bank, under the circumstances stated, the title to the check passed to the bank and it became the owner thereof. It was in no sense the agent of the defendant for the purpose of collecting the amount of the check from the trust company upon which it was drawn. From the time of the delivery of the check by the defendant to the bank it became the owner of the check; it could have torn it up or thrown it in the fire or made any other use or disposition of it which it chose, and no right of defendant would have been infringed. The testimony of Mr. Brice, the cashier of the Riggs National B nk, as to the custom of the bank when a check was not paid, of charging it up against the depositor's account, did not in the least vary the legal effect of the transaction; it was simply a method pursued by the bank of exacting payment from the indorser of the check, and nothing more. There was nothing whatever in the evidence showing any agreement or understanding as to the effect of the transaction between the parties—the defendant and the bank—making it other than such as the law would imply from the facts already stated. The forwarding of the check "for collection," as stated by Mr. Brice, was not a collection for defendant by the bank as his agent. It was sent forward to be paid, and the Riggs Bank was its owner when sent. With reference to the jurisdiction of the court over the offense described in the sixth and following counts in the indictment, the court held that if the checks were actually received by the defendant in Washington and

the money paid to him by the bank in that city, and the title and ownership of the checks passed to the bank at that time, the court in Missouri had no jurisdiction to try the offense set forth in those counts of the indictment already referred to. There was no question that such was the fact, and it was error to submit the matter to the jury to find some other fact not supported by any evidence. The court said:

"The Government claims that the compensation referred to in this count was sent to the accused by the Rialto Grain and Securities Company, in the form of a check, drawn by it on the Commonwealth Trust Company, payable to the order of the accused, by mail; that he received the check representing this compensation at Washington, in the District of Columbia, and then and there indorsed the check, deposited it to his own credit in the Riggs National Bank at Washington; that the last mentioned bank afterwards forwarded the check by and through its correspondents to St. Louis for payment by the Commonwealth Trust Company, upon which it was drawn, and that the Riggs Bank and its correspondents in all this matter became and were the agents of the accused for securing this money, and when the money called for by the check was finally paid at St. Louis, Missouri, by the trust company, on which it was drawn, it amounted to a payment of that money to the accused at St. Louis, Missouri. This suggests an important feature of the case, for the reason that unless it be true that the accused received the money represented by and paid on this check at St. Louis, this court would have no jurisdiction to try the case."

"The Constitution of the United States confers upon the accused in every criminal case the right to be tried by an impartial jury of a State and district where the crime shall have been committed.

"The receipt of the money is the gist of the crime charged against the accused, and if he did not receive it in this district, in fact in St. Louis, where he is charged to have received it, he is not amenable to the law in this district, and cannot be con-

victed in this court on this sixth count. Accordingly, it becomes your duty to ascertain and find from the evidence what were the true relations between the accused and the Washington bank, when he deposited the check in question with that bank, and what was the understanding between them as to their respective rights in relation to the check and the proceeds thereof. On this question the court charges you as follows:

"If it was the intent and understanding of the Wasnington bank and the accused at the time the latter deposited the check in question with the former, that the bank should forward the same in the usual course by and through its correspondents to St. Louis, for payment, and that in so doing it and its correspondents should act only as the agents of the accused for that purpose, then the final payment by the Commonwealth Trust Company at St. Louis, of the check to the correspondents of the Washington bank, would amount in law to a payment in St. Louis as charged in the sixth count, of the amount of the check to the accused. If on the contrary it was the understanding and intent of the Washington bank and the accused at the time the latter deposited the check in question with the former that the bank should become the purchaser of the check, and should thereafter be the absolute owner thereof, and not act as just indicated, as the agent of the accused in the collection of the check, then the payment at St. Louis by the Commonwealth Trust Company would amount in law to a payment to the Washington bank and not to the accused. In the latter event no crime would have been committed by the accused in this district, by reason of the check referred to in the sixth count of the indictment.

"In order to find the accused guilty on the sixth count, you must find from the evidence, by the same measure of proof as is required in all criminal cases, that the check referred to in the sixth count was deposited by the accused in the Washington bank for collection, and that the bank was to act in collecting the same, as the agent of the accused, and not as the owner of the check in question.

"In determining this issue, you are at liberty to and should consider all the evidence adduced; the actual transaction as it occurred at the Riggs Bank where the check was deposited, the check itself and all its endorsements, the rights and privileges which were immediately accorded the accused upon making the deposit, the actual conduct and purpose of the Riggs Bank in forwarding the check to St. Louis for payment, the customary conduct and usage of that bank, and all banks in Washington at the time so far as shown by the proof. And if from all these facts and all other facts disclosed by the proof you find that the check in question was in fact deposited by the accused, with the intent and knowledge on his part, as well as on the part of the bank itself, that it should be forwarded to St. Louis for collection for account of the accused, the bank and its correspondents acting as agents for the accused to make such collection, you should find that when the same was actually paid to the last indorser on the check at St. Louis by the trust company upon which it was drawn, it was in contemplation of law paid to the accused himself.

"If on the contrary you find from the evidence that the accused and the Riggs Bank, at the time of the deposit of the check in question, understood and intended that the bank should become the purchaser of the check and be its absolute owner, then the subsequent forwarding of it to St. Louis for payment was the act of the bank itself, and the final payment of the check by the trust company at St. Louis was a payment not to the accused, but to the bank, and if such is the fact your verdict on the sixth count must be not guilty."

A careful scrutiny of the evidence with relation to this charge to the jury shows that there was no foundation for submitting to the jury the question of what was the understanding (other than such as arose from the transaction itself, as shown by uncontradicted evidence) between the defendant and the bank at the time when these various checks were deposited with the bank and their proceeds placed to the credit of the defendant. There was no agreement or understanding of any kind other

than such as the law makes from the transaction detailed, which was itself proved by uncontradicted evidence offered by the Government itself. In the absence of any special agreement that the effect of the transaction shall be otherwise (and none can be asserted here), there is no doubt that its legal effect is a change of ownership of the paper, and that the subsequent action of the bank in taking steps to obtain payment for itself of the paper which it had purchased can in no sense be said to be the action of an agent for its principal, but the act of an owner in regard to its own property. The learned judge in his charge to the jury did not, indeed, deny the general truth of this proposition, but he left it to the jury to determine whether there was not an agreement or understanding made or arrived at by the parties at the time the checks were taken by the defendant to the bank, which altered the legal effect of the transaction actually proved. This, as we have said, there was not the slightest evidence of, and it was error to submit that question to the jury.

The general transactions between the bank and a customer in the way of deposits to a customer's credit and drawing against the account by the customer constitute the relation of creditor and debtor. As is said by Mr. Justice Davis, in delivering the opinion of the court in *Bank of the Republic* v. *Millard*, 10 Wall. 152, in speaking of this relationship, page 155:

"It is an important part of the business of banking to receive deposits, but when they are received, unless there are stipulations to the contrary, they belong to the bank, become part of its general funds, and can be loaned by it as other moneys. The banker is accountable for the deposits which he receives as a debtor, and he agrees to discharge these debts by honoring the checks which the depositors shall from time to time draw on him. The contract between the parties is purely a legal one, and has nothing of the nature of a trust in it. This subject was fully discussed by Lords Cottenham, Brougham, Lyndhurst and Campbell in the House of Lords in the case of

Foley v. *Hill*, 2 Clark & Finnelly, 28, and they all concurred in the opinion that the relation between a banker and customer, who pays money into the bank, or to whose credit money is placed there, is the ordinary relation of debtor and creditor, and does not partake of a fiduciary character, and the great weight of American authorities is to the same effect."

When a check is taken to a bank, and the bank receives it and places the amount to the credit of a customer, the relation of creditor and debtor between them subsists, and it is not that of principal and agent. This principle is held in *Thompson* v. *Riggs*, 5 Wall. 663, and also in *Marine Bank* v. *Fulton Bank*, 2 Wall. 252. See also *Scammon* v. *Kimball*, 92 U. S. 362, 369; *Davis* v. *Elmira Savings Bank*, 161 U. S. 275, 288.

The case of *Cragie* v. *Hadley*, 99 N. Y. 131, contains a statement of the rule as follows, per Andrews, J.:

"The general doctrine that upon a deposit made by a customer, in a bank, in the ordinary course of business, or of money, or of drafts or checks received and credited as money, the title to the money, or to the drafts or checks, is immediately vested in and becomes the property of the bank, is not open to question. (*Commercial Bank of Albany* v. *Hughes*, 17 Wend. 94; *Metropolitan Nat. Bank* v. *Loyd*, 90 N. Y. 530.) The transaction in legal effect is a transfer of the money, or drafts or checks, as the case may be, by the customer to the bank, upon an implied contract on the part of the latter to repay the amount of the deposit upon the checks of the depositor. The bank acquires title to the money, drafts or checks, on an implied agreement to pay an equivalent consideration when called upon by the depositor in the usual course of business."

In *Metropolitan Nat. Bank* v. *Loyd*, 90 N. Y. 530, one of the cases referred to by Judge Andrews, Judge Danforth, in speaking of the effect of placing a check to the credit of a depositor in his account with the bank, said that—

"The title passed to the bank, and they (the checks) were not again subject to his control. [See *Scott* v. *Ocean Bank in*

City of New York, 23 N. Y. 289, and other cases cited in the opinion.]

* * * * * * * *

"It is true no express agreement was made transferring the check for so much money, but it was delivered to the bank and accepted by it, and the bank gave Murray credit for the amount, and he accepted it. That was enough. The property in the check passed from Murray and vested in the bank. He was entitled to draw the money so credited to him, for as to it the relation of debtor and creditor was formed, and the right of Murray to command payment at once was of the very nature and essence of the transaction. On the other hand, the bank, as owner of the check, could confer a perfect title upon its transferee, and, therefore, when by its directions the plaintiff received and gave credit for it upon account, it became its owner and entitled to the money which it represented. . . . If, as the appellant insists, the check had been deposited for a specific purpose—for collection, the property would have remained in the depositor, but there is no evidence upon which such fact could be established, nor is it consistent with the dealings between the parties, or with any of the admitted circumstances.

"These show that it was the intention of both parties to make the transfer of the check absolute, and not merely to enable the bank to receive the money upon it, as Murray's agent."

The same principle is set forth in *Taft* v. *Bank*, 172 Massachusetts, 363. In that case the court said: "So when, without more, a bank receives upon deposit a check endorsed without restriction, and gives credit for it to the depositor as cash in a drawing account, the form of the transaction is consistent with and indicates a sale, in which, as with money so deposited, the check becomes the absolute property of the banker."

In the case at bar the proof was not disputed. The checks were passed to the credit of defendant unconditionally, and without any special understanding. The custom of the bank

to forward such checks for collection is a plain custom to forward for collection for itself. The only liability of defendant was on his indorsement. All this made a payment at Washington, and as a result there was a total lack of evidence to sustain the sixth, seventh, eighth and ninth counts of the indictment. The court should have, therefore, directed a verdict of not guilty on those counts.

This is not a case of the commencement of a crime in one district and its completion in another, so that under the statute the court in either district has jurisdiction. Rev. Stat. sec. 731; 1 Comp. Stat. p. 585. There was no beginning of the offense in Missouri. The payment of the money was in Washington, and there was no commencement of that offense when the officer of the Rialto Company sent the checks from St. Louis to defendant. The latter did not thereby begin an offense in Missouri.

Fourth. The judgment must also be reversed because of the error in the refusal of the court to charge as requested when the jury came into court and announced an inability to agree. Previous to the retirement of the jury the defendant's counsel submitted to the court certain requests to charge the jury, twelve in all. Those numbered seven, ten and eleven were refused. Numbers ten and eleven referred to the checks and the effect of the transaction of depositing them with the Riggs Bank. The other instructions referred to many of the questions arising in the case, and material upon the subject of the trial then before the court. After the court had concluded his main charge to the jury he added that he had been "asked by counsel for the defendant to give certain declarations here, and while I think they have, in the main, been covered by the charge, yet I will give them to you." (They were the instructions requested by defendant and above described.) "These are abstract propositions of law, which I give in connection with the charge, as perhaps more fully amplifying it. I am willing to give them, inasmuch as they are asked, and they contain general propositions of law." The jury then retired,

and after being out from Saturday evening at 8 o'clock until the following Monday morning at 10 o'clock without agreeing, returned into court and were charged by the court in relation to their duty as jurors. In the course of that charge the court said to the jury as follows:

"I gather from this letter, Mr. Foreman, what I may be incorrect about. I would like to ask the foreman of the jury how you are divided. I do not want to know how many stand for conviction, or how many for acquittal, but to know the number who stand the one way and the number who stand another way. I would like the statement from the foreman.

"The FOREMAN: Eleven to one.

"The COURT: The jury stand eleven to one. I gather that from the communication. In the light of that fact I feel constrained to make a statement to you, and in making it to use the language of the Supreme Court of the United States as found in *Allen* v. *United States*." (164 U. S. 492.)

The court then charged the jury in relation to its duty to agree if possible, and directed that the jury should, in the light of the comments of the court then made, retire and make a serious attempt to arrive at a verdict in the case. Counsel for the defendant then asked the court to indicate to the jury that the requests to charge theretofore, asked by the defendant and which were given by the court, constitute as much a part—

"The COURT: If you will wait a moment the jury may retire.

"Mr. KRUM: I beg your Honor to state to the jury—

"The COURT: Stop a moment and then I will hear your argument. I will, after the jury retire, hear counsel if they have anything to say, or any exceptions they may wish to take to the charge." The court here handed the foreman of the jury the charge and instructions heretofore referred to and directed the jury to retire for further consideration of their verdict.

"Mr. LEHMAN: I do not believe that the requests to charge in the manner made by defendant and given by the court to the jury, were given as they should have been, the suggestions being made by the court at the time, that they were mere ab-

stract statements, which had the effect to deprive them of something of their force, when they were not intended as mere abstractions and were believed by counsel to have specific reference to the case; and those instructions as well as others ought to be called to the attention of the jury. We must except here as earnestly as it is in our power to do, against the charge of the court made now.

"The COURT: If you except, I will allow the exception.

"Mr. KRUM: What I desire to do in the presence of the jury was to ask your Honor to indicate to the jury, as it was evident the jury did not understand, that it was a fact that the requests to charge which were recognized by the court, acquiesced in by the court and given by the court, were just as much a part of your Honor's charge as that which the court read as emanating from the court itself.

"The COURT: I did tell the jury so on Saturday.

"Mr. KRUM: I submit it is apparent that they do not understand that they are just as much to be controlled by that part of the instructions as any other part. That is evident from the inquiry made.

"The COURT: The court has endeavored to answer the only request made by the jury, and that is all I think should be done."

We think the court should have instructed the jury as requested by counsel for the defendant, and that its refusal to do so was error. Here was a case of very great doubt in the minds of some of the jury. It had deliberated for more than thirty-six hours and been unable to agree upon a verdict. The requests to charge originally made by counsel for defendant had at that time been received as abstract propositions of law, which the court gave in connection with the charge, saying that he was willing to give them inasmuch as they were asked, and as they contained general propositions of law. It does not appear from the bill of exceptions that defendant's counsel then excepted to those remarks by the court, but when the jury subsequently returned into court and announced their

inability to agree, counsel for defendant immediately saw the extreme importance of having the requests to charge made to the court regarded by the jury, not as abstract or general propositions of law, but as requests which affected the case then on trial with reference to the facts proved in the case; and so, before the jury again retired, they commenced to propound their requests upon the subject to the court, but the court before listening to them instructed the jury to retire, and then followed the colloquy above set forth between court and counsel.

Balanced as the case was in the minds of some of the jurors, doubts existing as to the defendant's guilt in the mind of at least one, it was a case where the most extreme care and caution were necessary in order that the legal rights of the defendant should be preserved. Considering the attitude of the case as it existed when the jury returned into court for further instructions, we think the defendant was entitled, as matter of legal right, to the charge asked for in regard to the previous requests to charge, which had been granted by the court under the circumstances stated, and it was not a matter of discretion whether the jury should, or should not, be charged as to the character of those requests. A slight thing may have turned the balance against the accused under the circumstances shown by the record, and he ought not to have longer remained burdened with the characterization of his requests to charge, made by the court, and when he asked for the assertion by the court of the materiality and validity of those requests which had already been made, the court ought to have granted the request.

We must say in addition, that a practice ought not to grow up of inquiring of a jury, when brought into court because unable to agree, how the jury is divided; not meaning by such question, how many stand for conviction or how many stand for acquittal, but meaning the proportion of the division, not which way the division may be. Such a practice is not to be commended, because we cannot see how it may be material

for the court to understand the proportion of division of opinion among the jury. All that the judge said in regard to the propriety and duty of the jury to fairly and honestly endeavor to agree could have been said without asking for the fact as to the proportion of their division; and we do not think that the proper administration of the law requires such knowledge or permits such a question on the part of the presiding judge. Cases may easily be imagined where a practice of this kind might lead to improper influences, and for this reason it ought not to obtain.

Our conclusion is, that the judgment must be reversed and the cause remanded to the District Court of Missouri with directions to grant a new trial.

So ordered.

MR. JUSTICE HARLAN, dissenting.

I dissent from so much of the opinion and judgment as holds that the offenses charged against the defendant, based on the checks made at St. Louis and mentioned in the sixth, seventh, eighth and ninth counts, were committed in this District, where the checks were received by him, and not at St. Louis, where they were paid by the bank on which they were drawn for his benefit. I am of opinion that the Riggs National Bank, upon receiving the checks from the accused, became, in every substantial sense, his agent and representative to present the checks and receive the proceeds thereof; in which case, the offense of receiving, by means of those checks, compensation for services rendered in violation of the statute was committed at St. Louis, not at Washington. In a strict sense, no title or ownership of the checks passed to the Riggs National Bank, as in the case of an unconditional sale, consummated by actual delivery, of tangible, personal property for the recovery of the possession of which the owner could, of right, maintain an action in his own name; for, if the St. Louis bank on which the checks were drawn had refused to accept or honor them, no

action on the checks, or at all, could have been maintained against it by the Riggs National Bank. *Bank of Republic* v. *Millard*, 10 Wall. 152, 156; *First National Bank* v. *Whitman*, 94 U. S. 343, 344; *St. Louis &c. Railway* v. *Johnston*, 133 U. S. 566, 574; *Fourth Street Bank* v. *Yardley*, 165 U. S. 634, 643. The checks were made at St. Louis and sent by mail from that city to the accused in discharge of an obligation assumed by his client at that city, and, as between him and his client, in the absence of any special agreement on the subject, compensation for services rendered by him before the Department could only be deemed to have been really made when the checks were paid by the bank on which they were directly drawn. It is true that when the Riggs National Bank received the checks and credited the account of the accused on its books with the amount thereof, there arose, as between that bank and him, only the relation of debtor and creditor. But when his account at that bank was so credited, he became liable, by implied contract—if the St. Louis bank failed to accept or pay the check when presented—to pay back to the bank an amount equal to the credit he received on the books of the Riggs National Bank. If the St. Louis bank had refused to accept or pay the checks when presented, and if the accused had then sued his client on its original contract with him, the latter could not have resisted recovery upon the ground that he received compensation by having his account at the Washington bank credited with the amount of the checks. Suppose the accused had been indicted in Washington on the day after the checks were indorsed to the Riggs National Bank, and the checks were not honored or paid when presented at the St. Louis bank, could he in that case have been convicted under the statute by proof that he received such credit at the former bank for the amount of the checks? Clearly not. Yet he could have been, if it be true that he was compensated, within the meaning of the statute, when his account with the Riggs National Bank was credited with the amount of the checks. As between the accused and his client, he was not, in any true

sense, compensated for the services alleged to have been rendered in violation of the statute, until by payment of the checks by the St. Louis bank he was relieved of all liability to the Riggs National Bank arising from his indorsing the checks to it. The accused is to be regarded as having received, at St. Louis, compensation for his services, because the check made in his behalf was paid there to his representative. The offense was, therefore, consummated at that city, and the Federal Court at St. Louis had jurisdiction.

Nor, in my opinion, does the record show any error, in respect of instructions that were to the substantial prejudice of the accused; no error for which the judgment should be reversed.

It seems to me that in reversing the judgment upon the grounds stated in the opinion the court has sacrificed substance to mere form. The result, I submit, well illustrates the familiar maxim: *Qui haeret in litera haeret in cortice.*

UNITED STATES *v.* HARVEY STEEL COMPANY.

APPEAL FROM THE COURT OF CLAIMS.

No. 275. Argued January 3, 4, 1905.—Decided January 16, 1905.

The United States made a contract with the steel company for the use of a process described as patented. The contract provided that in case it should at any time be judicially decided "that the company was not legally entitled under the patent to the process and the product the payment of royalties should cease. In a suit by the company for royalties the United States attempted to deny the validity of the patent while admitting there was no outstanding decision against it. *Held,* that this defense was not open.

Held further, that under the circumstances of this case, the contract, properly construed, extended to the process actually used even if it varied somewhat from that described in the patent.

THE facts are stated in the opinion.

Mr. Assistant Attorney General Pradt for the United States:

The Court of Claims ignored the fact that the contract called for the steel company to furnish a patented process and that in so doing it not only warranted the validity of the patent but made an express agreement that there should be no liability on the part of the United States for royalties if the patent were judicially declared invalid. There is no estoppel against the United States asserting that the patent is invalid. Through the adoption of the process by the Government the company not only received $96,000 but the value of the process was demonstrated and made known to the world and thus enabled the company to make contracts with foreign governments.

The contention of claimant that a licensee cannot set up the invalidity of the patent does not apply to this case. Walker on Patents, 3d ed. § 307. Such a holding would practically nullify the principal provision of the contract. Nor is it true that the validity of the patent can only be questioned in an action for infringement. Such an action is impossible in this case as the only users of this patent in this country are those building ships for this Government. The clause cannot properly be construed to apply to a case in which the manufacture of armor plate for the United States should be enjoined in an action for infringement by parties claiming under some patent, and asserting that the Harvey patent was invalid, because if the agents of the United States were thus enjoined, that fact itself would amount to an eviction and bring the contract to an end and thus render the clause superfluous and useless. Walker on Patents, 3d ed. § 307; *Am. Electric Co.* v. *Gas Company*, 47 Fed. Rep. 43; *Consumers' Gas Co.* v. *Electric Co.*, 50 Fed. Rep. 778. The essential element in estoppel that the claimant has changed his position for the worse is wanting.

If the patent was valid it was so narrow as not to include the process actually used.

There is no ambiguity in the contract and it is not permissible to consider circumstances and negotiations leading up to the

contract. 17 Am. & Eng. Ency. of Law, 2d ed., 23; *Springsteen* v. *Samson*, 32 N. Y. 703; *Muldoon* v. *Deline*, 135 N. Y. 150; *Railroad Co.* v. *Trimble*, 10 Wall. 367; *Davis* v. *Shafer*, 50 Fed. Rep. 764.

Mr. James R. Soley and *Mr. Frederic H. Betts* for appellee:

The court below did not err in refusing to enter into an examination of the state of the prior art to determine whether the Harvey patent was valid or invalid. A party who has contracted to pay royalties for the use of a patented process with full knowledge of what he was contracting for, and who has had the benefit of the use of such process, cannot resist payment of such royalty on the plea that the patent granted is invalid. A license under a patent never implies a warranty of validity. 3 Robinson on Patents, 692; Walker on Patents, 4th ed., 305; *Stott* v. *Rutherford*, 92 U. S. 107; *Kinsman* v. *Parkhurst*, 18 How. 289; *Eureka Co.* v. *Bailey Co.*, 11 Wall. 488; *Crossley* v. *Dixon*, 10 H. of L. Cas. 306.

The validity of a patent cannot be determined in a suit against licensee for royalties, nor can the holder of a license deny the validity of a patent which he enjoys under it. *Moore* v. *Boiler Co.*, 84 Fed. Rep. 346; *Birdsall* v. *Perego*, 5 Blatch. 251; *Sargent* v. *Larned*, 2 Curtis, 340; *Marsh* v. *Dodge*, 41 Hun, 278; *Bartlett* v. *Holbrook*, 1 Gray, 118; *Marston* v. *Sweet*, 66 N. Y. 207; *Pope Mfg. Co.* v. *Owsley*, 27 Fed. Rep. 105; *Marsh* v. *Harris Co.*, 63 Wisconsin, 283; *Magic Ruffle Co.* v. *Elm City Co.*, 13 Blatch. 151.

In order to construe the clause relating to the validity of the patent as requested by the Government it would be necessary to disregard all well settled rules of construction. *Charter Gas Engine Co.* v. *Charter*, 47 Ill. App. 36.

No contract for the use of a patent right upon the payment of royalties would create a monopoly unless it was a contract for an *exclusive* use, which this was not. But the principle that a licensee, acting under a license, is estopped from setting up the invalidity of the patent as a defense in a suit for royalties

is just as applicable whether the license is for the exclusive use or for any partial use, or, as in this case, for such use as the licensee desired. *Marston* v. *Swett*, 82 N. Y. 526, 533.

The Court of Claims committed no error in declining to examine the prior art in order to construe the patent, as in an action for infringement. The Government has admitted it used the Harvey process. Greenleaf on Evidence, 6th ed., 207; and it well knew what it had contracted for and what it received by its license and is now estopped from denying it used the process. *Eureka Co.* v. *Bailey Co.*, 11 Wall. 492; *Hobbie* v. *Smith*, 27 Fed. Rep. 659; *Andrews* v. *Landers*, 72 Fed. Rep. 670; *Sproull* v. *Pratt & Whitney*, 97 Fed. Rep. 809. The Court of Claims, in fact, found that the process used was that described in the Harvey patent.

Mr. Justice Holmes delivered the opinion of the court.

This is a claim for royalties upon a contract made between the parties to the suit under the following circumstances: The Harvey Steel Company is the owner of a patent, numbered 460,262, for a process for hardening armor plates and for armor plates. After careful experiments, made by the Navy Department, before the patent was granted, a contract was made on March 21, 1892, the material elements of which are these: It recited that the company was the owner of the patented rights to a process "known as the 'Harvey process' for the treatment of armor plate for use in the construction of vessels;" an agreement that armor plate "treated under the said 'Harvey process' " shall be applied to certain vessels; the previous giving of an option to the Navy Department "of purchasing the right to use and employ the 'Harvey process' for treating armor plates, as follows: 'We hereby agree to give to the Navy Department an option for the purchase of the application of the Harvey process for treating armor plates, which was tested at the Naval Ordnance Proving Ground, Annapolis, Md., February 14, 1891,' " on terms set forth, one of which

was that Harvey, the inventor, should furnish all details in his possession, or which he might develop in the perfection of his methods; the acceptance of the offer by the Navy Department; and an agreement by the United States to pay the expense of applying "the said process," etc. The contract then went on to agree that the United States, upon the terms stated, might use "the hereinbefore-mentioned process known as the 'Harvey process,'" gave the company a royalty of one-half of one cent a pound up to $75,000, when the royalty was to cease, and stated other terms.

This contract had conditions for further tests, etc. Numerous further experiments were made, and on October 8, 1892, the company was informed by letter that "the Harvey process for armor plate has been definitely adopted by the Navy Department." In pursuance of the offer mentioned in the contract, the Navy Department required and received from Harvey a revelation of the secret process and improvements, and thereafter, on April 12, 1893, the parties made a new contract upon which this suit is brought. This recited, as before, that the company was owner of the patented rights to a process "known as the Harvey process," and referred to the patent by number and date. It then recited the making of the agreement of March 21, 1892, "whereby the party of the first part granted to the party of the second part the right to use and employ the Harvey process aforesaid," etc. It then canceled the old contract, and agreed that, in consideration of $96,056.46 royalty, the United States might use "the aforesaid Harvey process" for all naval vessels authorized by Congress up to and including July 19, 1892, and further, that it might use the "aforesaid Harvey process" upon vessels authorized after that date, "paying therefor" a half a cent a pound. The company covenanted to hold the United States harmless from further claims, and from demands on account of alleged infringement of "patented rights appertaining to said process;" to furnish full information regarding the composition and application of the compounds employed in the Harvey process,

and all improvements which it might make upon "said process as covered by the aforesaid letters patent," and that the United States might adopt and use such improvements. Finally, it was agreed that "in case it should at any time be judicially decided that the party of the first part is not legally entitled, under the letters patent aforesaid, to own and control the exclusive right to the use and employment of said process, and the decrementally hardened armor plates produced thereunder, as set forth in the letters patent aforesaid, then the payment of royalty under the terms of this agreement shall cease, and all sums of money due the party of the first part from the party of the second part, as royalty for the use and employment of said process, and armor plates, as aforesaid, shall become the property of the party of the second part."

The United States has built battle ships armored by the Harvey process communicated to it, and, subject to the questions which will be mentioned, by the terms of the contract there was due a royalty of sixty thousand eight hundred and six dollars and forty-five cents, to which sum the Court of Claims found the claimant entitled. 38 C. Cl. 662. It never has been judicially decided that the claimant has not the rights mentioned in the last quoted clause of the contract. The United States asked additional findings, which, it now contends, would establish that the patent was invalid, or, if valid, valid only if restricted to the use of a heat above 3100° Fahrenheit, in which case the patent was not used by the United States. These findings were refused as immaterial and the United States appealed. The main question is whether, under the last quoted clause of the contract, the United States can set up the invalidity of the patent in this suit. It is argued also that the United States ought to have been allowed to show that it had not used the patent, properly construed, although it is not denied that it has used the process communicated to it and known in common speech as the Harvey process.

It is not argued that there was a technical entire failure of consideration. The claimant was under continuing obliga-

tions, which it is not suggested that it did not perform or is not still performing, and one of which, the imparting of its secret information and improvements, it had performed under the original agreement, out of which the last contract sprang. The argument is put mainly on the construction of the clause quoted, coupled with the further argument that the United States ought not to be estopped as licensee to deny the validity of the patent because it is not a vendor but simply a user of the patented article, and therefore has not enjoyed the advantage of a practical monopoly, as a seller might have enjoyed it even if the patent turned out to be bad. This distinction between sale and use, even for a non-competitive purpose, does not impress us. So far as the practical advantage secured is matter for consideration, whether a thing made under a patent supposed to be valid, is used or sold, it equally may be assumed that the thing would not have been used or sold but for the license from the patentee. We regard the clause in the contract as the measure of the appellant's rights.

The words of the condition on which the payment of royalty was to cease, taken in their natural and literal sense, do not mean what the Government says. A plea of that condition, to satisfy the words "in case it should at any time be judicially decided" that the patent was bad, would have to be that it had been decided to that effect. It would not be enough to say that the defendant thought the patent bad, and would like to have the court decide so now. We see no reason to depart from the literal meaning of the words. It is argued that so construed they are very little good to the United States, since private persons would not use the armor plates, and the more the United States used them the larger would be the royalties which the company received, so that it would have no motive, even if it had a right, to sue the makers of the plate. It is answered that armor was made for foreign governments, and that the makers were sued by the claimants in good faith, although, as it turned out, the final decrees were entered by consent.

And it is argued on the other hand that the Government's construction would put the claimants at a great disadvantage, and would be giving up all benefit of the patent at the moment it was issued. We do not amplify the considerations of this sort on one side or the other. They are too uncertain to have much weight. The truth seems to be that the proviso is a more or less well-known and conventional one in licenses, *Charter Gas Engine Co.* v. *Charter*, 47 Ill. App. 36, 51, not a special contrivance for the special case, and that fact alone is enough to invalidate attempts to twist the meaning of the words to the interest of either side. The proviso was inserted, no doubt, on the assumption that a licensee, when sued for royalties, is estopped to deny the validity of the patent which he has been using, and to give him the benefit of litigation by or against third persons, notwithstanding that rule.

We have somewhat more difficulty with the other question mentioned. It is argued that the agreement was only to pay for the use of the process covered by the patent named, and that if the meaning of the parties was to cover anything broader than the patent, even what was known in their speech as the Harvey process, that meaning could be imported into the contract only by reformation, not by construction of the contract as it stands. But we are of opinion that this defense also must fail. In the first place, it is not fully open on the record. The findings asked had a different bearing. All that were asked might have been made without necessitating a judgment for the United States as matter of law and the court believed that the difference between patent and process was trivial. But we should hesitate to admit the defense in any event. The argument is that at the time of the contract it was supposed that the heat required for the process was greater than that actually used, that the patent was valid only for a process with the greater heat, and that the contract covers no more than the patent. But the fact that the parties assumed that the process used and intended to be used was covered by the patent, works both ways. It shows that they thought

and meant that the agreement covered and should cover the process actually used. We think that this can be gathered from the agreement itself apart from the mere supposition of the parties. The contract dealt with a process "known as the Harvey process." It imported the speech of the parties and the common speech of the time into the description of the subject matter. The words, Harvey process, commonly are put in quotation marks in the first contract, thus emphasizing the adoption of common speech. They mean the process actually used. The contract states that it is dealing with the same thing that had been the subject of the former agreement. That agreement further identified that subject as a process which was tested at the Naval Ordnance Proving Ground. It also identified it, it is true, as a patented process, but, if the incompatibility of the two marks is more than trivial, as it was regarded by the court which found the facts with which we have to deal, the identification by personal familiarity and by common speech is more pungent and immediate than that by reference to a document couched in technical terms, which the very argument for the United States declares not to have been understood. It is like a reference to monuments in a deed. As we have said, this identification by personal experiment and by common speech is carried forward into the contract in suit. The latter contract manifests on its face that it is dealing with a process actually in use, which requires the communication of practical knowledge and which further experience may improve.

We have not thought it useful to do more than indicate the line of thought which leads us to the conclusion that the claimant must prevail. We have confined ourselves to the dry point of the law. It might have been enough to say even less and to affirm the judgment on the ground that the findings asked and refused, so far as they were not refused because not proved, were only grounds for further inferences, not a special verdict establishing the defense as matter of law. But the fuller the statement should be made the more fully it would

appear that the United States was dealing with a matter upon which it had all the knowledge that any one had, that it was contracting for the use of a process, which, however much it now may be impugned, the United States would not have used when it did but for the communications of the claimant, and that it was contracting for the process which it actually used—a process which has revolutionized the naval armor of the world.

Judgment affirmed.

ROONEY *v.* NORTH DAKOTA.

ERROR TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA.

No. 123. Argued Jauuary 12, 1905.—Decided January 23, 1905.

By chapter 99, March 9, 1903, Laws of North Dakota, the statutes in force when plaintiff in error committed the crime for which he was tried, and when the verdict of guilty was pronounced were altered to the following effect: Close confinement in the penitentiary for not less than six or more than nine months after judgment and before execution was substituted for confinement in the county jail for not less than three nor more than six months after judgment and before execution, and hanging within an inclosure at the penitentiary by the warden or his deputy was substituted for hanging by the sheriff in the yard of the jail of the county in which the conviction occurred.

Held that the changes looked at in the light of reason and common sense are to be taken as favorable to the plaintiff in error, and that a statute which mitigates the rigor of the law in force at the time the crime was committed cannot be regarded as *ex post facto* with reference to that crime.

Held that close confinement does not necessarily mean solitary confinement and the difference in phraseology between close confinement and confinement is immaterial, each only meaning such custody as will insure the production of the criminal at the time set for execution.

Held that the place of punishment by death within the limits of the State is not of practical consequence to the criminal.

THIS writ of error brings in question a final judgment of the Supreme Court of the State of North Dakota, affirming the

judgment of an inferior court of that State, by which, pursuant to the verdict of a jury, the plaintiff in error, John Rooney, was sentenced to death for the crime of murder in the first degree.

The sole question upon which the plaintiff in error seeks the judgment of this court, and the only one that will be noticed, is whether the statute under which he was sentenced was *ex post facto* and therefore unconstitutional in its application to his case. His counsel agrees that the judgment must stand if the statute be constitutional.

Before as well as after the passage of the statute under which the sentence was pronounced the punishment prescribed by the State for murder in the first degree was death or imprisonment in the penitentiary for life. Rev. Codes, North Dakota, 1899, § 7068.

By the statutes in force at the time of the commission of the offense, August 26, 1902, as well as when the verdict of guilty was rendered, it was provided that when a judgment of death is rendered the judge must deliver to the sheriff of the county a warrant stating the conviction and judgment, and appointing a day on which the judgment is to be executed, "which must not be less than three months after the day in which judgment is entered, and not longer than six months thereafter," § 8305; that when there was no jail within the county, or whenever the officer having in charge any person under judgment of death deemed the jail of the county where the conviction was had insecure, unfit or unsafe for any cause, he could confine the convicted person in the jail of any other convenient county of the State, § 8320; that the judgment of death should be executed within the walls or yard of the jail of the county in which the conviction was had, or within some convenient inclosure within such county, § 8321; and that judgment of death must be executed by the sheriff of the county where the conviction was had, or by his deputy, one of whom at least must be present at the execution. Rev. Codes of North Dakota, 1899, § 8322.

The sentence of death was pronounced March 31, 1903. Prior to that date, namely, on March 9, 1903, the legislature —without changing the law prescribing death or imprisonment for life as the punishment for the crime of murder in the first degree—passed an act providing that all executions should take place at the penitentiary, and amending certain sections of the Revised Codes of 1899. By that act it was provided:

"§ 1. The mode of inflicting the punishment of death shall be by hanging by the neck until the person is dead; and the warden of the North Dakota penitentiary, or in case of his death, inability or absence, the deputy warden shall be the executioner; and when any person shall be sentenced, by any court of the State having competent jurisdiction, to be hanged by the neck until dead, such punishment shall only be inflicted within the walls of the North Dakota penitentiary at Bismarck, North Dakota, within an enclosure to be prepared for that purpose under the direction of the warden of the penitentiary and the board of trustees thereof, which enclosure shall be higher than the gallows, and so constructed as to exclude public view."

"§ 3. When a person is sentenced to death, all writs for the execution of the death penalty shall be directed to the sheriff by the court issuing the same, and the sheriff of the county wherein the prisoner has been convicted and sentenced, shall, within the next ten days thereafter, in as private and secure a manner as possible to be done, convey the prisoner to the North Dakota penitentiary, where the said prisoner shall be received by the warden, superintendent or keeper thereof, and securely kept in close confinement until the day designated for the execution. . . ."

"§ 14. That section 8305 of the Revised Codes of 1899, relating to judgment of death, warrant to execute, be amended so as to read as follows: § 8305. When the judgment of death is rendered the judge must sign and deliver to the sheriff of the county a warrant duly attested by the clerk under the seal of the court, stating the conviction and judgment, and appointing

a day upon which the judgment is to be executed, which must not be less than six months after the day in which the judgment is entered, and not longer than nine months thereafter."

"§ 16. All acts and parts of acts in conflict with the provision of this act are hereby repealed." Laws of North Dakota, 1903, c. 99, p. 119.

By the sentence it was ordered that the accused be conveyed to the state penitentiary, "there to be kept in close confinement until October the ninth 1903," and, within an inclosure in that building to be erected for the purpose, be hung by the warden of the penitentiary, or in case of his inability to act or his absence therefrom, by the deputy warden, before the hour of sunrise on the day fixed for the execution.

Mr. B. F. Spalding, with whom *Mr. Seth Newman* was on the brief, for plaintiff in error:

Section 10, Art. I, U. S. Const., provides "No State . . . shall pass any . . . *ex post facto* law, . . ."

The punishment for murder in the first degree, where the death penalty is determined upon by the jury, under the law in force when this offense was committed, and the punishment fixed by the statute of March 9, 1903, was altered. Three months are added to the term of imprisonment before the execution. Under the former law the imprisonment before the execution, in case there was no jail in the county, in which the conviction was had, or where the jail in such county was deemed insecure, unfit or unsafe, was in another convenient county in the State. Under the latter law such imprisonment is in the penitentiary of the State, and in close confinement. Under the former law the defendant was to be executed in the county in which he was convicted, by the sheriff of such county, or his deputy. Under the latter law, the defendant is to be executed at the penitentiary of the State by the warden or his deputy. Plaintiff in error was sentenced under the statute of 1903, which is *ex post facto* and void.

Section 8305, Rev. Codes N. Dak., 1899, provides that the day appointed on which the judgment of death shall be executed ". . . must not be less than three months after the day in which the judgment is entered, and not longer than six months thereafter," as amended by the statute of 1903, it provides that the day appointed on which the judgment of death shall be executed "must not be less than six months after the day in which the judgment is entered, and not longer than nine months thereafter."

If the imprisonment under the latter statute was to be in the county jail, as under the former, the statute would be *ex post facto*, because the punishment is increased by the three months' added imprisonment. *Ex parte Mealey*, 134 U. S. 160; *People* v. *McNulty*, 28 Pac. Rep. (Cal.) 816.

Section 3 of the act of 1903 provides that persons sentenced to death shall, within ten days thereafter, be conveyed to the North Dakota penitentiary, "and securely kept in close confinement until the day designated for the execution. . . ." Imprisonment in the penitentiary as compared with imprisonment in the county jail is an increased and greater punishment. Case *supra*.

Mr. Emerson H. Smith, with whom *Mr. W. H. Barnett* was on the brief, for defendant in error:

The statute of 1903 is not void as *ex post facto;* it is an additional bulwark in favor of personal security. *Calder* v. *Bull*, 3 Dall. 386. For definitions of *ex post facto* laws in which *increase* of punishment is an element, see *United States* v. *Hall*, 26 Fed. Cas. 84; *S. C.*, 6 Cranch, 171; *King* v. *Missouri*, 107 U. S. 221; *Hopt* v. *Utah*, 110 U. S. 574; *In re Medley*, 134 U. S. 160; *Cummings* v. *Missouri*, 4 Wall. 277; *Ex parte Garland*, 4 Wall. 333; *State* v. *Hayes*, 140 N. Y. 484. The act is in mitigation of the death penalty any change in which, short of death itself, is considered a mitigation, and postponement of the time of its infliction is also a mitigation. *Commonwealth* v. *Gardner*, 11 Gray, 438; *Commonwealth* v. *Wyman*, 12 Cush. 239;

Cooley on Const. Lim. § 272; *In re Tyson,* 13 Colorado, 487. If any shortening of life is to the convict's disadvantage any extension of life must be considered to his advantage. *Territory* v. *Miller,* 4 Dakota, 173, 181; *State* v. *Rooney,* 95 N. W. Rep. (N. Dak.) 517.

The fact that the convict is kept in the penitentiary in close confinement instead of in the county jail does not increase the severity of the punishment. The word "close" is not necessarily synonymous with "solitary." If the statute does not require solitary imprisonment there is no presumption that the officers of the penitentiary will make the confinement solitary. *Holden* v. *State,* 137 U. S. 483.

The fact that the execution is to be at the penitentiary instead of in the county in which the conviction was had does not make the statute *ex post facto*. *In re Tyson,* 30 Colorado, 487.

Whether the change in this law works to the advantage or disadvantage of the convict, *i. e.,* which is the severer punishment, imprisonment for three months longer before hanging, under the new law, or death by hanging three months earlier, under the old law, is a question of law for the court to decide. *People* v. *Hayes,* 140 N. Y. 488, and other cases cited in 95 N. W. Rep. 518. *Hartung* v. *People,* 22 N. Y. 695, distinguished.

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

It appears from the statement of the case that the statute in force when the sentence of death was pronounced differed from those in force when the crime was committed and when the verdict was rendered, in these particulars:

1. By the later law, close confinement in the penitentiary for not less than six months and not more than nine months, after judgment and before execution, was substituted for confinement in the county jail for not less than three months nor more than six months after judgment and before execution.

2. By the later law, hanging, within an inclosure at the penitentiary by the warden or his deputy, was substituted for hanging by the sheriff within the yard of the jail of the county in which the conviction occurred.

We are of opinion that in the particulars just mentioned the statute of 1903 is not repugnant to the constitutional provision declaring that no State shall pass an *ex post facto* law. It did not create a new offense nor aggravate or increase the enormity of the crime for the commission of which the accused was convicted, nor require the infliction upon the accused of any greater or more severe punishment than was prescribed by law at the time of the commission of the offense. The changes, looked at in the light of reason and common sense and applied to the present case, are to be taken as favorable rather than as unfavorable to him. It may be sometimes difficult to say whether particular changes in the law are or are not in mitigation of the punishment for crimes previously committed. But it must be taken that there is such mitigation when by the later law there is an enlargement of the period of confinement prior to the actual execution of the criminal by hanging. The giving, by the later statute, of three months' additional time to live, after the rendition of judgment, was clearly to his advantage, for the court must assume that every rational person desires to live as long as he may. If the shortening of the time of confinement, whether in the county jail or in the penitentiary before execution, would have increased, as undoubtedly it would have increased, the punishment to the disadvantage of a criminal sentenced to be hung, the enlargement of such time must be deemed a change for his benefit. So that a statute which mitigates the rigor of the law in force at the time a crime was committed cannot be regarded as *ex post facto* with reference to that crime. *Calder* v. *Ball*, 3 Dall. 386, 391, Chase, J.; Story's Const. § 1345; Cooley's Const. Lim. *267; *Commonwealth* v. *Gardner*, 11 Gray, 438, 443; 1 Bishop's Crim. Law, § 280. Besides, the extension of the time to live, given by the later law, increased the opportunity of the ac-

cused to obtain a pardon or commutation from the Governor of the State before his execution.

Nor was the punishment, in any substantial sense, increased or made more severe by substituting close confinement in the penitentiary prior to execution for confinement in the county jail. It is contended that "close confinement" means "solitary confinement," and *Medley's Case*, 134 U. S. 160, is cited in support of the contention that the new law increased the punishment to the disadvantage of the accused. We do not think that the two phrases import the same kind of punishment. Although solitary confinement may involve close confinement, a criminal could be kept in close confinement without being subjected to solitary confinement. It cannot be supposed that any criminal would be subjected to solitary confinement when the mandate of the law was simply to keep him in close confinement.

Again, it is said that the law in force when the crime was committed only required confinement, whereas the later statute required *close* confinement. But this difference of phraseology is not material. "Confinement" and "close confinement" equally mean such custody, and only such custody, as will safely secure the production of the body of the prisoner on the day appointed for his execution.

The objection that the later law required the execution of the sentence of death to take place within the limits of the penitentiary rather than in the county jail, as provided in the previous statute, is without merit. However material the place of confinement may be in case of some crimes not involving life, the place of execution, when the punishment is death, within the limits of the State, is of no practical consequence to the criminal. On such a matter he is not entitled to be heard.

The views we have expressed are in accord with those announced by the Supreme Court of North Dakota. *State* v. *Rooney*, 12 N. Dak. 144, 152.

We are of opinion that the law of 1903 did not alter the

situation to the material disadvantage of the criminal, and, therefore, was not *ex post facto* when applied to his case in the particulars mentioned.

Judgment affirmed.

UNITED STATES *v.* CROSLEY.

APPEAL FROM THE COURT OF CLAIMS.

No. 96. Submitted December 9, 1904.—Decided January 23, 1905.

While the court may not add to or take from the terms of a statute, the main purpose of construction is to give effect to the legislative intent as expressed in the act under consideration.

The Navy Personnel Act undertook to equalize the pay of naval officers with those officers of the Army of equal rank as to duties properly required of a naval officer, and it has no operation to provide pay for services peculiar to the Army.

A lieutenant in the Navy serving as aid to a rear-admiral is entitled to the additional two hundred dollars allowed to a lieutenant serving as aid to a major-general under § 1261, Rev. Stat., but he is not entitled to the mounted pay allowed to the army lieutenant serving as such aid under § 1301, Army Regulations.

THIS case was tried in the Court of Claims upon a petition filed to recover pay for services in the United States Navy, rendered by the defendant in error, while he was a lieutenant of the junior grade and acting as aid to Rear-Admiral Watson, then serving with the rank of rear-admiral in the nine higher numbers of that grade, and, under section 1466 of the Revised Statutes, entitled to rank with a major-general in the Army. The claimant alleges that he should have received from the first day of July, 1899, to the eighth day of September, 1899,—

Pay of a first lieutenant in the Army, being the grade corresponding to lieutenant, junior grade, in the Navy, under Revised Statutes, § 1261	$1,500
Longevity pay under Revised Statutes, § 1262, for second five years of service	150
Pay as aid to rear-admiral of corresponding grade to major-general, under Revised Statutes, § 1261	200
Mounted pay due under Army Regulations of 1895, paragraph 1301, to "authorized aids duly appointed"	100
Longevity pay upon the last two items under Revised Statutes, § 1262	30
Total	$1,980

That from September 9, 1899, to September 8, 1900, he was entitled to pay as follows:

Pay of a first lieutenant in the Army under Revised Statutes, § 1261	$1,500
Longevity pay under Revised Statutes, § 1262, for third five years of service	300
Pay as aid to rear-admiral of corresponding grade to major-general, under Revised Statutes, § 1261	200
Mounted pay due under Army Regulations of 1895, paragraph 1301	100
Longevity pay on the last two items under Revised Statutes, § 1262	60
Total	$2,160

He received pay during the period in controversy at the rate of $1,800 per annum, being from July 1, 1899, to September 8, 1899, the rate of pay granted by statute, Rev. Stat. § 1556, to a lieutenant, junior grade, at sea during his first five years in that rank, and for the period from September 9, 1899, to September 8, 1900, being the rate fixed by Revised Statutes, § 1261, for a first lieutenant not mounted, with the longevity allowance of the statute, § 1262, for the third five years of service, and he claims that, in addition to the amount allowed,

he is entitled to pay or allowance as aid to a rear-admiral; also, mounted pay due for such service, with the longevity pay arising from the items in question. In all, he claims the sum of $394.

The Court of Claims upon the hearing made the following findings of fact:

"The claimant entered service in the United States Navy on the 9th day of September, 1889, and from the 1st day of July, 1899, until the 8th day of September, 1900, was a lieutenant, junior grade, in the Navy, and an aid to Rear-Admiral J. C. Watson; Rear-Admiral Watson was at that time one of the nine higher numbers of the grade of rear-admiral, and was entitled under section 1466 of the Revised Statute to rank with a major-general in the United States Army. During said period claimant was paid at the rate of $1,800 a year."

And as conclusions of law held:

"Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimant recover judgment of and from the United States in the sum of three hundred and ninety-four dollars ($394)."

From the judgment of that court the United States appeals to this court.

Mr. Assistant Attorney General Pradt and *Mr. Special Attorney John Q. Thompson* for the United States:

It is a question of rank which determines the pay and not the character of the service which the officer performs. The position of aid to either a major-general or to a rear-admiral is not a distinct rank, within the meaning of the law. The Navy Personnel Act, very likely by oversight, leaves an aid to a rear-admiral in exactly the same position as it found him, with no provision for his compensation for his services as such aid.

He is not entitled to mounted pay by reason of acting as aid to a rear-admiral if the court should find that he is not entitled to $200 pay as aid, since the mounted pay is claimed as the pay

of an aid to a major-general. But it may be contended that he should rank for the purpose of pay with a first lieutenant mounted, and that therefore he is entitled to mounted pay. The increase in pay for mounted service follows the condition where the officer is compelled to keep a horse in order to the proper performance of his duties. No such condition is possible in sea service in the Navy. The right to mounted pay depends wholly upon the condition of mounted service, or a kind of service that requires the officer performing the same to be mounted, and since claimant was in a position where he could not have performed mounted service, and where such service was palpably inappropriate to his situation, it does not come within the conditions which entitle him to mounted pay.

Mr. George A. King and *Mr. William B. King* for appellee:

Officers of the Navy are granted by the Personnel Act "the same pay and allowances" as officers of the Army. These words are used to describe the "entire compensation" of an officer of the Army. *Emory* v. *United States*, 19 C. Cl. 266, and the evident purpose is that with the exception named in the act (forage) naval officers shall have what army officers receive. There is no reason for the discrimination attempted to be made by the United States between pay for rank and pay for special duty and it clearly violates this principle of equality of pay. Section 1261, Rev. Stat., gives to the rank of first lieutenant two different rates of pay, "mounted" and "not mounted." These rates of pay vary under Section 1262 according to the length of service of these officers. They may draw additional pay while serving as aids to brigadier or major-generals. On foreign service, after May 26, 1900, they may receive ten per cent increase of pay under the acts of May 26, 1900, and March 2, 1901, 31 Stat. 211, 903. Section 1265, Rev. Stat., adds another rate of pay to all officers, that is, half pay while on leave beyond thirty days a year.

First lieutenants in the Army receive pay made up of grade pay, longevity pay, foreign duty pay, mounted pay or pay for

special duty, besides allowances. The supposed "pay for rank" cannot be the "pay and allowances" intended by the Navy Personnel Act.

As to mounted pay the defense is based upon a misunderstanding. Section 1301, Army Regulations, under which aids to major-generals draw mounted pay provides mounted pay whether the officer is or is not mounted. Section 1272, Rev. Stat., gives forage to officers only for horses actually kept by them in service, but mounted pay is granted without regard to the question whether an officer has or has not a horse in service.

Engineer officers of the Army receive mounted pay although they in time of peace are to superintend river and harbor improvements and do not require horses.

The Navy Personnel Act gives to naval officers the pay of army officers "provided by or in pursuance of law." This includes not only the pay granted by direct statute but the pay allowed under the Army Regulations, in pursuance of law.

The equality of pay between the Army and Navy as fixed by the Personnel Act is intended to be a substantial equality, which cannot exist unless under equivalent conditions in the two branches the same pay is received. Army "pay and allowances" is made up of many different items. All these items (except forage) must be paid to the naval officer, or he will not have "the same pay and allowances" as given to the army officer.

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

The decision of this case turns upon the answers to two questions arising under the facts stated. First, was the claimant entitled to the extra two hundred dollars, the same as allowed an aid to a major-general in the Army? Second, was he entitled to the "mounted pay" as allowed to the major-general's aid?

The Navy Personnel Act, so called, has been so frequently before this court in recent cases as to require little general discussion of its objects and purposes. *Rodgers* v. *United States*, 185 U. S. 83; *White* v. *United States*, 191 U. S. 545; *Gibson* v. *United States*, 194 U. S. 182; *United States* v. *Thomas*, decided at this term, 195 U. S. 418.

As pointed out in the opinion in the last-named case, while the act of July 16, 1862, Revised Statutes, § 1466, had fixed the relative rank of army and naval officers, no provision for similarity of pay was made until the passage of the Navy Personnel Act, 30 Stat. 1004, which act, while providing against a reduction of then existing pay of commissioned officers of the Navy, undertook to equalize the pay of naval officers (theretofore generally below that paid to officers of corresponding rank in the Army) with that of officers in the Army of equal rank. Under the act of July 16, 1862, rear-admirals ranked with major-generals. Section 13 of the Navy Personnel Act provides:

"That after June 30, 1899, commissioned officers of the line of the Navy and of the Medical Pay Corps shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army."

The claimant, as lieutenant of the junior grade in the Navy, corresponded in rank with a first lieutenant in the Army (Revised Statutes, § 1466), the rank of "master," named in § 1466, being subsequently changed to lieutenant, junior grade, 22 Stat. 472. By section 1098 of the Revised Statutes it is provided that each major-general shall have three aids, who may be chosen by him from the captains or lieutenants of the Army. First lieutenants, officers of the Army, under section 1261 of the Revised Statutes, are entitled to pay as follows:

"The officers of the Army shall be entitled to pay herein stated after their respective designations: . . . First lieutenant, mounted: sixteen hundred dollars a year; first lieuten-

ant, not mounted: fifteen hundred dollars a year; . . . aid to major-general: two hundred dollars a year, in addition to the pay of his rank."

For each five years of service it is provided in section 1262:

"There shall be allowed and paid to each commissioned officer below the rank of brigadier-general, including chaplains and others having assimilated rank or pay, ten per centum of their current yearly pay for each term of five years service."

The contention of the Government is that, while the pay of naval officers is made to correspond with that of army officers of like rank, the naval officer assigned to duty as aid may not receive the $200 additional pay, as it is not pay on account of rank, but on account of service. But we think this is too narrow a construction of the terms of the act, in view of its intent and purpose. For while we may not add to or take from the terms of a statute, the main purpose of construction is to give effect to the legislative intent as expressed in the act under consideration. An aid to a rear-admiral renders services similar to those rendered by an aid to a major-general in the Army. The naval aids are appointed under paragraphs 343 and 345 of the Naval Regulations of 1895, which are:

"SEC. 343. The chief of staff, flag lieutenant, clerk and aids shall constitute the personal staff of a flag officer."

"SEC. 345. (1) A flag officer may select any officer of his command to serve as flag lieutenant or clerk, provided his grade accords with the rules laid down in Article 344. (2) He may also, when necessary, select other line officers junior to the flag lieutenant to serve on his personal staff as aids, but shall not assign naval cadets to such duty."

They are selected for like service, and it is admitted that there would have been reason for a like express statutory provision in their favor as to compensation. The sum of $200 is allowed to an aid to a major-general in addition to the regular pay of his rank. It is allowed as payment for the additional service imposed. Bearing in mind the purpose of the act to give the same compensation to corresponding officers of the

Army and Navy, and that it is expressly provided that officers of the Navy shall receive the same pay and allowances, except for forage, as are or may be provided by law for officers of the Army of corresponding rank, we think it does no violence to, but rather carries out, the purpose of Congress to construe this section so as to give to an aid of a rear-admiral, in addition to the regular pay of his rank, pay similar to that allowed an aid to a major-general. We reach the conclusion that the Court of Claims was right in its allowance of this item.

The solution of the question as to mounted pay depends upon whether such pay is given to an officer whose duty requires him to be subject to mounted duty, or whether it is a term used to designate the pay of aids whether they are required to render mounted service or not. Section 1301 of the Army Regulations of 1895 provides:

"The following officers, in addition to those whose pay is fixed by law, are entitled to pay as mounted officers: Officers of the staff corps below the rank of major, officers serving with troops of cavalry, officers of a light battery duly organized and equipped, authorized aids duly appointed, officers serving with companies of mounted infantry, and officers on duty which, in the opinion of the department commander, requires them to be mounted and so certified by the latter on their pay vouchers."

The contention of the appellee is that aids, duly appointed under this section, serving in the Army, are entitled to this compensation, whether required to be mounted or not. And further, that the language "pay as mounted officers" is used in the paragraph rather with a view of fixing the amount to be paid than to characterize the service required. It is doubtless true that the terms mounted pay may be used in this sense. *Richardson* v. *United States*, 38 C. Cl. 182, is cited as an illustration of this use of the phrase. In that case it was held that an assistant surgeon in the Navy was entitled to mounted pay under the Navy Personnel Act, because an assistant surgeon in the Army was entitled thereto. Under section 1168 of the Revised Statutes, an assistant surgeon in the Army ranked

with a lieutenant of cavalry for the first three years of service, and with a captain of cavalry after the expiration of that period. Under these provisions the assistant surgeon was held entitled to mounted pay.

We are further cited to a decision of the Comptroller of the Treasury, 10 Comp. Dec. 523, holding that officers of the Pay Corps of the Navy are entitled to mounted pay, as officers of the Pay Corps of the Army are given by law cavalry or mounted pay. It may well be that in these cases mounted pay was descriptive of the compensation to be paid, and an officer may therefore be entitled to it, although he renders no mounted service.

But the right of mounted pay to an aid to a rear-admiral, assuming that the Navy Personnel Act assimilates the compensation of an admiral's aid to that of an aid to a major-general in the Army, depends upon whether an aid to a major-general under section 1301 of the Army Regulations above quoted, although he renders no mounted service, and may not be required to be mounted, is entitled to such compensation. We think sections 1302 and 1303 of the Army Regulations may also be noticed in this connection. They are:

"SEC. 1302. Department commanders will announce, in orders, the authority obtained from the Secretary of War for mounting companies of infantry, giving the date from which such mounted service commences, and termination of the same.

"SEC. 1303. Muster rolls and returns of light batteries and companies of mounted infantry will show the number, date and source of order authorizing mounted service. The pay accounts of officers charging mounted pay will contain the same information. A copy of the order will be attached to the first muster rolls prepared after the battery or company has been equipped or mounted; a copy of the order discontinuing such service will appear on the first muster rolls prepared after its discontinuance."

We think these sections, with § 1301 of the Army Regulations above quoted, read in the light of the statute (Rev. Stat.

§ 1270) giving to army officers the pay of cavalry officers of the same grade when assigned to duty which requires them to be mounted, indicate a general purpose to give to officers of the Army mounted pay when their duties are such as may require them to be actually mounted, or are such as may at any time subject them to the necessity of rendering mounted service. The particular section (1301) under which it is insisted that a naval aid is entitled to mounted pay, designates officers who either are or may be required to be mounted in the discharge of their duties, and likewise to "officers on duty which, in the opinion of the department commander, requires them to be mounted and so certified by the latter on their pay vouchers."

This paragraph was intended to include the particular classes of officers who are entitled to pay as mounted officers under the classification in the first part thereof, and gives the benefit of the higher rate of compensation to other officers, not expressly named therein, whose duties require them to be mounted. It may be true, as argued at the bar, that there may be times when the duties of an aid to a major-general will not require him to be mounted. But, as we understand the Army Regulations, such officers may be at any time required to render mounted service, and are therefore given the pay of that class. Obviously, the duties of an aid to a rear-admiral are not such as to require him to render mounted service, and as the Navy Personnel Act only undertakes to afford a measure of compensation for duties which can properly be required of a naval officer, it can have no operation to provide pay for services peculiar to the Army. As was held in *United States* v. *Thomas*, *supra*, it does not follow, because Congress gives special pay to army officers, that the same right of compensation applies to naval officers also. In that case it was held that an allowance to army officers who might be ordered to sea or a foreign port could not be given to naval officers whose regular duties require them to engage in service upon the sea and to cruise upon foreign waters and serve in foreign ports.

The present case affords still less reason for giving the pay of an army officer to one in the Navy, where the compensation is given for a character of service which never can be required except in the Army.

Upon this branch of the case we think the Court of Claims was in error, and the judgment for mounted pay should not have been rendered in favor of the claimant.

The judgment of the Court of Claims is modified, disallowing the sums claimed in the petition and carried into the judgment on account of mounted pay and longevity pay based thereon, and, as modified, is

Affirmed.

CREEDE AND CRIPPLE CREEK MINING AND MILLING COMPANY *v.* UINTA TUNNEL MINING AND TRANSPORTATION COMPANY.

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

No. 18. Argued April 15, 18, 1904.—Reargued January 10, 11, 1905.—Decided January 30, 1905.

As between the Government and the locator, it is not a vital fact that there was a discovery of mineral in a lode claim before the commencement of any of the steps required to perfect a location, and by accepting the entry, and confirming it by a patent, the Government does not determine as to the order of proceedings prior to the entry but only that all required by law have been taken.

Adverse proceedings, are called for only when one mineral claimant contests the right of another mineral claimant, and, as a tunnel is not a mining claim but only a means of exploration, the owner, prior to discovery of a lode or vein within the tunnel, is not bound to adverse the application for the patent of a lode claim, the lode of which was discovered on the surface; and his omission to do so does not preclude him from asserting a right prior to the date of discovery named in the certificate of location on which the patent for the surface lode claim is based.

THE facts are stated in the opinion.

Mr. Charles S. Thomas, with whom *Mr. A. T. Gunnell, Mr. W. H. Bryant, Mr. H. H. Lee, Mr. T. M. Patterson, Mr. E. F. Richardson* and *Mr. H. N. Hawkins* were on the brief, for petitioner.

Mr. Charles J. Hughes, Jr., with whom *Mr. Scott Ashton,* and *Mr. Gerald Hughes* were on the brief, for respondent.

Mr. J. C. Helm, by special leave, as *amicus curiæ.*

MR. JUSTICE BREWER delivered the opinion of the court.

Certiorari to review a judgment of the United States Circuit Court of Appeals for the Eighth Circuit, 119 Fed. Rep. 164, reversing a judgment of the Circuit Court of the United States rendered upon a verdict of a jury directed by the court.

The action was originally brought by the Creede and Cripple Creek Mining and Milling Company, as plaintiff, against the Uinta Tunnel Mining and Transportation Company, as defendant, in the District Court of the county of El Paso, Colorado, for the possession of certain mining claims and for damages. Equitable relief was also prayed. On motion of the defendant the action was removed to the United States Circuit Court for the District of Colorado, where, also on its motion, the pleadings were reformed and the action made one for the possession of the property and damages.

The plaintiff filed an amended complaint, alleging in substance that it was the owner in fee and in possession and entitled to the possession of the Ocean Wave and Little Mary lode mining claims—being survey lot No. 8192, evidenced by mineral certificate No. 338, the patent of the United States to said plaintiff for said claims bearing date December 21, 1893—that said claims were duly located and discovered on the second of January, 1892, and that the patent related back and took effect of that date for all purposes given and provided

by the laws of the United States and the State of Colorado concerning mining claims.

Entry upon the claims and ouster of plaintiff by defendant by means of its tunnel were also alleged.

Thereafter the defendant filed its answer. Upon motion of plaintiff certain portions thereof were stricken out, and on the trial testimony offered by the defendant in support of the portions stricken out was rejected.

The matter to be determined is the sufficiency of the defenses pleaded and stricken out. To appreciate them fully it is well to state some facts about which there is no dispute, and it is sufficient to state the facts in reference to one of the lode mining claims, as the proceedings in respect to the two were alike. On February 1, 1892, J. B. Winchell and E. W. McNeal filed in the office of the county clerk of El Paso County (the county in which the mining claim was situated) a certificate of location which, not verified by affidavit or other testimony, stated that they had on January 2, 1892, located and claimed, in compliance with the mining acts of Congress, 1,500 linear feet on the Ocean Wave lode, and gave the boundaries of the claim. By several mesne conveyances the title of Winchell and McNeal passed to the plaintiff. On August 5, 1893, the plaintiff made an entry of the claim in the proper land office of the United States, and, no proceedings in adverse being instituted, a patent therefor was issued to it on December 21, 1893. There is no reference in the patent to the discovery or the filing of the location certificate. The first appearance of the claim on the records of any office of the United States is the entry in the local land office of August 5, 1893, and the only prior record in any state office is the location certificate, unsworn to, filed February 1, in which the parties filing the certificate stated that they had discovered the lode on January 2, 1892. On February 25, 1892, a location certificate of the defendant's tunnel was filed in the office of the county clerk of El Paso County, which, verified by the oath of one of the locators, stated that on January 13, 1892, they

had located the tunnel site by posting in a conspicuous place and at the entrance to the tunnel a notice of their intent to claim and work the tunnel; that they had performed work therein to the value of $270 in driving said tunnel and $80 in furnishing and putting in timbers, and that it was their *bona fide* intent to prosecute the work with diligence and dispatch for the discovery of lodes and for mining purposes. The certificate also contained a full description of the boundaries of the tunnel site as claimed.

In a general way it may be said that the defenses which were stricken out were a priority of right and an estoppel. We quote these paragraphs from the answer:

"It further avers that the patent of the United States issued for said Ocean Wave and Little Mary lodes and lode mining claims was issued subject to the act of Congress in reference to tunnel rights and subject to the laws of the State of Colorado in reference to the right to run tunnels through ground that may be patented, for the purpose of reaching territory that belongs to tunnel owners beyond such patented claims, and subject to the rights which the defendant The Uinta Tunnel Mining and Transportation Company and its grantors had acquired by reason of the location of said Uinta tunnel, and in and to any and all lodes, veins, and mining claims that it might cut or discover in driving said tunnel, as is guaranteed to the locator of said tunnel under and by virtue of section 2323 of the Revised Statutes of the United States; that the pretended discovery alleged and pretended to have been made in and upon said pretended Ocean Wave and Little Mary lodes and lode mining claims, and by virtue of which the plaintiff claims the right to patent the same under the laws of the United States, was not made until long after the location of said Uinta tunnel, and at the time said pretended locations were made said locators thereof were advised and knew that said tunnel had been located and had been and was being prosecuted with due diligence and in strict compliance with the terms and conditions of the statutes of the United States

and of the State of Colorado, which authorize and provide for the location and prosecution of such tunnels and which define and determine the rights pertaining thereto; and that said pretended Ocean Wave and Little Mary lode mining claims, so far as the same may be now claimed and possessed by said plaintiff, were taken and held subject to the rights of this defendant as owner of said Uinta tunnel, located in accordance with section 2323 of the Revised Statutes of the United States, and also subject to the rights of this defendant to cross said claims and to drive drifts therein and to follow said lode claims as located by this defendant and to reach lode claims so owned by this defendant, as hereinbefore and hereinafter stated.

"It alleges that it and its grantors have expended in and upon said tunnel the sum of more than one hundred and twenty-five thousand dollars ($125,000), and in addition to said expenditures have also expended upon surface work, in improvements and expenses, the further sum of not less than ten thousand dollars ($10,000).

"It alleges that its work and the work of its said grantors in and upon said tunnel has been done openly and without concealment; that the same has been at all times prosecuted under the claim of the defendant and its grantors of the right so to do by virtue of the location of said tunnel and tunnel site location, under and by virtue of the laws of the United States, and under the provisions of section 2323 of the Revised Statutes of the United States; and that the expenditures thereof and the developments made thereon have been made in compliance with the terms and provisions of and in reliance upon said statute.

"That the plaintiff, by permitting and allowing this defendant to expend more than the sum of one hundred and thirty-five thousand dollars ($135,000) as aforesaid in reaching, uncovering and discovering said ore body, has no right to interfere with the defendant in operating its tunnel over, through and along said pretended Ocean Wave and Little Mary lodes and lode mining claims, but that, on the contrary, the plaintiff

by its conduct and actions in the premises as hereinabove recited and set forth has permitted and allowed the defendant to expend said sum of one hundred and thirty-five thousand dollars ($135,000), and has permitted and allowed the defendant so to proceed with said tunnel through and across said pretended Ocean Wave and Little Mary lodes and lode mining claims until the same has ripened into such a license and permission as entitles the defendant to use its said tunnel as it penetrates said pretended Ocean Wave and Little Mary lodes and lode mining claims, and that said license and permission is such that the defendant cannot be disturbed therein."

It was also alleged that the tunnel had been driven some 2,200 feet; that it entered the ground of the plaintiff at about 550 feet from its portal, and in running through that ground the tunnel was driven 625 feet, leaving the plaintiff's ground at about 1,175 feet from the portal; that after passing it the defendant discovered in the tunnel three or four blind lodes, which it duly located; and it was not until after the discovery and location of these lodes that the plaintiff commenced this action.

Was there error in striking out these defenses? By section 2319, Rev. Stat., "all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase." Until, therefore, the title to the land passes from the Government the minerals therein are "free and open to exploration and purchase." A lode locator acquires a vested property right by virtue of his location, *Clipper Mining Co.* v. *Eli Mining & Land Co.*, 194 U. S. 220, but what is the extent of that property right? Section 2322 defines it as follows: "The locators . . . shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a

perpendicular in their course downward as to extend outside the vertical side lines of such surface locations." The express grant to the locator made by this section includes only the surface and the veins apexing within the boundaries of the location. Until, therefore, by entry and payment to the Government the equitable title to the ground passes to the locator, he is in no position to question any rights of exploration which are granted by other provisions of the statute. The fee still remains in the Government. By section 2320 it is provided that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." And by section 2324: "The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located, by reference to some natural object or permanent monument as will identify the claim." Tunnel rights are granted by section 2323, which reads:

"Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid; but failure to prosecute the work on the tunnel for six months

shall be considered as an abandonment of the right to all undiscovered veins on the line of such tunnel."

It does not appear from the answer or testimony that the tunnel had reached the boundaries of the plaintiff's claims prior to the entry or even prior to the patent. For the purpose of this case, therefore, we must assume that, although its line had been marked out—a line extending through the plaintiff's ground—yet in fact no work had been done within such ground prior to the patent.

The propositions upon which the plaintiff relies are that discovery is the initial fact; that the patent when issued relates back to that initial fact and confirms all rights as of that date; that no inquiry is permissible as to the time of that discovery, it being concluded by the issue of the patent; that such time antedated anything done in or for the tunnel; that no adverse proceedings were instituted after it had applied for patent, and that, therefore, its right became vested in the ground, the same right which any other landowner has, and which could not be disturbed by the defendant by means of its tunnel. *St. Louis Mining Company* v. *Montana Mining Company*, 194 U. S. 235.

On the other hand, defendant contends that, as the first record in any office of the Government was the record of the entry on August 5, 1893, the patent issued in an *ex parte* proceeding is conclusive only that every preceding step, including discovery, had then been taken; that it in fact located its tunnel site prior to any discovery or marking on the ground of plaintiff's claim; that it was not called upon to adverse plaintiff's application for a patent, because no patent is ever issued for a tunnel, and it had not then discovered any vein within its tunnel; that plaintiff, with full knowledge of defendant's tunnel location, permitted the driving of the tunnel through its ground and beyond, at an expenditure of $135,000, and made no objection until the discovery of the veins beyond its ground, and then for the first time and to prevent defendant from developing such veins brought this action, and that by such acquies-

cence it was now estopped to question defendant's use of the tunnel.

Obviously the parties divide as to the effect of plaintiff's patent. The Circuit Court held with the plaintiff, the Court of Appeals with the defendant. It may be conceded that a patent is conclusive that the patentee has done all required by law as a condition of the issue; that it relates to the initiation of the patentee's right and cuts off all intervening claims. It may also be conceded that discovery of mineral is the initial fact. But when did the initial fact take place? Are all other parties concluded by the locator's unverified assertion of the date or the acceptance by the Government of his assertion as sufficient with other matters to justify the issue of a patent? Undoubtedly, so far as the question of time is essential to the right, the patent is conclusive, but is it beyond that?

In order to reach a clear understanding of the question it seems necessary to consider the legislation. Three things are provided for, discovery, location and patent. The first is the primary, the initial fact. The others are dependent upon it and are the machinery devised by Congress for securing to the discoverer of mineral the full benefit of his discovery. Chap. 6 of Title 32, Rev. Stat., is devoted to the subject of "Mineral Lands and Mining Resources." The first section, 2318, reserves mineral lands from sale, except as expressly directed. The next provides that all valuable mineral deposits in government lands shall be free and open to exploration and purchase and the lands in which they are found to occupation and purchase. In the next it is declared that no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim. The whole scope of the chapter is the acquisition of title from the United States to mines and mineral lands, the discovery of the mineral being, as stated, the initial fact. Without that no rights can be acquired. As said by Lindley, in his work on Mines, 2d ed., vol. 1, sec. 335:

"Discovery in all ages and all countries has been regarded

as conferring rights or claims to reward. Gamboa, who represented the general thought of his age on this subject, was of the opinion that the discoverer of mines was even more worthy of reward than the inventor of a useful art. Hence, in the mining laws of all civilized countries the great consideration for granting mines to individuals is *discovery*. 'Rewards so bestowed,' says Gamboa, 'besides being a proper return for the labor and anxiety of the discoverers, have the further effect of stimulating others to search for veins and mines, on which the general prosperity of the state depends.' "

Location is the act or series of acts by which the right of exclusive possession of mineral veins and the surface of mineral lands is vested in the locator. For this the only requirement made by Congress is the marking on the surface of the boundaries of the claim. By section 2324, however, Congress recognized the validity of any regulations made by the miners of any mining district not in conflict with the laws of the United States or the laws of the State or Territory within which the district is situated. This is held to authorize legislation by the State. Thus in *Belk* v. *Meagher*, 104 U. S. 279, 284, it was said:

"A location is not made by taking possession alone, but by working on the ground, recording and doing whatever else is required for that purpose by the acts of Congress and the local laws and regulations."

In *Kendall* v. *San Juan Mining Company*, 144 U. S. 658, 664, is this language:

"Section 2324 of the Revised Statutes makes the manner of locating mining claims and recording them subject to the laws of the State or Territory, and the regulations of each mining district, when they are not in conflict with the laws of the United States."

See also *Erhardt* v. *Boaro*, 113 U. S. 527, 533, 534, 535; *Butte City Water Company* v. *Baker*, 196 U. S. 119.

And many Territories and States (Colorado among the number) have made provisions in respect to the location other

than the mere marking on the ground of the boundaries of the claim. So before a location in those States is perfected all the provisions of the state statute as well as of the Federal must be complied with, for location there does not consist in a single act. In Morrison's Mining Rights, 11th ed., p. 37, the author, having primarily reference to the laws of Colorado, says:

"The location of a lode consists in defining its position and boundaries, and in doing such acts as indicate and publish the intention to occupy and hold it under the license of the United States. The formal parts of location include: 1, the location notice at discovery; 2, the discovery shaft; 3, the boundary stakes."

In *Smelting Company* v. *Kemp*, 104 U. S. 636, 649, Justice Field, referring to the fact that the terms "location" and "mining claim" are often indiscriminately used to denote the same thing, says by way of definition:

"A mining claim is a parcel of land containing precious metal in its soil or rock. A location is the act of appropriating such parcel, according to certain established rules."

See also *Northern Pacific R. R. Co.* v. *Sanders*, 49 Fed. Rep. 129, 135.

The patent is the instrument by which the fee simple title to the mining claim is granted.

Returning now to the matter of location, the Colorado statutes in substance require:

"1. To place at the point of discovery, on the surface, a notice containing the name of the lode, the name of the locator and the date of the discovery.

"2. Within sixty days from the discovery, to sink a discovery shaft ten feet deep showing a well-defined crevice.

"3. To mark the surface boundaries by six posts, one at each corner and one at the center of each side line, hewed or marked on the side or sides in towards the claim.

"4. The disclosure of the lode in an open cut, cross cut or tunnel suffices instead of a ten-foot shaft.

"5. Within three months from date of discovery he must file a location certificate with the county recorder giving a proper description of the claim, and containing also the name of the lode, the name of the locator, the date of the location, the number of feet in length on each side of the center of the discovery shaft and the general course of the lode." Morrison's Mining Rights, 11th ed., p. 59.

The issue of a patent for a lode claim in Colorado is therefore not only a conclusive adjudication of the fact of the discovery of the mineral vein, but also of compliance with these several provisions of its statutes. The Supreme Court of that State has decided that the order is not essential, providing no intervening rights have accrued. In *Brewster* v. *Shoemaker*, 28 Colorado, 176, 180, it said:

"The order of time in which these several acts are performed is not of the essence of the requirements, and it is immaterial that the discovery was made subsequent to the completion of the acts of location, provided only all the necessary acts are done before intervening rights of third parties accrue. All these other steps having been taken before a valid discovery, and a valid discovery then following, it would be a useless and idle ceremony, which the law does not require, for the locators again to locate their claim and refile their location certificate or file a new one."

And that has been the general doctrine. In 1 Lindley on Mines, 2d ed., § 330, the author says:

"The order in which the several acts required by law are to be performed is non-essential, in the absence of intervening rights. The marking of the boundaries may precede the discovery, or the discovery may precede the marking; and if both are completed before the rights of others intervene, the earlier act will inure to the benefit of the locator. But if the boundaries are marked before discovery, the location will date from the time discovery is made."

In 1 Snyder on Mines, § 354, it is said:

"While the general rule is, as stated elsewhere in the fore-

going sections, that a location must rest upon a valid discovery, yet a location otherwise good, with a discovery made after location and before the intervention of adverse claims or the creation of adverse rights, will validate the location from the date of discovery, and generally from the first act towards claim and appropriation—this by relation."

In Morrison's Mining Rights, 11th ed., p. 32:

"If a location be made before discovery, but is followed by a discovery in the discovery shaft, before any adverse rights intervene, such subsequent discovery cures the original defect and the claim is valid."

In *In re James Mitchell*, 2 L. D. 752, it was held by Commissioner McFarland that, "although prior to location no discovery of mineral was made within the ground claimed, upon a subsequent discovery prior to application for patent the location became good and sufficient, in the absence of any adverse rights."

In *Reins* v. *Raunheim*, 28 L. D. 526, 529, Secretary Hitchcock declared that "it is immaterial whether the discovery occurred before or after the location, if it occurred before the rights of others intervened. *Erwin* v. *Perego et al.*, 93 Fed. Rep. 608."

Reference is made to the statement of Secretary Smith in *Etling* v. *Potter*, 17 L. D. 424, 426, as though that announced a different conclusion, that "a location certificate is but one step, the last one, in the location of a mining claim." But a location certificate is simply a certificate required by the local statute or custom that some things have been done, and of course it must come after those things have been done.

Again, in the same volume, pp. 545 and 546, *Northern Pacific Railroad Company* v. *Marshall*, he said:

"In the location of a mineral claim, placer or lode, the first requirement of the law is a discovery. (Secs. 2329 and 2320 Rev. Stat.) All rights inuring to the benefit of the locators are based upon this initial act. (*Erhardt* v. *Boaro*, 113 U. S. 537; *United States* v. *Iron Silver Mining Company*, 128 U. S. 673; *O'Reilly* v. *Campbell*, 116 U. S. 418.) When, therefore, a

legal location has been made on land returned as agricultural, the slight presumption in favor of the return of the surveyor general is, *ipso facto*, overcome, and the burden of proofs shifts to the party attacking such mineral entry. By such discovery and location it is demonstrated that the return was erroneous, and it would be trifling with physical facts to put the *onus* on the locator to present further evidence until it is shown that, as a matter of fact, he had no discovery."

But the question he was considering was simply as to the burden of proof between one claiming land returned as agricultural land and one claiming a portion thereof, as an apparently legal location of a mineral claim.

In *North Noonday Mining Company* v. *Orient Mining Company*, 1 Fed. Rep. 522, 531, Judge Sawyer, in charging the jury, said:

"I instruct you further, that if a party should make a location in all other respects regular, and in accordance with the laws, and the rules, regulations and customs in force at the place at the time, upon a supposed vein, before discovering the true vein or lode, and should do sufficient work to hold the claim, and after such location should discover the vein or lode within the limits of the claim located, before any other party had acquired any rights therein, from the date of his discovery his claim would be good to the limits of his claim, and the location valid."

To the same effect was the charge of the same judge in *Jupiter Mining Company* v. *Bodie Mining Company*, 11 Fed. Rep. 666, 676.

In *Cedar Canyon Mining Company* v. *Yarwood*, 27 Washington, 271, the Supreme Court of Washington ruled that:

"In the absence of intervening rights, the fact that mineral is not discovered on a claim until after the notice of location is posted and the boundary marked is immaterial, and, where the discovery is the result of work subsequently done by the locator, his possessory rights under his location are complete from the date of such discovery. *Nevada Sierra Oil Co.* v.

Home Oil Co. [C. C.], 98 Fed. Rep. 673; *Erwin* v. *Perego*, 35 C. C. A. 482; *S. C.*, 93 Fed. Rep. 608; *Jupiter Min. Co.* v. *Bodie Consol. Min. Co.* [C. C.], 11 Fed. Rep. 666; 1 Lindl. Mines, § 335, and cases cited."

See especially *Erwin* v. *Perego*, cited in this quotation, decided by the Court of Appeals for the Eighth Circuit. Tending in the same direction are *Thompson* v. *Spray*, 72 California, 528, 533; *Gregory* v. *Pershbaker*, 73 California, 109, 118; *Tuolumne Cons. Mining Co.* v. *Maier*, 134 California, 583, 585.

But what is the meaning of the statute? Its language is "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." Does that require that a discovery must be made before any marking on the ground, especially when as under the Colorado statutes several other steps in the process of location are prescribed, or does it mean that no location shall be considered as complete until there has been a discovery? Bearing in mind that the principal thought of the chapter is exploration and appropriation of mineral, does it mean anything more than that the fact of discovery shall exist prior to the vesting of that right of exclusive possession which attends a valid location?

This may be looked at in another aspect. Suppose a discovery is not made before the marking on the ground and posting of notice, but is then made, and it and all other statutory provisions are complied with before the entry, which is an application for the purchase of the ground, of what benefit would it be to the Government to require the discoverer to repeat the marking on the ground, the posting of notice, and other acts requisite to perfect a location? If everything has been done which under the law ought to be done to entitle the party to purchase the ground, wherein is the Government prejudiced if the precise order of those acts is not followed? Or, to go a step further, suppose, on an application for a patent, an adverse suit is instituted, and on the trial it appeared that the plaintiff in that suit had made a discovery and taken all the

steps necessary for a location in the statutory order, although not until after the applicant for the patent had done everything required by law, would there be any justice in sustaining the adverse suit and awarding the property to the plaintiff therein on the ground that the applicant had not made any discovery until the day after his marking on the ground, and so the discovery did not precede the location?

These suggestions add strength to the concurring opinion of three leading commentators on mining law, the general trend of the rulings of the Department and decisions of the courts, to the effect that the order in which the several acts are done is not essential, except so far as one is dependent on another. Doubtless a locator does not acquire the right of exclusive possession unless he has made a valid location, and discovery is essential to its validity, but if all the acts prescribed by law are done, including a discovery, is it not sacrificing substance to form to hold that the order of those acts is essential to the creation of the right? It must be remembered that the discovery and the marking on the ground are not matters of record put *in pais*, and if disputed in an adverse suit or otherwise must be shown, as other like facts, by parol testimony. It must also be remembered that the certificate of location required by the Colorado statutes need not be verified. The one in this case was not. A locator might, if so disposed, place the date of discovery before it was in fact made, and at any time within three months prior to the filing of the certificate.

But it has been said that the question has been decided by this court adversely to these views, and *Enterprise Mining Company* v. *Rico-Aspen Mining Company*, 167 U. S. 108, and *Calhoun Mining Company* v. *Ajax Mining Company*, 182 U. S. 499, are cited. In the former case the question was as to when a vein discovered in a tunnel must be located, and in the opinion (p. 112) we said:

"In order to make a location there must be a discovery; at least, that is the general rule laid down in the statute. Sec-

tion 2320 provides: 'But no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located.' The discovery in the tunnel is like a discovery on the surface. Until one is made there is no right to locate a claim in respect to the vein, and the time to determine where and how it shall be located arises only upon the discovery—whether such discovery be made on the surface or in the tunnel."

But that comes far short of meeting the question before us. It is undoubtedly true that discovery is the initial fact. The language of the statute makes that plain, and parties may not go on the public domain and acquire the right of possession by the mere performance of the acts prescribed for a location. But the question here is whether, if there be both a discovery and the performance of all the acts necessary to constitute a location, the order in which these things take place is essential to the right of exclusive possession which belongs to a valid location?

In the *Ajax* case the contest was between mining claims on the one hand and a mining claim and tunnel site on the other. All the mining claims had passed to patent. The plaintiff in error, who was defendant below, held the junior patent issued upon a later entry, and the entries of plaintiff's claims were made and the receiver's final receipts issued prior to the location of the tunnel site. In other words, the defendant, admitting that its right to a tunnel had not been established by a location at the time of the entries of plaintiff's claims, sought to invalidate them by proof that there had been no previous discovery of mineral. This was refused by the trial court, and we sustained the ruling, saying (p. 510):

"The patents were proof of the discovery and related back to the date of the locations of the claims. The patents could not be collaterally attacked. This has been decided so often that a citation of cases is unnecessary."

An entry, sustained by a patent, is conclusive evidence that at the time of the entry there had been a valid location and

such valid location implies as one of its conditions a discovery, and the decision only went to the extent that this could not be challenged by one who at the time of the entry had made no location and therefore had acquired no tunnel right. There is nothing in this ruling to conflict with the views we have expressed.

It would seem, therefore, from this review of the authorities as well as from the foregoing considerations that, as between the Government and the locator, it is not a vital fact that there was a discovery of mineral before the commencement of any of the steps required to perfect a location, and that if at the time of the entry everything has been done which entitled the party to an entry, to wit, a discovery and a perfect location, the Government would not be justified in rejecting the application on the ground that the customary order of procedure had not been followed. In other words, the Government does not, by accepting the entry and confirming it by a patent, determine as to the order of proceedings prior to the entry, but only that all required by law have been taken.

If, therefore, the entry and patent do not of themselves necessarily determine the order of the prior proceedings, why may not any one who claims rights anterior to the entry and dependent upon that order show as a matter of fact what it was? One not a party to proceedings between the Government and the patentee is concluded by the action of the Government only so far as that action involves a determination. There is a determination by the fact of entry and patent that there was prior to the entry a discovery and a location. Having been so determined third parties may be concluded thereby.

But it may be said that when the time of a particular fact is concluded by an adjudication or when an opportunity is presented for such an adjudication and not availed of, the time as stated must be considered as settled; that when the plaintiff applied for its patent if there was any question to be made by the defendant of any statement of fact made in the location certificate, or other record, it should have been challenged by

an adverse suit. Failing to do so the fact must be considered to be settled as stated. Undoubtedly, if in an adverse suit the time of any particular matter is litigated, the judgment is conclusive, and if the date of discovery stated in the plaintiff's location certificate had been challenged in an appropriate action brought by the defendant and determined in favor of the plaintiff, there could be now no inquiry. So, when the owner of a lode claim makes application for a patent and the owner of another seeks to challenge the former's priority of right on account of the date of discovery, it is his duty to bring an adverse suit, and if he fails to do so that question will be as to him concluded. Such is the purpose and effect of the adverse proceedings.

Is the same rule also applicable to a tunnel site? This opens up the question of what are the rights and obligations of the owner of a tunnel? And here these facts must be borne in mind. The owner of a tunnel never receives a patent for it. There is no provision in the statute for one, and none is in fact ever issued. No discovery of mineral is essential to create a tunnel right or to maintain possession of it. A tunnel is only a means of exploration. As the surface is free and open to exploration, so is the subsurface. The citizen needs no permit to explore on the surface of government land for mineral. Neither does he have to get one for exploration beneath the surface for like purpose. Nothing is said in section 2323 as to what must be done to secure a tunnel right. That is left to the miners' customs or the state statutes, and the statutes of Colorado provide for a location and the filing of a certificate of location. When the tunnel right is secured the Federal statute prescribes its extent—a tunnel 3,000 feet in length and a right to appropriate the veins discovered in such tunnel to the same extent as if discovered from the surface.

If the tunnel right was vested before a discovery in the plaintiff's lode claim the defendant ought to have the benefit of it. The plaintiff's right does not antedate his discovery, at least it does not prevail over any then existing right. But, it

is said, the defendant did not adverse the plaintiff's application for a patent; that its omission so to do precludes it from now asserting a right prior to the date of discovery named in the certificate of location, just as a judgment in an adverse suit involving the question of date would have been conclusive. Is the owner of a tunnel who simply seeks to protect his tunnel and has as yet discovered no lode claim, bound to adverse an application for the patent of a lode claim, the lode of which was discovered on the surface? It is contended that the case of *Enterprise Mining Company* v. *Rico-Aspen Mining Company, supra,* decides this question. But in that case the line of the tunnel did not enter the ground of the lode claim but ran parallel with and distant from it some 500 feet, and we held that the mere possibility that in the line of the tunnel might be discovered a vein which extended through the ground of the distant lode claim did not necessitate adverse proceedings. Here the line of the tunnel runs directly through the ground of the plaintiff, and the question is distinctly presented whether, in order to protect the right to that tunnel, the defendant was called upon to adverse. Whatever might be the propriety or advantage of such action, the statute does not require it.

Sections 2325 and 2326 provide the manner of obtaining a patent and for adverse proceedings. The first commences: "A patent for any land claimed and located for valuable deposits may be obtained in the following manner." This, obviously, does not refer to easements or other rights, nor the acquisition of title to land generally, but only to land claimed and located for valuable deposits. Then, after prescribing certain proceedings, the statute adds, "if no adverse claim shall have been filed with the register . . . it shall be assumed that the applicant is entitled to a patent . . . and that no adverse claim exists." The next section commences, "Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and

extent of such adverse claim." The section then authorizes the commencement of an action by the adverse claimant and a stay of proceedings in the Land Department pending such action, and adds:

"After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment roll with the register of the land office, together with the certificate of the surveyor general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment roll shall be certified by the register to the Commissioner of the General Land Office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess. If it appears from the decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim, with the proper fees, and file the certificate and description by the surveyor general, whereupon the register shall certify the proceedings and judgment roll to the Commissioner of the General Land Office, as in the preceding case, and patents shall issue to the several parties according to their respective rights."

Reading these two sections together it is apparent that they provide for a judicial determination of a controversy between two parties contesting for the possession of "land claimed and located for valuable deposits;" in other words, the decision of a conflict between two mining claims, a decision which will enable the Land Department without further investigation to issue a patent for the land. A tunnel is not a mining claim, although it has sometimes been inaccurately called one. As we have seen, it is only a means of exploration. The owner has a right to run it in the hope of finding a mineral vein. When one is found he is called upon to make a location of the

ground containing that vein and thus creates a mining claim, the protection of which may require adverse proceedings. As the claimant of the tunnel he takes no ground for which he is called upon to pay, and is entitled to no patent. A judgment in adverse proceedings instituted by him (if such proceedings were required) might operate to create a limitation on the estate of the applicant for a patent to the mining claim, and thus, as it were, engraft an exception on his patent. But taking the whole surface the applicant is required to pay the full price of five dollars per acre with no deduction because of the tunnel. The statute provides for no reduction on account of any tunnel. The tunnel owner might be said to have established his right to continue the tunnel through the lode claim after patent, a right which he undoubtedly had before patent, or at least before entry. There is no statutory warrant for placing in a patent to the owner of a lode claim any limitation of his title by a reservation of tunnel rights. In *Deffeback* v. *Hawke*, 115 U. S. 392, 406, we said:

"The position that the patent to the plaintiff should have contained a reservation excluding from its operation all buildings and improvements not belonging to him, and all rights necessary or proper to the possession and enjoyment of the same, has no support in any legislation of Congress. The land officers, who are merely agents of the law, had no authority to insert in the patent any other terms than those of conveyance, with recitals showing a compliance with the law and the conditions which it prescribed."

Other limitations on the full title granted by a patent for a mineral claim are recognized in the statutes. Thus, by section 2339, which is found in the same chapter as the other sections quoted, the one devoted to "Mineral Lands and Mining Resources," it is provided that:

"Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the de-

cisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed."

But it has never been supposed that the owner of any of these rights was compelled to adverse an application for a patent for a mining claim, for they are not "mining claims."

The decisions on the question of the duty of the tunnel owner to adverse the application of the lode claimant are not harmonious. In *Bodie Tunnel & Mining Company* v. *Bechtel Consolidated Mining Company*, 1 L. D. 594, Secretary Kirkwood held that a tunnel location was a mining claim and necessitated adverse proceedings to protect its rights as against an applicant for a lode claim (see also *Back* v. *Sierra Nevada Con. Mining Company*, 2 Idaho, 386), while the Supreme Court of Colorado in *Corning Tunnel Company* v. *Pell*, 4 Colorado, 507, denied the right of a tunnel owner to adverse the application for a patent for a lode claim where the lode had not been discovered in the tunnel and the discovery shaft was not on the line of the tunnel. Lindley (sec. 725), referring to the decision in *Enterprise Mining Company* v. *Rico-Aspen Mining Company*, *supra*, said:

"In the light of this decision and the one which it affirms, the rule may be thus formulated: Where a lode claimant applies for a patent to a location embracing a lode which has previously been discovered in the tunnel, the tunnel claimant will be compelled to adverse to protect his rights. A right in the particular lode inures to the tunnel proprietor immediately upon its discovery in the tunnel, which right is essentially adverse to the lode applicant; but where there has been no discovery in the tunnel, and it cannot be demonstrated that the lode will be cut by the tunnel bore, there is no necessity for an adverse claim."

Without further review of the conflicting authorities, it would seem that whatever may be the propriety or advantage of an adverse suit, one cannot be adjudged necessary when

Congress has not specifically required it. Until the discovery of a lode or vein within the tunnel, its owner has only a possibility. He is like an explorer on the surface. Adverse proceedings are called for only when one mineral claimant contests the right of another mineral claimant.

If the defendant was not estopped by a failure to institute adverse proceedings then the trial court erred in striking out the parts of the answer in reference to the date of plaintiff's discovery, and the judgment of the Court of Appeals was right.

This conclusion avoids the necessity of any inquiry as to the effect of the alleged estoppel, and the judgment of the Circuit Court of Appeals is

Affirmed.

RAMSEY *v.* TACOMA LAND COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 138. Submitted January 17, 1905.—Decided January 30, 1905.

In a remedial statute such as § 5, act of March 3, 1887, 24 Stat. 557, enabling *bona fide* purchasers from railroad companies to perfect their titles by purchase from the Government in case the land purchased was not included in the grant the term "citizens," in the absence of anything to indicate the contrary, includes state corporations.

Whether a *bona fide* purchaser from a railroad company acts with reasonable promptness in availing of the provisions of the act of March 3, 1887, is a question primarily for the Land Department and one attempting to enter the land is charged with knowledge of the act, the railroad's title and, if the deeds have been properly recorded, of the claims of the railroad's grantee and subsequent assigns; and, under the circumstances of this case, this court will not set aside the decision of the Land Department allowing a *bona fide* purchaser to avail of the privilege of the act within ten months after the lands had been stricken from the company's list as the result of a decision affecting that and other lands rendered ten years after the purchase from the railroad company, and during which period all parties had considered the full equitable title to be in the railroad company and its grantees.

THIS was a suit commenced in the Superior Court of Pierce County, Washington, by the plaintiff in error, praying that she be decreed to be the owner of the S.W. $\frac{1}{4}$ of the N.W. $\frac{1}{4}$ of section 3, township 20 north, range 2 east, in said county, and that the defendants be adjudged to hold the legal title in trust for her. A decree of the trial court in her favor was reversed by the Supreme Court of the State, and the cause dismissed. 31 Washington, 351.

The essential facts, which are not disputed, are stated in the opinion of the Supreme Court. The land was within the primary limits of the grant to the Northern Pacific Railroad Company by joint resolution of Congress, of May 31, 1870. 16 Stat. 378. The company filed its map of general route on August 13, 1870, and its map of definite location on May 14, 1874. The Land Department thereupon withdrew from sale and entry this with other tracts. On May 19, 1869, one W. C. Kincade made a preëmption filing on the land, but had abandoned the filing and the land prior to the act of 1870. Subsequently to the filing of the map of definite location the tract was held by the company and considered by the Land Department to have passed to the company until the departmental decision of August 28, 1896, in *Corlis* v. *Railroad Company*, 23 L. D. 265 (on review 26 L. D. 652), which held that lands situated as this were excepted from the grant. In 1874 the railroad company, for value and in good faith, sold and conveyed the land to the Tacoma Land Company, a corporation created under the laws of Pennsylvania. Thereafter that company, for value and in good faith, sold to the other defendants, who also acted in good faith. The several deeds representing these transactions were placed on record in the county where the tract is situated. On October 13, 1896, the Commissioner of the General Land Office canceled the railroad company's list of the tract in question, on the basis of the decision in *Corlis* v. *Railroad Company*. On February 24, 1897, the plaintiff filed in the local land office her application to enter the land as a homestead, which filing was accepted by

the local officers, and in May of that year she went upon the land, and has there since remained, making improvements to the value of $1,200. In August, 1897, the land company filed its application to purchase the tract, under section 5 of the act of Congress of March 3, 1887. 24 Stat. 556. A contest between the plaintiff and the land company was had in the Department, which resulted in a decision in its favor, and to it a patent was issued.

Mr. John F. Shafroth, Mr. John C. Stallcup and *Mr. J. W. A. Nichols* for plaintiff in error.

Mr. Stanton Warburton and *Mr. E. R. York* for defendants in error.

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

Plaintiff in error presents but two questions which have not already been determined by this court. One is whether a state corporation is entitled to the benefit of section 5 of the act of 1887, which names as beneficiaries "citizens of the United States," or "persons who have declared their intentions to become such citizens." This can scarcely be considered a debatable question, for in *United States* v. *Northwestern Express Company*, 164 U. S. 686, similar language in the Indian Depredations Statute was adjudged broad enough to include a state corporation. No review of the authorities there considered and no restatement of the argument is necessary. Obviously, in a remedial statute like this, the term "citizens" is to be considered as including state corporations, unless there be something beyond the mere use of the word to indicate an intent on the part of Congress to exclude them.

The other question arises on the contention of the plaintiff, that the statute of 1887 is not curative but simply permissive; that it does not attempt to confirm the title of the purchaser

from the railroad company, but simply gives him the privilege of purchasing from the Government at the ordinary price. It is urged that it cannot be presumed that Congress intended that the land should be held indefinitely waiting for the election of the purchaser, and that the privilege must be exercised at once or considered as abandoned. It is said that the land company did not attempt to exercise the privilege immediately after the passage of the act, but waited for more than ten years. Obviously the statute is not a curative one, confirms no title, but simply grants a privilege. We shall assume that that privilege is not one continuing indefinitely, that the land is not held free from entry until the purchaser from the railroad company has formally refused to purchase, and that he must act within a reasonable time. Nevertheless, we are of opinion that the action of the Land Department must be sustained. It is true that the land company did not proceed immediately after the passage of the act of 1887, but until 1896 both the railroad company and the Land Department assumed that the land was already the property of the land company by its purchase from the railroad company. While all parties considered the full equitable title as vested in the land company, there was no duty cast upon it of securing a further title by purchase from the Government. Only after the decision in the *Corlis* case in 1896, and on October 13 of that year, was the land stricken from the railroad company's list. Within ten months thereafter the land company made its application. Now, whether it acted with reasonable promptness was a question primarily for the consideration of the Land Department. That Department had before it the application of the plaintiff to enter the land under the general land laws, and that of the land company to purchase it under the act of 1887; and after a full consideration it decided in favor of the land company, a decision which, in effect, determined that the company had acted with all necessary promptness and was entitled to the benefit of the statute. Of course, the privilege granted by the statute would be of little or no avail if it had

to be exercised on the very day. Some time must be allowed for acquiring knowledge of the situation and determining the course of action. The plaintiff was as fully charged with knowledge of this act of 1887 as the land company. Upon the records of the county were the deeds from the railroad to the land company and from the latter to its grantees. So she acted with knowledge both of the law and the facts, and is not in a position now to complain of the action of the Land Department. We are not justified in setting aside the decision of the Land Department and holding that it erred in awarding to the land company the privilege which the statute, without any express limitation of time, gives to it.

We see no error in the record, and the judgment of the Supreme Court of Washington is

Affirmed.

MUNSEY *v.* CLOUGH.

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

No. 126. Argued January 13, 1905.—Decided January 30, 1905.

Proceedings in interstate rendition are summary; strict common law evidence is not necessary, and the person demanded has no constitutional right to a hearing. The governor's warrant for removal is sufficient until the presumption of its legality is overthrown by contrary proof in a legal proceeding to review his action.

The indictment found in the demanding State will not be presumed to be void on *habeas corpus* proceedings in the State in which the demand is made if it substantially charges an offense for which the person demanded may be returned for trial.

Where there is no doubt that the person demanded was not in the demanding State when the crime was committed and the demand is made on the ground of constructive presence only he will be discharged on *habeas corpus*, but he will not be discharged when there is merely contradictory evidence as to his presence or absence, for *habeas corpus* is not the proper proceeding to try the question of alibi or any question as to the guilt or innocence of the accused.

THE facts are stated in the opinion.

Mr. Edward A. Lane for plaintiff in error:

The record fails to show this relator a fugitive from justice as to all of the several crimes with which she was charged, hence the rendition warrant was illegally issued. A person cannot be a fugitive from justice when not personally present in the State where the offense is alleged to be committed. *North Carolina* v. *Hall*, 28 L. R. A. 289, and cases cited; *People* v. *Hyatt*, 172 N. Y. 176.

As Massachusetts failed to show relator to be a fugitive from justice as to the three offenses alleged to be committed by her, it is not entitled to ask New Hampshire to comply with its demand that it be allowed to take relator there to try her for said three offenses. A demand that relator be surrendered to be tried and punished for three offenses is not a demand that she be surrendered to be tried and punished for two.

In this case Massachusetts is not seeking to extradite this relator for the alleged commission of two crimes as to which she may be a fugitive from justice, but is also seeking in this proceeding to extradite her for a crime as to which it is admitted she is not such fugitive, and hence cannot be extradited. *Lascelles* v. *Georgia*, 148 U. S. 537; *Commonwealth* v. *Wright*, 158 Massachusetts, 149. Interstate rendition does not depend on comity between the States but on the provisions of cl. 2, § 4, Art. IV of the Constitution.

The evidence contained in the requisition papers did not authorize a finding by the governor that the relator was a fugitive from justice as to any one of the three crimes charged against her, consequently the rendition warrant was illegally issued. *Ex parte Reggel*, 114 U. S. 642, distinguished. As to two of the offenses the statute of limitations had run and concealment of the crime does not prevent the running of the statute. *State* v. *Nute*, 63 N. H. 80.

The so-called *copy* of an affidavit which accompanied the requisition papers was incompetent evidence to be considered

by the governor on the question whether relator was a fugitive from justice.

If a foreign affidavit was admissible evidence it should have been produced, as it was the best evidence. Even then the original affidavit on file would not constitute such a judicial proceeding, or any part of such a judicial proceeding, nor such part of the record of the court as is contemplated by § 1, Art. IV, of the Constitution. *Baltimore &c. Ry. Co.* v. *Trustee &c.*, 91 U. S. 127, 130; *Roanoke Land &c. Co.* v. *Hickson*, 80 Virginia, 589; *D'Arcy* v. *Ketchum*, 11 How. 165; *Gibson* v. *Tilton*, 17 Am. Dec. 306.

The copy of the indictment was not competent evidence to show that the person indicted was within the State. Rev. Stat. § 5278; *Ex parte Swearingen*, 13 S. Car. 74, 79; *Re John Leary*, 10 Benedict, 197, distinguished, and see *Re Jackson*, 2 Flippen, 183; *People* v. *Hyatt*, 172 N. Y. 176, 189; *Ex parte Reggel*, 114 U. S. 651; *Roberts* v. *Reilly*, 116 U. S. 80, distinguished.

No citizen should be arrested and exiled from a State on evidence which does not carry with it in such State the penal consequences of false swearing.

The refusal of the governor to hear the relator at the time and under the circumstances in which she appeared before him, was not "due process of law" and deprived her of her legal rights. Spear on Extradition, 340; Anderson's Dictionary of Law under "Habeas Corpus"; *State* v. *Clough*, 71 N. H. 594; *In re Cook*, 49 Fed. Rep. 833; *Hovey* v. *Elliott*, 167 U. S. 409; *Roller* v. *Holly*, 176 U. S. 398, 409.

Under the organic and statutory law of the United States the relator was illegally restrained of her liberty and the rendering of judgment against her violated her constitutional rights. § 1, ch. 263, Pub. Stat. N. H.

The constitutional principles applicable to the preservation of personal liberty should be at least as strenuously applied when there is occasion therefor, as in the case of right to property. *East Kingston* v. *Darius Towle*, 48 N. H. 57; Opinion

of the Justices, 66 N. H. 629; *Carter* v. *Colby*, 71 N. H. 230; *State* v. *Jackman*, 69 N. H. 318, 330.

Mr. Edwin G. Eastman and *Mr. George A. Sanderson* for defendant in error, submitted:

At common law the time of the commission of an offense need not be proved as alleged. *Ledbetter* v. *United States*, 170 U. S. 606; *Commonwealth* v. *Sego*, 125 Massachusetts, 210; *Commonwealth* v. *Brown*, 167 Massachusetts, 144. This rule of law as to time should have the same application in requisition proceedings as in the trial of the case. Rev. Laws, Mass., ch. 218, § 20. The evidence submitted to the governor of New Hampshire, taken as a whole, should be construed to mean that the defendant fled from Massachusetts after the commission of the last offense charged in the indictment.

It is sufficient to justify the extradition of the plaintiff in error if it appears that she is a fugitive from the State asking her return as to one crime committed in the State. *Lascelles* v. *Georgia*, 148 U. S. 537; *Commonwealth* v. *Wright*, 158 Massachusetts, 149. If the indictment upon which this proceeding is based had contained only the first count, but it appeared that another indictment containing the other counts was pending in the same court, that fact would not prevent the rendition of the prisoner. The governor was justified in finding that she was a fugitive with reference to the first two counts in the indictment. On that question the relator is entitled to submit evidence and be heard, and the justice before whom the *habeas corpus* proceedings were returned may review the action of the governor in this respect. The governor's finding that the relator is a fugitive is not conclusive upon the court on *habeas corpus*. Church, Habeas Corpus, § 474*a*; 2 Moore Extradition, § 640; Spear Extradition, 391; *Hartman* v. *Aveline*, 63 Indiana, 344; *Jones* v. *Leonard*, 50 Iowa, 106; *In re Mohr*, 73 Alabama, 503.

An indictment is sufficient for the purpose of extradition proceedings when it is framed in accordance with the technical

rules of pleading of the State within which it is found, and where the offense was committed. 8 Ency. of Pl. and Pr. 816; *Commonwealth* v. *Hills*, 10 Cush. 530; *Commonwealth* v. *Costello*, 120 Massachusetts, 358; *Carlton* v. *Commonwealth*, 5 Met. 532; *Commonwealth* v. *Jacobs*, 152 Massachusetts, 276; *Benson* v. *Commonwealth*, 158 Massachusetts, 164.

There is no prescribed form in which the evidence on rendition proceedings must be submitted and in this case it was sufficient. Rev. Stat. § 5278; *State* v. *Clough*, 71 N. H. 594.

When a proper warrant has been issued the burden of showing that the prisoner has not fled or is not a fugitive from justice rests upon the prisoner in *habeas corpus* proceedings. *State* v. *Justus*, 24 Minnesota, 237. As to who is a fugitive, see *Roberts* v. *Reilly*, 116 U. S. 80; *Matter of Voorhees*, 32 N. J. L. 141; *Ex parte Reggel*, 114 U. S. 642.

The governor in determining the question as to whether the defendant is a fugitive from justice may receive evidence that fails to meet the requirements of legal proof if he deems it advisable. The policy of Congress and the legislature is to permit the chief magistrate to determine the question upon such proof as seems to him worthy of credit. *State* v. *Clough*, 71 N. H. 594; *Roberts* v. *Reilly*, 116 U. S. 80; *In re Cook*, 49 Fed. Rep. 833.

On the indictment, the statement of the district attorney and the request of the governor of Massachusetts, the governor of New Hampshire would have been justified in finding that the relator was a fugitive from justice and in ordering her return.

Mr. Justice Peckham delivered the opinion of the court.

This was a proceeding on *habeas corpus* in a state court of New Hampshire to obtain the discharge of the plaintiff in error from arrest under a warrant given by the governor of that State, directing the return of the plaintiff in error to the Commonwealth of Massachusetts, as a fugitive from justice.

Upon the hearing the state court refused to discharge the plaintiff in error, the order of refusal was affirmed by the Supreme Court, and she has brought the case here for review. (On a former proceeding in Supreme Court, see 71 N. H. 594.)

The proceedings before the governor of New Hampshire to obtain the warrant of arrest were taken under section 5278 of the Revised Statutes of the United States, reënacting the statute approved February 12, 1793, 1 Stat. 302; 3 U. S. Comp. Stat. 3597, relating to the arrest of persons as fugitives from justice, under clause 2 of section 2 of Article IV of the Constitution of the United States.

The papers before the governor of New Hampshire consisted of a copy of an indictment of the plaintiff in error, found in Massachusetts on the second Monday of February, 1902; it contained three counts, and charged the plaintiff in error with uttering and publishing as true a certain forged instrument, purporting to be a will, well knowing the same to be forged. The first count alleged that the crime was committed on the twenty-eighth of February, 1895, at Cambridge, in the county of Middlesex, in the Commonwealth of Massachusetts; and it also alleged that since the commission of the offense the plaintiff had not been usually or publicly a resident in that Commonwealth.

The second count averred the uttering, etc., to have been on the seventeenth day of May, in the year 1895, in the same place, and the indictment had the same averment as to the non-residence of the plaintiff in error as contained in the first count.

The third count averred the uttering at the same place as that named in the other two counts, but laid the date as the twentieth day of November, 1901. There was also before the governor of New Hampshire an application, dated the twenty-sixth of February, 1902, signed by George A. Sanderson, district attorney for the Northern District of Middlesex, to the governor of Massachusetts, requesting a requisition from him upon the governor of New Hampshire for the extradition of

the plaintiff in error, who, as stated in the application, stood charged by indictment with the crime of uttering forged wills, committed in the county of Middlesex (on the days stated in the indictment), and who, to avoid prosecution, had fled from the jurisdiction of the Commonwealth and was a fugitive from justice, and was within the jurisdiction of the State of New Hampshire. It was also stated in the application that the indictment was not found by the grand jury until the February sitting of the Superior Court in the year 1902. There was also before the governor of New Hampshire a copy of what purported to be an affidavit of one Whitney, the original of which was used before the governor of Massachusetts, to obtain the requisition. It is short, and is as follows:

"Commonwealth of Massachusetts, } ss:
Middlesex. }

"I, Jophanus H. Whitney, of Medford, in the county of Middlesex and said Commonwealth, on oath depose and say that Martha S. Munsey, who stands charged by indictment with the crime of uttering forged wills, as is more fully set forth in the papers hereto annexed, has fled from the limits of said Commonwealth and is a fugitive from justice. And I further depose that at the time of the commission of said crime she was in the State of Massachusetts, in the county of Middlesex of said Commonwealth, and that at the same time and previous thereto she was a resident of Cambridge in the said county of Middlesex; that she fled from said Commonwealth of Massachusetts on or about the fourth day of November, A. D. 1901; that she is not now within the limits of the Commonwealth, but, as I have reason to believe, is now in Pittsfield, in the State of New Hampshire. The grounds of my knowledge are that I have interviewed her since the fourth of November last in Pittsfield, New Hampshire, where she was living with her husband during the last week January last.

"Jophanus H. Whitney."

There was also a certificate of the district attorney for the

Northern District of Middlesex, that the offense charged against the plaintiff in error is a felony within that Commonwealth, and that application for the arrest and return of the fugitive had not been sooner made because the indictment was not found by the grand jury until February, 1902.

The governor of the Commonwealth of Massachusetts having given the requisition applied for, the papers above mentioned were presented to the governor of New Hampshire, and a request made that he should issue his warrant of arrest to take the plaintiff in error back to the Commonwealth of Massachusetts, as a fugitive from justice, and for the purpose of being tried on the indictment referred to. The counsel for the plaintiff in error appeared before the governor and stated they desired a hearing before him before the warrant of arrest should be granted. This hearing was refused, and the governor then granted the warrant for the arrest and return of the plaintiff in error to the Commonwealth of Massachusetts as a fugitive from justice. In that warrant it was provided that the plaintiff in error should be afforded an opportunity to sue out a writ of *habeas corpus* before being delivered over to the authorities of Massachusetts. She availed herself of that right and sued out such writ, and upon its return the plaintiff in error made several objections to the execution of the governor's warrant, and alleged the insufficiency of the papers to authorize the granting of the same. At the close of the hearing the counsel for plaintiff in error moved that she be discharged for the reasons stated in the motion; the motion was denied, subject to the objection and exception of the plaintiff in error. The record then shows the following:

"The court thereupon ordered that the relator proceed to introduce evidence upon the question whether she was in fact a fugitive from justice. This the relator's counsel declined to do, upon the ground that such action, on their part, would constitute a waiver of their right to object to the refusal of the governor to grant a hearing upon this question of fact.

"The court then directed that the counsel for the relator

state whether the relator waived the right to then, or at any future time, introduce further evidence upon this, or any question of fact, and counsel for relator declared that she did waive that right.

"No evidence was offered by the relator either upon the question whether the relator was a fugitive from justice, or upon any other question of fact, other than as above stated."

The question of the legality of the detention of the plaintiff in error is thus brought before the court. The proceedings in matters of this kind before the governor are summary in their nature. The questions before the governor, under the section of the Revised Statutes, above cited, are whether the person demanded has been substantially charged with a crime, and whether he is a fugitive from justice. The first is a question of law and the latter is a question of fact, which the governor, upon whom the demand is made, must decide upon such evidence as is satisfactory to him. Strict common law evidence is not necessary. The statute does not provide for the particular kind of evidence to be produced before him, nor how it shall be authenticated, but it must at least be evidence which is satisfactory to the mind of the governor. *Roberts* v. *Reilly*, 116 U. S. 80, 95. The person demanded has no constitutional right to be heard before the governor on either question, and the statute provides for none. To hold otherwise would in many cases render the constitutional provision, as well as the statute passed to carry it out, wholly useless. The governor, therefore, committed no error in refusing a hearing. The issuing of the warrant by him, with or without a recital therein that the person demanded is a fugitive from justice, must be regarded as sufficient to justify the removal, until the presumption in favor of the legality and regularity of the warrant is overthrown by contrary proof in a legal proceeding to review the action of the governor. *Roberts* v. *Reilly*, *supra*; *Hyatt* v. *Cockran*, 188 U. S. 691.

After the decision of the governor and the issuing of the warrant the plaintiff in error sued out this writ of *habeas corpus*

for the purpose of reviewing his action. The position taken by the plaintiff in error upon the hearing on the return of the writ in refusing to introduce evidence upon the question whether she was in fact a fugitive from justice left the case for decision upon the papers before the governor upon which he acted in issuing the warrant of arrest. We have no doubt that a *prima facie* case was made out, and as the plaintiff in error waived any right to give further evidence, she is concluded by that *prima facie* case. The indictment undoubtedly set forth a substantial charge against the plaintiff in error, and the facts therein set forth constituted a felony in the Commonwealth of Massachusetts, as certified by the district attorney. The sufficiency of the indictment, as a matter of technical pleading, will not be inquired into on *habeas corpus*. *Ex parte Reggel*, 114 U. S. 642; *Pearce* v. *Texas*, 155 U. S. 311; *Ex parte Hart*, 59 Fed. Rep. 894.

If the indictment be for three distinct offenses (although of the same nature) set out in the three different counts, as is argued by plaintiff in error, it will not be presumed that such an indictment is void under the laws of Massachusetts, and the question of procedure under the indictment is one for the courts of the State where it was found. The courts of that State would undoubtedly protect her in the enjoyment of all her constitutional rights. These are matters for the trial court of the demanding State, and are not to be inquired of on this writ. If it appear that the indictment substantially charges an offense for which the person may be returned to the State for trial, it is enough for this proceeding.

Upon the question of fact, whether the plaintiff was a fugitive from justice, her counsel, in the argument before this court, set up several objections of a technical nature, which, he argued, showed that the plaintiff in error was not present in Massachusetts at the time when one of the crimes, at least, was alleged to have been committed. As the indictment sets up in the first two counts that the plaintiff in error had not been usually or publicly a resident of Massachusetts at any

time since the commission of the offense set forth in those counts, it is argued that the indictment shows that she was not present in the State at the time when the third count charges a crime to have been committed, and the Whitney affidavit shows she fled from the State before the alleged commission of the crime set forth in the third count. There is no impossibility in the plaintiff in error having returned and been present in the State at the time of the alleged commission of the offense set forth in the third count, even though she had not been "usually or publicly a resident of that State" since the time when it is alleged that she committed the offenses set forth in the first two counts, and had fled therefrom before the commission of the last offense set forth in the third count. The affidavit of Mr. Whitney is to the effect that at the time of the commission of the crimes she was in the State of Massachusetts, and that at the same time and previous thereto she was a resident of Cambridge, in the county of Middlesex. Whether she was a resident or not is not important, as to the third count, if she were present in the State and committed the crime therein. The statement in the affidavit that she fled on *or about* the fourth day of November, 1901, while the third count of the indictment avers the commission of the crime on the twentieth of November of that year, is sufficiently exact, considering the facts in the case, as the affiant states, that she was in the Commonwealth at the time of the commission of the crime. Reasonably construed, the affidavit of Whitney shows the presence of the plaintiff in error in the State, and is sufficient, unexplained and uncontradicted for that purpose.

When it is conceded, or when it is so conclusively proved, that no question can be made that the person was not within the demanding State when the crime is said to have been committed, and his arrest is sought on the ground only of a constructive presence at that time, in the demanding State, then the court will discharge the defendant. *Hyatt* v. *Cockran*, 188 U. S. 691, affirming the judgment of the New York Court

of Appeals, 172 N. Y. 176. But the court will not discharge a defendant arrested under the governor's warrant where there is merely contradictory evidence on the subject of presence in or absence from the State, as *habeas corpus* is not the proper proceeding to try the question of alibi, or any question as to the guilt or innocence of the accused. As a *prima facie* case existed for the return of the plaintiff in error, and she refused to give any evidence upon the return of the writ which she had herself sued out, other than the papers before the governor, no case was made out for her discharge, and the judgment of the Supreme Court of New Hampshire refusing to grant it must, therefore, be

Affirmed.

SWIFT AND COMPANY *v.* UNITED STATES.

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

No. 103. Argued January 6, 7, 1905.—Decided January 30, 1905.

A combination of a dominant proportion of the dealers in fresh meat throughout the United States, not to bid against, or only in conjunction with, each other in order to regulate prices in and induce shipments to the live stock markets in other States, to restrict shipments, establish uniform rules of credit, make uniform and improper rules of cartage, and to get less than lawful rates from railroads to the exclusion of competitors with intent to monopolize commerce among the States, is an illegal combination within the meaning and prohibition of the act of July 2, 1890, 26 Stat. 209, and can be restrained and enjoined in an action by the United States.

It does not matter that a combination of this nature embraces restraint and monopoly of trade within a single State if it also embraces and is directed against commerce among the States. Moreover the effect of such a combination upon interstate commerce is direct and not accidental, secondary or remote as in *United States* v. *E. C. Knight Co.*, 156 U. S. 1.

Even if the separate elements of such a scheme are lawful, when they are bound together by a common intent as parts of an unlawful scheme to monopolize interstate commerce the plan may make the parts unlawful.

When cattle are sent for sale from a place in one State, with the expectation

they will end their transit, after purchase, in another State, and when in effect they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a constantly recurring course, it constitutes interstate commerce and the purchase of the cattle is an incident of such commerce.

A bill in equity, and the demurrer thereto, are neither of them to be read and construed strictly as an indictment but are to be taken to mean what they fairly convey to a dispassionate reader by a fairly exact use of English speech.

THE facts are stated in the opinion.

Mr. John S. Miller, with whom *Mr. Merritt Starr* was on the brief, for appellants:

The charges in each of the paragraphs or counts of the bill or petition of alleged violations of the Sherman Act are, respectively, mere statements of legal conclusions. Each is bad on demurrer for that reason.

These charges would be bad on that ground, even in an indictment under this act. *In re Greene*, 52 Fed. Rep. 104; *United States* v. *Cruikshank*, 92 U. S. 542, 563; *United States* v. *Simmons*, 96 U. S. 360; *United States* v. *Carll*, 105 U. S. 611; *United States* v. *Britton*, 107 U. S. 655; *Hazard* v. *Griswold*, 21 Fed. Rep. 178. And *a fortiori* are they bad in a bill or petition in equity, which is required to state the facts essential to the cause of action. *Lawson* v. *Hewell*, 118 California, 613; *Wright* v. *Dame*, 22 Pick. 59; *Ambler* v. *Choteau*, 107 U. S. 586; *Van Weel* v. *Winston*, 115 U. S. 228, 237; 1 Foster Fed. Prac. § 67.

The *facts* alleged are looked at and not adjectives or adverbs or epithets. *Magniac* v. *Thompson*, 2 Wall. Jr. 209; *Price* v. *Coleman*, 21 Fed. Rep. 357; *Van Weel* v. *Winston*, and *Ambler* v. *Choteau*, *supra*.

The importance of applying this rule with strictness here is more marked because answer by the defendants under oath is called for. This point is properly raised by demurrer. 1 Daniel Ch. Pr. 372. It was so raised in *Van Weel* v. *Winston*, *supra*.

The decree complained of, which is merely one of injunction, is erroneous on like grounds of indefiniteness. *Laurie* v.

Laurie, 9 Paige, 234, 235; *Robinson* v. *Clapp*, 65 Connecticut, 365; *Whipple* v. *Hutchinson*, 4 Blatchf. 190.

It makes clear the misconception of the Sherman Act and of Federal power to regulate commerce upon which the bill and decree proceed. They appear to go upon the theory that under the act of Congress the Federal courts are to regulate commerce, and the decree enjoins, not specific acts, but violations of the statute in terms as general as the act of Congress itself. A defendant cannot know from its terms what he may or may not do without making himself liable as in contempt.

This makes the insufficiency of the bill more obvious, as no valid decree could have been entered upon its allegations.

The provisions of the Sherman Act do not contemplate such a general proceeding or decree to interfere in advance with future dealings, as interstate commerce, which may be interstate trade or may be domestic trade according to the future and changeable intention of the dealers. *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 15.

The business of defendants of purchasing live stock and of selling fresh meats produced therefrom, as described in the bill, is not, upon the allegations of fact in the bill, interstate or foreign commerce.

The purchase of cattle as alleged and described in the first paragraph of the bill is not alleged or shown to be interstate commerce.

The business of defendants of selling such fresh meats, at the several places where they are so prepared, as described in the second paragraph, is not, under the facts there alleged, interstate trade or commerce. The sales and deliveries, although to dealers in other States and Territories, are there alleged to be made at the places where the meats are prepared by defendants, and are domestic sales.

The deliveries by defendants to the carriers, who are agents of the purchasers in that respect, under the allegations of the bill, are deliveries to the purchasers in the State where the sale is made; and the sales and deliveries are there fully completed.

Merchant v. *Chapman*, 4 Allen, 362; *Orcutt* v. *Nelson*, 1 Gray, 543; *Waldron* v. *Romaine*, 22 N. Y. 368; *Ramsey & Gore Co.* v. *Kelsea*, 55 N. J. L. 320; *Cotte* v. *Harden*, 4 East. 211; *Brown* v. *Hodgson*, 2 Camp. 86; *Groning* v. *Needham*, 5 Maule & S. 189; 2 Kent. Com. 499; *Crossman* v. *Lurman*, 192 U. S. 189, 198.

The sellers' act in delivering the merchandise to the common carrier, or carrying the merchandise to the carrier's depot (if that is taken to be in effect alleged), is not any part of the interstate transportation, and does not make the goods the subject of interstate commerce. *Coe* v. *Errol*, 116 U. S. 517, 528.

The fact that the sale is made with a view to the goods being transported by the buyer's agent to another State after the sale and delivery is fully completed, does not make the sale interstate commerce.

The sales alleged in the third paragraph of the bill, by agents of the owners in other States and Territories to whom the owners of the fresh meats have shipped the same for sale there by such agents on the ground, are not incidents of interstate commerce. *Coe* v. *Errol*, 116 U. S. 517, 525; *Kidd* v. *Pearson*, 128 U. S. 1, 23; *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 13, 17; *Austin* v. *Tennessee*, 179 U. S. 343; *Crossman* v. *Lurman*, 192 U. S. 189, 198; *Am. Harrow Co.* v. *Shaffer*, 68 Fed. Rep. 750; *Stevens* v. *Ohio*, 93 Fed. Rep. 793.

Under the allegations here in question, it is to be taken that the meats, before the sales here referred to are made, have come to their place of rest and are at rest for an indefinite time awaiting sale at their place of destination, and are a commodity in the market where the sales are made; and that the sales are not in the "original packages"; and that the meats, at the time of the sales, have become a part of the general property in the State where sold, and are there handled and sold as such. *Southern Coal Co.* v. *Bates*, 156 U. S. 577, 588; *Brown* v. *Houston*, 114 U. S. 623, 632; *Emert* v. *Missouri*, 156 U. S. 296, 310; *Singer Mfg. Co.* v. *Wright*, 97 Georgia, 123.

The point here made is entirely consistent with the rulings

in many cases, that the owner of merchandise, who transports it from one State to another for sale, has a right (which cannot be interfered with by state or municipal laws) to sell it as an article of interstate commerce. He also has a right to make such article part of the general property of the State into which it is taken, and he then has the right to sell and others have the right to purchase it as an article of domestic commerce, which cannot be interfered with by Federal law. The Sherman Act does not seek to and could not interfere with that right. *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 15, and *Kidd* v. *Pearson* and *Veazie* v. *Moor*, there cited. But this bill here does seek to interfere with that right. Again, the point here made is not touched by the line of decisions holding that state or municipal laws are invalid, which, by taxation or other regulations, discriminate against merchandise brought from another State, or seek to prevent interstate commerce therein, —such as *Welton* v. *Missouri*, 91 U. S. 465; *Walling* v. *Michigan*, 116 U. S. 446; *Minnesota* v. *Barber*, 136 U. S. 313; *Brimmer* v. *Rebman*, 138 U. S. 78, and *Schollenberger* v. *Pennsylvania*, 171 U. S. 1, 24, 25.

The bill of complaint does not show any contract, combination or conspiracy in restraint of interstate trade or commerce within the meaning of the Sherman Act.

It does not allege any acts of defendants monopolizing or attempting to monopolize or combining or conspiring to monopolize such trade or commerce.

If the act in question be given a construction which would sustain this bill of complaint, the statute would be unconstitutional.

The alleged offenses complained of are set forth in the sixth, seventh, eighth, ninth, tenth and eleventh paragraphs of the bill. As to the sixth and seventh paragraphs we maintain: The allegations of combination and conspiracy here are of mere legal conclusions. That the purchases of live stock referred to in the sixth and seventh paragraphs, as therein alleged, are not interstate commerce.

The first paragraph of the bill in which the business of purchasing live stock for slaughter is set forth and described, does not allege or show that the business is interstate commerce.

The description of the live stock in the sixth paragraph, as live stock produced and owned principally in other States and Territories, and shipped by the owners to the places where sold, for sale to persons engaged in producing and dealing in fresh meat, does not show that the sales of the live stock are interstate commerce. The live stock, when offered for sale in the pens of the stock yards, are, under the allegations of fact in the bill, to be considered as having become part of the general mass of property of the State where offered for sale. The defendants purchasing the live stock have the right so to treat and deal therewith. *Brown* v. *Houston*, 114 U. S. 622, 632; *Pittsburgh Coal Co.* v. *Bates*, 156 U. S. 577, 588, 589; *Emert* v. *Missouri*, 120 U. S. 489, 497. When purchased, the live stock is, under the allegations of this bill, at rest for an indefinite time, awaiting sale at its place of destination. *Diamond Match Co.* v. *Ontonagon*, 188 U. S. 82, 92.

The defendants have as much right, then, to treat and deal with and purchase such live stock as an article of domestic commerce as the State has so to treat it for the purposes of taxation or regulation. This bill seeks to interfere with that right under the Sherman Act.

If the sworn allegations of the bill in this respect were to be supplemented by other facts, as matters of common knowledge, with respect to the situation of the live stock when sold, such as appeared in the *Hopkins* and *Anderson* cases, the case of the Government would be no better. It would then appear that the cattle and other live stock are shipped to commission merchants at the stock yards; are then placed in the pens of the stock yards companies, and there held, cared for and fed by the stock yards company for the account of the commission merchants, and under the allegations here it must be taken that their bulk is broken up; they are divided into lots and sold and delivered by the commission merchant as the principal or

owner thereof, and so are not purchased as articles of interstate commerce.

But if these purchases of live stock are interstate commerce, the acts alleged in the sixth and seventh paragraphs are not violations of the Sherman Act. *Hopkins* v. *United States*, 171 U. S. 591; *Anderson* v. *United States*, 171 U. S. 604. They are the exercise of a constitutional right of defendants to control their own business.

There is nothing in the bill to show the proportion of the entire number of head of live stock offered for sale at the markets in question, which is bought by the defendants for the purposes of the production of fresh meat; and so there is nothing to show anything like monopoly or attempt at monopoly of the live stock purchases by the defendants.

There is nothing in the bill to show any attempt on the part of the defendants to control or affect the purchases or business in the purchases of live stock of any other persons than themselves. The alleged combinations by defendants in the sixth and seventh paragraphs charged have to do merely with their own business conduct in themselves buying live stock, or determining how much they shall buy, at private sale for consumption in their own private business.

The combination charged in the sixth paragraph, for directing their respective purchasing agents "to refrain from bidding against each other, except perfunctorily, and without good faith," does not allege a combination to restrain trade; or even a combination to refrain from bidding. A perfunctory bid, made without good faith, is one which the seller could accept and enforce.

The alleged combination in the seventh paragraph, "for bidding up, through their respective purchasing agents, the prices of live stock for a few days at a time at the said stock yards and open markets," does not charge a combination to restrain trade.

These alleged combinations do not have the direct and immediate effect of restraining interstate commerce, but their

effect, if any, upon interstate trade in live stock is indirect and incidental, within the meaning of the decisions of this court. The effect is not near so direct or immediate as the mutual agreement of the traders who were members of the Traders' Exchange in the *Anderson* case.

Obviously the supply of live stock for fresh meat greatly varies in the market at different seasons and times, while the demand for fresh meats for human consumption, for which defendants purchase such live stock, is comparatively constant and uniform.

It is a public benefit and not a public evil that defendants should always be able to supply such constant demand for their fresh meats, and that at the same time they should not overstock the market with their perishable meats. This makes it proper that they should act with some concert and common understanding in their purchases of live stock for that purpose.

As to the eighth paragraph we contend: The allegation of combination and conspiracy is of a mere legal conclusion, and insufficient. The sales of fresh meats by agents of defendants, as there described, under the facts alleged, are not interstate commerce. But if it be interstate commerce, no violation of the Sherman Act is thereby shown.

No criminal conspiracy is alleged. The charge there is not of a combination or conspiracy to restrain trade (which the statute forbids), but is of a combination or conspiracy to do a lawful act, the exercise of a constitutional right, viz: to raise, lower, fix and maintain their own prices, for their own property, in private sales thereof by themselves. The doing that is not prohibited or made criminal by the Act of Congress.

A criminal conspiracy is an agreement of two or more, either to do an act criminal or unlawful in itself, or to do a lawful act by means which are criminal or unlawful. *Pettibone* v. *United States*, 148 U. S. 203; *Commonwealth* v. *Shedd*, 7 Cush. 514. Here neither the act nor the means alleged are criminal or unlawful. The allegation of intent is immaterial. *Stevenson* v. *Newham*, 13 C. B. 285; *Allen* v. *Flood*, App. Cas. 1.

Again, this point is settled by the ruling in the *Knight Case*, 156 U. S. 1, 16, that the restraint of trade, if any, which a combination by defendants to raise or lower their own prices would tend to effect would be an indirect result, and such result would not necessarily determine the object of the contract, combination or conspiracy.

As to the ninth paragraph we contend: The allegation is of a conclusion of law. The cartage as there described is not, under the allegations of the bill, interstate commerce. *State* v. *Knight*, 192 U. S. 1, 21; *Detroit &c. Ry.* v. *Interstate Comm. Com.*, 74 Fed. Rep. 803, 808; *Hopkins* v. *United States*, 171 U. S. 578, 592. The charge is not of a conspiracy either to do a criminal or unlawful act, or to do by unlawful means the lawful act of fixing their own charges for cartage. Nothing here charged has the direct, immediate or necessary effect to restrain interstate commerce.

As to the tenth paragraph we maintain: The allegation is of a legal conclusion. It also is too indefinite and general. Sufficient facts are not alleged. *United States* v. *Hanley*, 71 Fed. Rep. 672.

A contract or combination among manufacturers or producers of an article which is intended to become the subject of interstate commerce, to raise, lower and fix prices of such article, is not necessarily a contract, combination or conspiracy in restraint of interstate trade or an attempt to monopolize that trade under the Sherman Act. *United States* v. *Nelson*, 52 Fed. Rep. 646; *In re Greene*, 52 Fed. Rep. 104; *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 16; *Gibbs* v. *McNeeley*, 102 Fed. Rep. 504. See also *Distillery Co.* v. *People*, 156 Illinois, 468; *Glucose Company* v. *Harding*, 182 Illinois, 551.

There was no jurisdiction herein of this charge. No common contract, combination or conspiracy of the defendants with each other is alleged. The allegation that "all and each" have made agreements for less than lawful transportation rates is that they did so acting separately. That was not unlawful on

the part of the defendants; much less was it any violation of the Sherman Anti Trust Act. There is here no sufficient showing of an attempt to monopolize either the interstate transportation of live stock or fresh meats or interstate trade in live stock or fresh meats. The paragraph is multifarious, and there is therein a misjoinder of causes and parties.

As to the eleventh paragraph we submit that it is too general and insufficient to require argument. It is disposed of by what has been urged as to previous paragraphs.

Prior rulings by this court in cases arising under the Sherman Act do not sustain the Government's case here.

With respect to the supposed limitations of the Sherman Act upon the right of private contract, that act is to be interpreted in the light of the principles of the common law. *United States* v. *Wong Kim Ark*, 169 U. S. 649; *Moore* v. *United States*, 91 U. S. 270, 274; *Minor* v. *Happersett*, 21 Wall. 162; *Ex parte Wilson*, 114 U. S. 417, 422; *Boyd* v. *United States*, 116 U. S. 616, 624; *Smith* v. *Alabama*, 124 U. S. 465.

The bill of complaint is multifarious; and there is therein a misjoinder of causes and of parties. *Walker* v. *Powers*, 104 U. S. 251; *Brown* v. *Guarantee Trust Company*, 128 U. S. 403; *Zeigler* v. *Lake Street Railway*, 76 Fed. Rep. 662.

The bill is too general and indefinite to require answer. It does not sufficiently set forth definite or specific facts.

The demurrers to so much of the bill as prays for answer under oath, and to so much thereof as prays discovery of defendants' books, papers, etc., are well taken.

Rights protected by the Fourth and Fifth Amendments are thereby infringed. *United States* v. *Saline Bank*, 1 Pet. 100; *Boyd* v. *United States*, 116 U. S. 616; *Counselman* v. *Hitchcock*, 142 U. S. 547; *Livingston* v. *Tompkins*, 4 Johns. Ch. 415, 432; *Entick* v. *Carrington*, 19 Howell's St. Tr. 1029; *S. C.*, 2 Wils. 275; *Huckle* v. *Money*, 2 Wils. 206; Mitford & Tyler's Eq. Pldg. 289.

Mr. Attorney General Moody, with whom *Mr. William A.*

Day, Assistant to the Attorney General, was on the brief, for the United States:

The facts show a combination which restrains or monopolizes trade or commerce and operates upon and directly affects interstate or foreign trade or commerce.

The combination or conspiracy which the Government is seeking to destroy and which it was the aim of the petition in this case to set forth is one between all the principal American producers or packers of fresh meats for the purpose of jointly controlling the market for those products throughout the entire United States so as to maintain uniform prices therefor and destroy competition in the sale thereof to dealers and consumers.

The combination set forth in the bill is in restraint of trade, for if in the entire field of the law concerning monopolies and restraints of trade there is a single proposition to which all courts now yield assent, it is that a combination, conspiracy, or agreement between independent manufacturers or producers of a necessary of life to fix and maintain uniform prices for their products, or otherwise to suppress competition with each other, is an unlawful restraint upon trade. *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 16; *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290; *United States* v. *Joint Traffic Association*, 171 U. S. 505; *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211; *Northern Securities Co.* v. *United States*, 193 U. S. 197; *Chesapeake & Ohio Fuel Co.* v. *United States*, 115 Fed. Rep. 610; judgments of Lord Bramwell and Lord Hannen in *Mogul S. S. Co.* v. *McGregor*, L. R. App. Cas. (1892) 46, 58; *Morris Run Coal Co.* v. *Barclay Coal Co.*, 68 Pa. St. 155, 173; *Nester et al.* v. *Continental Brewing Co.*, 161 Pa. St. 473; *Salt Co.* v. *Guthrie*, 35 Ohio St. 166; *People* v. *Sheldon*, 139 N. Y. 251; *Cummings* v. *Union Blue Stone Co.*, 164 N. Y. 405; *Trenton Potteries Co.* v. *Olyphant*, 58 N. J. Eq. 507; *Craft* v. *McConoughby*, 79 Illinois, 346; Noyes on Intercorporate Relations, p. 513, note 1, and see the cases collected; and necessarily the means agreed upon to effect the unlawful object of the com-

bination of conspiracy are inseparable parts of the combination or conspiracy itself, and along with it fall within the condemnation of the law.

The combination or conspiracy in controversy operates upon interstate or foreign commerce, and its operations are not confined to commerce carried on wholly within state lines.

The sales of live stock to the defendants and the sales by them of the prepared meats are interstate and not intrastate transactions.

As to what is interstate commerce, see *Gibbons* v. *Ogden*, 9 Wheat. 1, 194; *Northern Securities Co.* v. *United States*, 193 U. S. 197, 337. If interstate commerce is commerce which concerns more States than one, and if a combination of independent producers to suppress competition between its members is a restraint upon commerce, it must follow that a combination of independent producers to fix and control prices and suppress competition between each other in an area covering more States than one is in restraint of interstate commerce and the petition in this case discloses such a combination.

It is impossible to say with even a color of reason that the facts stated in the bill, which cannot be denied, do not show a combination between the defendants to suppress competition between themselves in an area embracing more States than one and it is immaterial to inquire whether the particular purchases and sales made by the defendants are, technically, interstate or intrastate transactions. There is nothing unreasonable or novel in the conclusion that a combination may restrain interstate commerce, although the individual transactions of its members might, standing alone and viewed separate and apart from the purpose and necessary effect of the whole combination, be intrastate in character. *Montague & Co.* v. *Lowry*, 193 U. S. 38. The character of a combination —that is, whether or not it is interstate in its operation—is decided, not by the nature of the particular transactions of its individual members, but by the extent of the territory in which it operates—in which it controls prices and sales and

suppresses competition. If that territory embraces more States than one the combination restrains interstate commerce. *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 240.

Whether a combination in restraint of trade operates upon interstate or only intrastate commerce does not depend upon whether the individual transactions of its members, standing alone and viewed separate and apart from the purpose and necessary effect of the whole combination, are interstate or intrastate in character, and the petition here discloses a combination which operates upon *interstate* commerce; for whatever may be the character of the individual transactions of its several members, it is also true in this case that the individual transactions of the members of the combination do fall within the jurisdiction conferred upon Congress by the commerce clause of the Constitution. These transactions consist of the defendants' purchases of live stock; the sales and shipments of fresh meats made directly by the defendants to dealers and consumers in the several States, and the sales of fresh meats to dealers and consumers in the several States by agents of the defendants located in those States.

From all over the stock-raising section, embracing many different States, cattle, sheep and hogs are habitually shipped to the great live-stock markets at Chicago, Omaha, Sioux City, St. Joseph, Kansas City, East St. Louis and St. Paul for sale, to those, the defendants chief among them, engaged in the business of converting live stock into fresh meats for human consumption. The shipments are made with the express and sole purpose of sale as soon as market conditions will permit, and the sales are made while the cattle yet remain in first hands, that is, in the hands of the owners or their agents, and in the ordinary form or condition in which cattle are shipped from one country or State to another, which is analogous to the form or condition of the original package in the case of merchandise. *Austin* v. *Tennessee*, 179 U. S. 343, 359.

The cattle are not dealt with in a commercial way from the time of their arrival until their sale to the defendants and others, but are simply fed and cared for. No act is done with reference to them that would cause them to become mixed with the general mass of local property. Now, it may be that a distinction should be made between what may be called an interstate sale proper and in the full sense of the term—that is, a sale between persons negotiating and dealing from two or more different States, and a sale, at its destination and while it still remains in the original state or package, of an article of commerce sent from another State. But so far as the result in this instance is concerned it is a distinction without a difference. If the sales of live stock set forth in the petition do not fall within the first of these classes they certainly fall within the second, and that brings them within the protection of the Federal power over commerce and therefore within the protection of the Anti Trust Act; for the right to transport articles of commerce from one State to another includes the right of the owner or consignee to sell them in the latter free from any burden or restraint that the States might attempt to impose. *Brown* v. *Maryland*, 12 Wheat. 419; *Bowman* v. *Chicago and Northwestern Railway Co.*, 125 U. S. 465; *Leisy* v. *Hardin*, 135 U. S. 100; *Rhodes* v. *Iowa*, 170 U. S. 412, and, *a fortiori*, free from any burden or restraint that a combination of individuals might attempt to impose. *In re Debs*, 158 U. S. 564, 581; *Hopkins* v. *United States*, 171 U. S. 578, 590.

Paragraph 2 of the bill contains matter of description and inducement, and must be read in conjunction with the stating part of the petition, which alleges, *inter alia*, that "in order to restrain and destroy competition among themselves" the defendants have engaged in a "combination and conspiracy to arbitrarily from time to time raise, lower, and fix prices, and to maintain uniform prices at which they will sell, directly or through their respective agents, such fresh meats to dealers and consumers throughout the said States and Territories and the District of Columbia and foreign countries."

As the sales made directly by the defendants to dealers and consumers throughout the United States are interstate sales, and as decisions of this court have settled that a combination to control and suppress competition in such sales is a combination in restraint of interstate commerce, the petition in this case, having shown that much, cannot in any event be dismissed, even should it be held to have failed in all other respects.

Paragraph 3 of the petition states that the defendants are engaged in shipping fresh meats from their plants in certain States to their respective agents at and near the principal markets in other States and Territories for sale by such agents to dealers and consumers in those States and Territories. Upon the question whether or not the sales made by these agents under the circumstances set forth are within the body of interstate commerce, there is nothing to add to the cogent argument in the opinion of the circuit judge.

The bill is not multifarious and does not disclose a misjoinder of parties. 14 Ency. of Pl. and Pr. 198; 1 Bates Fed. Eq. Pro. §§ 135, 195. The Circuit Court did not err in sustaining the demurrers to the bill in its aspect as a bill of discovery. The demurrers are demurrers to the whole bill. *Livingston* v. *Story*, 9 Pet. 632, 654.

The well-settled rule of equity pleading is that a demurrer to a whole bill cannot be sustained as to part of the bill and overruled as to part, but must be overruled as to the whole if any part of the bill is good and entitles the complainant to any relief. Fletcher, Eq. Pl. §§ 203, 204; Story, Eq. Pl., 10th ed., §§ 443, 444; *Parker* v. *Simpson*, 62 N. E. Rep. (Mass.) 401; *Metler's Admn's.* v. *Metler*, 18 N. J. Eq. 270, 273. When the defendants leveled their demurrers at the relief as well as the discovery, instead of answering as to the relief and demurring as to the discovery they did so at their peril. Daniell's Chan. Prac., 3d Am. ed., 568–608; see also Acts of Congress of February 25, 1903, 32 Stat. 903; of February 11, 1893, 27 Stat. 443, and *Interstate Comm. Com.* v. *Baird*, 194 U. S. 25, 44,

citing *Brown* v. *Walker*, 161 U. S. 591; *Boyd* v. *United States*, 116 U. S. 616.

Judges have differed as to the validity of aggregations of capital effected by some form of organic union between several smaller and competing corporations, and economists are far from agreeing that such aggregations, within limitations, are hurtful. So too, associations of manufacturers to regulate competition within a restricted area have not always been condemned by courts and have sometimes been approved by publicists. But as yet no responsible voice has been heard to justify, legally or economically, a conspiracy or agreement between nearly all the producers of a commodity necessary to life by which the confederates acquire absolute control and dominion over the production, sale and distribution of that commodity throughout the entire territory of a nation, with the power, at will, to raise prices to the consumer of the finished product and lower prices to the producer of the raw material. Yet such is that now at the bar of this court. That there is a conspiracy to control the market of the nation for fresh meats, that it does control it, and that its control is merciless and oppressive, are facts known of all men. The broad question here is, Does the Government's petition, with its statements of fact standing unchallenged, discover that conspiracy to the court? We submit that it does and that the decree of the Circuit Court should in all things be affirmed.

Mr. Justice Holmes delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court, on demurrer, granting an injunction against the appellants' commission of alleged violations of the act of July 2, 1890, c. 647, 26 Stat. 209, "to protect trade and commerce against unlawful restraints and monopolies." It will be necessary to consider both the bill and the decree. The bill is brought against a number of corporations, firms and individuals of different States and makes the following allegations: 1. The defend-

ants (appellants) are engaged in the business of buying live stock at the stock yards in Chicago, Omaha, St. Joseph, Kansas City, East St. Louis and St. Paul, and slaughtering such live stock at their respective plants in places named, in different States, and converting the live stock into fresh meat for human consumption. 2. The defendants "are also engaged in the business of selling such fresh meats, at the several places where they are so prepared, to dealers and consumers in divers States and Territories of the said United States other than those wherein the said meats are so prepared and sold as aforesaid, and in the District of Columbia, and in foreign countries, and shipping the same meats, when so sold from the said places of their preparation, over the several lines of transportation of the several railroad companies serving the same as common carriers, to such dealers and consumers, pursuant to such sales." 3. The defendants also are engaged in the business of shipping such fresh meats to their respective agents at the principal markets in other States, etc., for sale by those agents in those markets to dealers and consumers. 4. The defendants together control about six-tenths of the whole trade and commerce in fresh meats among the States, Territories and District of Columbia, and, 5, but for the acts charged would be in free competition with one another.

6. In order to restrain competition among themselves as to the purchase of live stock, defendants have engaged in, and intend to continue, a combination for requiring and do and will require their respective purchasing agents at the stock yards mentioned, where defendants buy their live stock (the same being stock produced and owned principally in other States and shipped to the yards for sale), to refrain from bidding against each other, "except perfunctorily and without good faith," and by this means compelling the owners of such stock to sell at less prices than they would receive if the bidding really was competitive.

7. For the same purposes the defendants combine to bid up, through their agents, the prices of live stock for a few days at

a time, "so that the market reports will show prices much higher than the state of the trade will warrant," thereby inducing stock owners in other States to make large shipments to the stock yards to their disadvantage.

8. For the same purposes, and to monopolize the commerce protected by the statute, the defendants combine "to arbitrarily, from time to time raise, lower, and fix prices, and to maintain uniform prices at which they will sell" to dealers throughout the States. This is effected by secret periodical meetings, where are fixed prices to be enforced until changed at a subsequent meeting. The prices are maintained directly, and by collusively restricting the meat shipped by the defendants, whenever conducive to the result, by imposing penalties for deviations, by establishing a uniform rule for the giving of credit to dealers, etc., and by notifying one another of the delinquencies of such dealers and keeping a black list of delinquents, and refusing to sell meats to them.

9. The defendants also combine to make uniform charges for cartage for the delivery of meats sold to dealers and consumers in the markets throughout the States, etc., shipped to them by the defendants through the defendants' agents at the markets, when no charges would have been made but for the combination.

10. Intending to monopolize the said commerce and to prevent competition therein, the defendants "have all and each engaged in and will continue" arrangements with the railroads whereby the defendants received, by means of rebates and other devices, rates less than the lawful rates for transportation, and were exclusively to enjoy and share this unlawful advantage to the exclusion of competition and the public. By force of the consequent inability of competitors to engage or continue in such commerce, the defendants are attempting to monopolize, have monopolized, and will monopolize the commerce in live stock and fresh meats among the States and Territories, and with foreign countries, and, 11, the defendants are and have been in conspiracy with each other, with

the railroad companies and others unknown, to obtain a monopoly of the supply and distribution of fresh meats throughout the United States, etc. And to that end defendants artificially restrain the commerce and put arbitrary regulations in force affecting the same from the shipment of the live stock from the plains to the final distribution of the meats to the consumers. There is a prayer for an injunction of the most comprehensive sort, against all the foregoing proceedings and others, for discovery of books and papers relating directly or indirectly to the purchase or shipment of live stock, and the sale or shipment of fresh meat, and for an answer under oath. The injunction issued is appended in a note.[1]

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[1] "And now, upon motion of the said attorney, the court doth order that the preliminary injunction heretofore awarded in this cause, to restrain the said defendants and each of them, their respective agents and attorneys, and all other persons acting in their behalf, or in behalf of either of them, or claiming so to act, from entering into, taking part in, or performing any contract, combination or conspiracy, the purpose or effect of which will be, as to trade and commerce in fresh meats between the several States and Territories and the District of Columbia, a restraint of trade, in violation of the provisions of the act of Congress approved July 2, 1890, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' either by directing or requiring their respective agents to refrain from bidding against each other in the purchase of live stock; or collusively and by agreement to refrain from bidding against each other at the sales of live stock; or by combination, conspiracy or contract raising or lowering prices or fixing uniform prices at which the said meats will be sold, either directly or through their respective agents; or by curtailing the quantity of such meats shipped to such markets and agents; or by establishing and maintaining rules for the giving of credit to dealers in such meats, the effect of which rules will be to restrict competition; or by imposing uniform charges for cartage and delivery of such meats to dealers and consumers, the effect of which will be to restrict competition; or by any other method or device, the purpose and effect of which is to restrain commerce as aforesaid; and also from violating the provisions of the act of Congress approved July 2, 1890, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' by combining or conspiring together, or with each other and others, to monopolize or attempt to monopolize any part of the trade and commerce in fresh meats among the several States and Territories and the District of Columbia, by demanding, obtaining, or, with or without the connivance of the officers or agents thereof, or of any of them, receiving from railroad companies or other common carriers transporting such fresh meats

To sum up the bill more shortly, it charges a combination of a dominant proportion of the dealers in fresh meat throughout the United States not to bid against each other in the live stock markets of the different States, to bid up prices for a few days in order to induce the cattle men to send their stock to the stock yards, to fix prices at which they will sell, and to that end to restrict shipments of meat when necessary, to establish a uniform rule of credit to dealers and to keep a black list, to make uniform and improper charges for cartage, and finally, to get less than lawful rates from the railroads to the exclusion of competitors. It is true that the last charge is not clearly stated to be a part of the combination. But as it is alleged that the defendants have each and all made arrangements with the railroads, that they were exclusively to enjoy the unlawful advantage, and that their intent in what they did was to monopolize the commerce and to prevent competition, and in view of the general allegation to which we

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in such trade and commerce, either directly or by means of rebates, or by any other device, transportation of or for such means, from the points of the preparation and production of the same from live stock or elsewhere, to the markets for the sale of the same to dealers and consumers in other States and Territories than those wherein the same are so prepared, or the District of Columbia, at less than the regular rates which may be established or in force on their several lines of transportation, under the provisions in that behalf of the laws of the said United States for the regulation of commerce, be and the same is hereby made perpetual.

"But nothing herein shall be construed to prohibit the said defendants from agreeing upon charges for cartage and delivery, and other incidents connected with local sales, where such charges are not calculated to have any effect upon competition in the sales and delivery of meats; nor from establishing and maintaining rules for the giving of credit to dealers where such rules in good faith are calculated solely to protect the defendants against dishonest or irresponsible dealers, nor from curtailing the quantity of meats shipped to a given market where the purpose of such arrangement in good faith is to prevent the over-accumulation of meats as perishable articles in such markets.

"Nor shall anything herein contained be construed to restrain or interfere with the action of any single company or firm, by its or their officers or agents (whether such officers or agents are themselves personally made parties defendant hereto or not) acting with respect to its or their own corporate or firm business, property or affairs."

shall refer, we think that we have stated correctly the purport of the bill. It will be noticed further that the intent to monopolize is alleged for the first time in the eighth section of the bill as to raising, lowering and fixing prices. In the earlier sections, the intent alleged is to restrain competition among themselves. But after all the specific charges there is a general allegation that the defendants are conspiring with one another, the railroads and others, to monopolize the supply and distribution of fresh meats throughout the United States, etc., as has been stated above, and it seems to us that this general allegation of intent colors and applies to all the specific charges of the bill. Whatever may be thought concerning the proper construction of the statute, a bill in equity is not to be read and construed as an indictment would have been read and construed a hundred years ago, but it is to be taken to mean what it fairly conveys to a dispassionate reader by a fairly exact use of English speech. Thus read this bill seems to us intended to allege successive elements of a single connected scheme.

We read the demurrer with the same liberality. Therefore we take it as applying to the bill generally for multifariousness and want of equity, and also to each section of it which makes a charge and to the discovery. The demurrer to the discovery will not need discussion in the view which we take concerning the relief, and therefore we turn at once to that.

The general objection is urged that the bill does not set forth sufficient definite or specific facts. This objection is serious, but it seems to us inherent in the nature of the case. The scheme alleged is so vast that it presents a new problem in pleading. If, as we must assume, the scheme is entertained, it is, of course, contrary to the very words of the statute. Its size makes the violation of the law more conspicuous, and yet the same thing makes it impossible to fasten the principal fact to a certain time and place. The elements, too, are so numerous and shifting, even the constituent parts alleged are and from their nature must be so extensive in time

and space, that something of the same impossibility applies to them. The law has been upheld, and therefore we are bound to enforce it notwithstanding these difficulties. On the other hand, we equally are bound by the first principles of justice not to sanction a decree so vague as to put the whole conduct of the defendants' business at the peril of a summons for contempt. We cannot issue a general injunction against all possible breaches of the law. We must steer between these opposite difficulties as best we can.

The scheme as a whole seems to us to be within reach of the law. The constituent elements, as we have stated them, are enough to give to the scheme a body and, for all that we can say, to accomplish it. Moreover, whatever we may think of them separately when we take them up as distinct charges, they are alleged sufficiently as elements of the scheme. It is suggested that the several acts charged are lawful and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful. *Aikens* v. *Wisconsin,* 195 U. S. 194, 206. The statute gives this proceeding against combinations in restraint of commerce among the States and against attempts to monopolize the same. Intent is almost essential to such a combination and is essential to such an attempt. Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. *Commonwealth* v. *Peaslee,* 177 Massachusetts, 267, 272. But when that intent and the consequent dangerous probability exist, this statute, like many others and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result. What we have said disposes incidentally of the objection to the bill as multifarious. The unity of the plan embraces all the parts.

One further observation should be made. Although the

combination alleged embraces restraint and monopoly of trade within a single State, its effect upon commerce among the States is not accidental, secondary, remote or merely probable. On the allegations of the bill the latter commerce no less, perhaps even more, than commerce within a single State is an object of attack. See *Leloup* v. *Port of Mobile*, 127 U. S. 640, 647; *Crutcher* v. *Kentucky*, 141 U. S. 47, 59; *Allen* v. *Pullman Co.*, 191 U. S. 171, 179, 180. Moreover, it is a direct object, it is that for the sake of which the several specific acts and courses of conduct are done and adopted. Therefore the case is not like *United States* v. *E. C. Knight Co.*, 156 U. S. 1, where the subject matter of the combination was manufacture and the direct object monopoly of manufacture within a State. However likely monopoly of commerce among the States in the article manufactured was to follow from the agreement it was not a necessary consequence nor a primary end. Here the subject matter is sales and the very point of the combination is to restrain and monopolize commerce among the States in respect of such sales. The two cases are near to each other, as sooner or later always must happen where lines are to be drawn, but the line between them is distinct. *Montague & Co.* v. *Lowry*, 193 U. S. 38.

So, again, the line is distinct between this case and *Hopkins* v. *United States*, 171 U. S. 578. All that was decided there was that the local business of commission merchants was not commerce among the States, even if what the brokers were employed to sell was an object of such commerce. The brokers were not like the defendants before us, themselves the buyers and sellers. They only furnished certain facilities for the sales. Therefore, there again the effects of the combination of brokers upon the commerce was only indirect and not within the act. Whether the case would have been different if the combination had resulted in exorbitant charges, was left open. In *Anderson* v. *United States*, 171 U. S. 604, the defendants were buyers and sellers at the stock yards, but their agreement was merely not to employ brokers, or to

recognize yard-traders, who were not members of their association. Any yard-trader could become a member of the association on complying with the conditions, and there was said to be no feature of monopoly in the case. It was held that the combination did not directly regulate commerce between the States, and, being formed with a different intent, was not within the act. The present case is more like *Montague & Co.* v. *Lowry*, 193 U. S. 38.

For the foregoing reasons we are of opinion that the carrying out of the scheme alleged, by the means set forth, properly may be enjoined, and that the bill cannot be dismissed.

So far it has not been necessary to consider whether the facts charged in any single paragraph constitute commerce among the States or show an interference with it. There can be no doubt, we apprehend, as to the collective effect of all the facts, if true, and if the defendants entertain the intent alleged. We pass now to the particulars, and will consider the corresponding parts of the injunction at the same time. The first question arises on the sixth section. That charges a combination of independent dealers to restrict the competition of their agents when purchasing stock for them in the stock yards. The purchasers and their slaughtering establishments are largely in different States from those of the stock yards, and the sellers of the cattle, perhaps it is not too much to assume, largely in different States from either. The intent of the combination is not merely to restrict competition among the parties, but, as we have said, by force of the general allegation at the end of the bill, to aid in an attempt to monopolize commerce among the States.

It is said that this charge is too vague and that it does not set forth a case of commerce among the States. Taking up the latter objection first, commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one State, with the expectation that they will end their transit, after purchase, in another, and when in effect

they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the States, and the purchase of the cattle is a part and incident of such commerce. What we say is true at least of such a purchase by residents in another State from that of the seller and of the cattle. And we need not trouble ourselves at this time as to whether the statute could be escaped by any arrangement as to the place where the sale in point of law is consummated. See *Norfolk & Western Ry.* v. *Sims*, 191 U. S. 441. But the sixth section of the bill charges an interference with such sales, a restraint of the parties by mutual contract and a combination not to compete in order to monopolize. It is immaterial if the section also embraces domestic transactions.

It should be added that the cattle in the stock yard are not at rest even to the extent that was held sufficient to warrant taxation in *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500. But it may be that the question of taxation does not depend upon whether the article taxed may or may not be said to be in the course of commerce between the States, but depends upon whether the tax so far affects that commerce as to amount to a regulation of it. The injunction against taking part in a combination, the effect of which will be a restraint of trade among the States by directing the defendants' agents to refrain from bidding against one another at the sales of live stock, is justified so far as the subject matter is concerned.

The injunction, however, refers not to trade among the States in cattle, concerning which there can be no question of original packages, but to trade in fresh meats, as the trade forbidden to be restrained, and it is objected that the trade in fresh meats described in the second and third sections of the bill is not commerce among the States, because the meat is sold at the slaughtering places, or when sold elsewhere may be sold in less than the original packages. But the allegations of the second section, even if they import a technical passing

of title at the slaughtering places, also import that the sales are to persons in other States, and that the shipments to other States are part of the transaction—"pursuant to such sales"—and the third section imports that the same things which are sent to agents are sold by them, and sufficiently indicates that some at least of the sales are of the original packages. Moreover, the sales are by persons in one State to persons in another. But we do not mean to imply that the rule which marks the point at which state taxation or regulation becomes permissible necessarily is beyond the scope of interference by Congress in cases where such interference is deemed necessary for the protection of commerce among the States. Nor do we mean to intimate that the statute under consideration is limited to that point. Beyond what we have said above, we leave those questions as we find them. They were touched upon in the *Northern Securities Company's Case*, 193 U. S. 197.

We are of opinion, further, that the charge in the sixth section is not too vague. The charge is not of a single agreement but of a course of conduct intended to be continued. Under the act it is the duty of the court, when applied to, to stop the conduct. The thing done and intended to be done is perfectly definite: with the purpose mentioned, directing the defendants' agents and inducing each other to refrain from competition in bids. The defendants cannot be ordered to compete, but they properly can be forbidden to give directions or to make agreements not to compete. See *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211. The injunction follows the charge. No objection was made on the ground that it is not confined to the places specified in the bill. It seems to us, however, that it ought to set forth more exactly the transactions in which such directions and agreements are forbidden. The trade in fresh meat referred to should be defined somewhat as it is in the bill, and the sales of stock should be confined to sales of stock at the stock yards named, which stock is sent from other States to the stock yards for sale or is bought at those yards for transport to another State.

After what we have said, the seventh, eighth and ninth sections need no special remark, except that the cartage referred to in section nine is not an independent matter, such as was dealt with in *Pennsylvania R. R. Co.* v. *Knight*, 192 U. S. 21, but a part of the contemplated transit—cartage for delivery of the goods. The general words of the injunction "or by any other method or device, the purpose and effect of which is to restrain commerce as aforesaid," should be stricken out. The defendants ought to be informed as accurately as the case permits what they are forbidden to do. Specific devices are mentioned in the bill, and they stand prohibited. The words quoted are a sweeping injunction to obey the law, and are open to the objection which we stated at the beginning that it was our duty to avoid. To the same end of definiteness so far as attainable, the words "as charged in the bill," should be inserted between "dealers in such meats," and "the effect of which rules," and two lines lower, as to charges for cartage, the same words should be inserted between "dealers and consumers" and "the effect of which."

The acts charged in the tenth section, apart from the combination and the intent, may, perhaps, not necessarily be unlawful, except for the adjective which proclaims them so. At least we may assume, for purposes of decision, that they are not unlawful. The defendants, severally, lawfully may obtain less than the regular rates for transportation if the circumstances are not substantially similar to those for which the regular rates are fixed. Act of Feb. 4, 1887, c. 104, § 2, 24 Stat. 379. It may be that the regular rates are fixed for carriage in cars furnished by the railroad companies, and that the defendants furnish their own cars and other necessities of transportation. We see nothing to hinder them from combining to that end. We agree, as we already have said, that such a combination may be unlawful as part of the general scheme set forth in the bill, and that this scheme as a whole might be enjoined. Whether this particular combination can be enjoined, as it is, apart from its connection with the other

elements, if entered into with the intent to monopolize, as alleged, is a more delicate question. The question is how it would stand if the tenth section were the whole bill. Not every act that may be done with intent to produce an unlawful result is unlawful, or constitutes an attempt. It is a question of proximity and degree. The distinction between mere preparation and attempt is well known in the criminal law. *Commonwealth* v. *Peaslee*, 177 Massachusetts, 267, 272. The same distinction is recognized in cases like the present. *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 13; *Kidd* v. *Pearson*, 128 U. S. 1, 23, 24. We are of opinion, however, that such a combination is within the meaning of the statute. It is obvious that no more powerful instrument of monopoly could be used than an advantage in the cost of transportation. And even if the advantage is one which the act of 1887 permits, which is denied, perhaps inadequately, by the adjective "unlawful," still a combination to use it for the purpose prohibited by the act of 1890 justifies the adjective and takes the permission away.

It only remains to add that the foregoing question does not apply to the earlier sections, which charge direct restraints of trade within the decisions of the court, and that the criticism of the decree, as if it ran generally against combinations in restraint of trade or to monopolize trade, ceases to have any force when the clause against "any other method or device" is stricken out. So modified it restrains such combinations only to the extent of certain specified devices, which the defendants are alleged to have used and intend to continue to use.

Decree modified and affirmed.

SMALL v. RAKESTRAW.

ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

No. 133. Argued January 18, 1905.—Decided January 30, 1905.

A homestead claimant in a contest in the Land Department admitted he voted in a precinct in Montana other than that in which the land was situated, and that he returned there only often enough to keep up a good showing. The Secretary of the Interior, after reviewing some of the facts, "without passing upon any other question" laid down that a residence for voting purposes elsewhere precluded claiming residence at the same time on the land and decided against the claimant.

Held that the Secretary found as a fact, by implication, that the plaintiff not only voted elsewhere, but resided elsewhere for voting, that as the case presented no exceptional circumstances, this court was not warranted in going behind these findings of fact and that the words "without passing on any other question" could not be taken absolutely to limit the ground of decision to the proposition of law but merely emphasized one aspect of the facts dominant in the Secretary's mind.

THE facts are stated in the opinion.

Mr. George A. King, with whom *Mr. William B. King* and *Mr. William E. Harvey* were on the brief, for plaintiff in error:

The action of the officers of the land office was not conclusive and a court of equity may afford relief if proper cause is shown. *Lindsey* v. *Hawes,* 2 Black, 554; *Johnson* v. *Towsley,* 13 Wall. 72; *Cornelius* v. *Kessel,* 128 U. S. 456; *Cunningham* v. *Ashley,* 14 How. 377; *Barnard's Heirs* v. *Ashley's Heirs,* 18 How. 43; *Garland* v. *Wynn,* 20 How. 6; *Lytle* v. *Arkansas,* 22 How. 193; *O'Brien* v. *Perry,* 1 Black, 132; *Minnesota* v. *Bachelder,* 1 Wall. 109; *Stark* v. *Starrs,* 6 Wall. 402, 419; *Silver* v. *Ladd,* 7 Wall. 219; *Monroe Cattle Company* v. *Becker,* 147 U. S. 47, 57; *Thayer* v. *Spratt,* 189 U. S. 346; *Hodges* v. *Colcord,* 193 U. S. 192.

The facts found by the officers of the Land Department on the testimony adduced to them did not warrant their decision

that Rakestraw was entitled to a patent and they should have decided in favor of Small.

For requirements as to residence see §§ 2290, 2291, 2297, Rev. Stat., and for departmental decisions as to residence showing that poverty and business excused absences, see *Clark* v. *Lawson*, 2 L. D. 149; *Foley* v. *Brasch*, 2 L. D. 155; *Re Dunlop*, 3 L. D. 545; *Kurtz* v. *Holt*, 4 L. D. 56; *Healy's Case*, 4 L. D. 80; *Nilson* v. *St. Paul &c. R. R.*, 6 L. D. 567; *Martel's Case*, 6 L. D. 566; *Platt* v. *Gordon*, 7 L. D. 249; *Wood's Case*, 7 L. D. 345; *Farringer's Case*, 7 L. D. 360; *Fuchser's Case*, 7 L. D. 467; *Alderson's Case*, 8 L. D. 517; *Edward's Case*, 8 L. D. 353; *Lutz' Case*, 9 L. D. 266; *Montgomery* v. *Curl*, 9 L. D. 57; *Smith's Case*, 9 L. D. 146; *Main's Case*, 12 L. D. 102; *Williams's Case*, 13 L. D. 42; *Logan* v. *Gunn*, 13 L. D. 113; *Paulsen* v. *Ellingwood*, 17 L. D. 1; *Tomlinson* v. *Soderlund*, 21 L. D. 155.

Bohall v. *Dilla*, 114 U. S. 47; *Lee* v. *Johnson*, 116 U. S. 48, are inapplicable to this case, and see *Silver* v. *Ladd*, 7 Wall. 219, 225.

Voting in another precinct is no bar, and the Secretary's decision in this respect is not correct in law. See Montana Election Statutes, §§ 1007, 1020; Compiled Stat. 923, 926; Laws of Montana, 1891, 67; *California* v. *Levoy*, 9 L. D. 139, 142; *Pratsch* v. *Dobbins*, 24 L. D. 426; *Edward's Case*, 8 L. D. 353. The voting was done prior to Rakestraw's pretended settlement and he cannot take advantage of it.

The entry of Rakestraw seems to have been of very much the character of that condemned by this court in *Atherton* v. *Fowler*, 96 U. S. 513, and see *Hosmer* v. *Wallace*, 97 U. S. 575; *Quinby* v. *Conlan*, 104 U. S. 420; *Del Monte Mining Company* v. *Last Chance Mining Company*, 171 U. S. 55, 82.

There was no appearance or brief filed for defendant in error.

Mr. Justice Holmes delivered the opinion of the court.

This is a complaint by the plaintiff in error to charge the

defendant with a trust in respect of land which the latter holds under a patent from the United States. It alleges a homestead entry by the plaintiff, a contest by the defendant, a decision for the defendant by the local register and receiver, a reversal of this by the Commissioner of the Land Office, and a reversal of the latter decision and a cancelation of the plaintiff's entry by the Secretary of the Interior. The last order is set forth in full and the complaint goes on the ground that this order discloses a mistake of law on its face. The complaint was demurred to, the demurrer was sustained, and the suit dismissed. An appeal was taken to the Supreme Court of the State, which affirmed the judgment. 28 Montana, 413. The case then was brought here.

The material portion of the Secretary's decision is as follows:

"January 21, 1892, plaintiff [1] filed his affidavit of contest against the defendant's homestead entry charging that the entryman had failed to comply with the law as to residence. The testimony of Small, himself, is that he never voted in the precinct in which his homestead entry lies, but did vote at other points a long distance from his homestead at least twice during the time he claims he was seeking to maintain residence upon the land. He runs a carpenter shop in town, and, to use his own words, 'determined to return to the ranch only often enough to keep a good showing of habitation.' His excuse for that was that the plaintiff [1] threatened him with violence if he undertook to stay on the land.

"Without passing upon any other question it is enough to say that a residence for voting purposes in another precinct from the land, precludes an entryman from claiming residence at the same time, on the land for homestead purposes. *George T. Barnes*, 4 L. D. 62; *Hart* v. *McHugh*, 17 L. D. 176; *Edwards* v. *Ford and O'Connor*, decided June 18, 1894."

The plaintiff's case rests on the assumption that the words "without passing upon any other question," mean without

[1] Defendant in error in this court.

passing upon any other question than an absolute proposition of law, and that this proposition is that a vote in another precinct is fatal to a claim of residence. But the Secretary found, by implication, that the plaintiff not merely voted elsewhere, but resided elsewhere for voting. It was after this finding that he laid down the rule complained of. The case presents no exceptional circumstances which would warrant our going behind the finding of fact. *Bohall* v. *Dilla*, 114 U. S. 47; *Lee* v. *Johnson*, 116 U. S. 48, 51; *Stewart* v. *McHarry*, 159 U. S. 643, 650. The plaintiff admits that on one occasion after his entry he voted in a county other than that in which the land lies, so that it appears from the complaint that there was some evidence that his residence for voting was not in the latter county, and, as the Supreme Court of Montana remarks, it does not appear clearly that all the facts before the Secretary are those set forth. It is true that a vote in another county is only a circumstance to be considered, but when it leads to the conclusion of a voting residence elsewhere it leads to the conclusion of a residence elsewhere for all purposes by the very words of the Compiled Statutes of Montana on which the plaintiff relies. §§ 1007, 1020.

In view of what we have said it does not appear as matter of law that the Secretary's finding of voting residence was wrong, and it does not appear that his proposition, taken as a proposition of law, was wrong. But, further, the words, "without passing on any other question" cannot be taken absolutely to limit the ground of decision to the proposition of law. It hardly goes further than to emphasize one aspect of the facts as dominant in the Secretary's mind. He already had adopted the plaintiff's own words as establishing that the plaintiff's purpose was only to keep up a good showing. This goes to the general conclusion which the Secretary drew and shows that it was a conclusion, not from the plaintiff's voting residence merely, but from other facts.

Judgment affirmed.

HAMBURG AMERICAN STEAMSHIP COMPANY *v.* GRUBE.

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

No. 411. Submitted January 16, 1905.—Decided February 20, 1905.

The agreement of September 16, 1833, between New York and New Jersey, confirmed by act of Congress of June 28, 1834, 4 Stat. 708, did not vest exclusive jurisdiction in the Federal Government over the sea adjoining those States, neither of which abdicated any rights to the United States.

Although when the charge of the state court is not before this court, and the record contains no exception to any part of it, the verdict and judgment must be held to have been rendered according to law, nevertheless, if a provision of the Federal Constitution was properly invoked the motion to dismiss may be denied.

The act of the legislature of New Jersey of March 12, 1846, under which the jurisdiction of the United States over Sandy Hook is derived is merely one of cession and does not purport to transfer jurisdiction over the littoral waters beyond low water mark.

THIS action was brought in the Supreme Court of New York by Minnie Grube, as administratrix of John Grube, against the Hamburg American Steamship Company, to recover damages for his death, under the statute of New Jersey in that behalf, occasioned by the sinking of the James Gordon Bennett, a vessel owned by a New Jersey corporation, by the steamship Alene, belonging to the steamship company. There was a conflict of evidence as to the place of the collision, evidence being given on the one hand that it occurred in waters beyond the three-mile limit of the coast of the State of New Jersey, and, on the other, that it occurred within the three-mile limit along that coast.

The record discloses no instructions to the jury requested by defendant below, and no exceptions were taken by it to the charge of the court, which was not included in the bill of exceptions or case made.

Defendant moved the court to direct a verdict in its favor upon the following grounds:

"Defendant claims the right, under the statute of the United States confirming and approving the agreement as to boundaries between the State of New York and the State of New Jersey, to be free in navigating the main sea to the eastward of Sandy Hook peninsula, from the operation of any law of the State of New Jersey giving a right of action for injuries causing death, and claims that under the statutes aforesaid, the jurisdiction of that State extends only to the main sea; that is to say, low water mark along its exterior coast line and to a line drawn from headland to headland across the entrance to the bay of New York. It, therefore, asks the court to direct the jury to return a verdict for the defendant, on the ground that it appears by uncontradicted evidence that the collision between the steamship Alene and the schooner James Gordon Bennett, to recover damages for which this suit is brought, occurred upon the main sea and to the eastward of the Sandy Hook peninsula, and at a distance of more than a mile to the eastward of low water mark upon the exterior line thereof.

"Defendant claims the right, by reason of the purchase by the United States of the Sandy Hook peninsula, and the cession to the United States by the State of New Jersey of jurisdiction over the same and the long continued use of that peninsula, and of the main sea to the eastward of it for military purposes, to be free in navigating the main sea to the eastward of that peninsula from the operation of any law of the State of New Jersey, giving a right of action for injuries causing death, and claims that the main sea to the eastward of said peninsula to a distance of three miles from the shore is subject to the exclusive jurisdiction of the United States. It, therefore, asks the court to direct the jury to return a verdict for the defendant on the ground that it appears by uncontradicted evidence that the collision between the steamship Alene and the schooner James Gordon Bennett, to recover damages for which

this suit is brought, occurred upon the main sea and to the eastward of the Sandy Hook peninsula, and at a distance of more than a mile to the eastward of low water mark, upon the exterior line thereof."

The court denied the motion and defendant excepted. The jury found a general verdict for plaintiff below, and assessed the damages. Judgment was entered thereon, which was affirmed by the Appellate Division of the Supreme Court, and a writ of error from the Court of Appeals was denied. This writ of error was then allowed, and the case submitted on motions to dismiss or affirm.

Mr. Everett P. Wheeler for plaintiff in error:

The effect of the statutes and deeds was to vest in the United States title in fee to Sandy Hook and exclusive jurisdiction over it. All the prerequisite conditions were complied with. As to the effect of jurisdiction of the United States over lands ceded by the States see Story, Const. § 1227; *In re Ladd*, 74 Fed. Rep. 31; *United States* v. *Tucker*, 122 Fed. Rep. 518; *Commonwealth* v. *Clary*, 8 Massachusetts, 72; *United States* v. *King*, 34 Fed. Rep. 302. As the States have no longer legislative power over military tracts, so their inhabitants have none of the rights of citizens of the States to which they originally belonged. *Sinks* v. *Reese*, 19 Ohio St. 306; Opinion of the Justices, 1 Metc. (Mass.) 580; 6 Op. Atty. Gen. 577; *United States* v. *Carter*, 84 Fed. Rep. 622.

The jurisdiction over Sandy Hook acquired by the United States included the littoral waters lying to the eastward. Such waters within three miles are subject to the jurisdiction of the sovereign. Wheaton Int. Law, § 177; Dana's note to same (105), citing Bynkershock; Pomeroy on Int. Law, § 144; 1 Hautefeuille, Droit des Nation Neutres, 53; *Ex parte Tatem*, 23 Fed. Cas. 708. Jurisdiction over these waters is vital to the United States and a matter of indifference to New Jersey, and to realize the object of the cession control of the waters is essential and when the use of a thing is granted everything

is granted by which the grantee may have and enjoy the same. Kent's Comm. 467, note *g; United States* v. *Appleton,* 1 Sumner, 492; *Potter* v. *Boyce,* 73 App. Div. N. Y. 383; *S. C.,* 176 N. Y. 551; *Huttemeier* v. *Albro,* 18 N. Y. 48; *Richardson* v. *Bigelow,* 15 Gray (Mass.), 154; *Voorhees* v. *Burchard,* 55 N. Y. 98; *Simmons* v. *Cloonan,* 81 N. Y. 557; *Middleton* v. *La Compagnie, &c.,* 100 Fed. Rep. 866, distinguished.

The effect of the transfer of jurisdiction over Sandy Hook and the adjacent waters was to deprive New Jersey of power to legislate for that region, and the death act of that State, passed subsequent to the cession, has no operation there. Before the cession, Sandy Hook was subject to the common and statute law of the State of New Jersey. The cession did not *ipso facto* abrogate this body of law, for it is well recognized that change of sovereignty over territory does not *ipso facto* work a general change of the law then existing. Halleck Int. Law, ch. 34, § 14; *Am. Ins. Co.* v. *Canter,* 1 Pet. 511, 542; *Commonwealth* v. *Chapman,* 13 Metc. (Mass.) 68; *Chappell* v. *Jardine,* 51 Connecticut, 64; *Chi. & Pac. Ry. Co.* v. *McGlinn,* 114 U. S. 542; *Barrett* v. *Palmer,* 135 N. Y. 336; *Madden* v. *Arnold,* 22 App. Div. N. Y. 240. The act of cession was in 1846. The statute giving a right of action for death by wrongful act in 1848. This act is no more operative upon the Sandy Hook peninsula than legislation of the State of Maryland enacted after the cession of the District of Columbia is operative in that District.

Such a cession severs the territory ceded from all further political relations with the State of which it was formerly a part. Thenceforth all legislation must be by the new sovereign. *In re Ladd,* 74 Fed. Rep. 31; *Mitchell* v. *Tibbets,* 17 Pick. (Mass.) 298; *Commonwealth* v. *Clary,* 8 Massachusetts, 72, *Contzon* v. *United States,* 179 U. S. 191.

The proviso in the New Jersey act as to retention of jurisdiction in certain cases contains nothing at variance with this proposition. *Ft. Leavenworth R. R. Co.* v. *Lowe,* 114 U. S. 525; *United States* v. *Cornell,* 2 Mason, 60; *United States* v.

Meagher, 37 Fed. Rep. 875; *Lasher* v. *Texas*, 30 Tex. App. 387; *United States* v. *Hammond*, 1 Cranch. C. C. 15. The New Jersey laws referred to in the proviso then in operation were laws then in force and not those subsequently passed. *McConihay* v. *Wright*, 121 U. S. 201; *Morris Canal Co.* v. *The State*, 24 N. J. Law, 62; *Griswold* v. *Dock Co.*, 21 Barb. (N. Y.) 225.

Under the Act of Congress ratifying the boundary agreement between the States of New York and New Jersey, the boundary of the latter State extends only to the main sea,—that is to low water mark along the coast.

This agreement was adopted by statutes of New York and New Jersey. Ch. 2, Gen. Laws N. Y. § 7, 1 Heydecker's ed. 69; 3 Gen. Stats. N. J. 3464, and was ratified by Congress, June 28, 1834, 4 Stat. 708. It was invalid until so ratified. Const. U. S., Art. I, § 10.

The effect of this statute of the United States was to vest in the United States jurisdiction over the littoral waters to the south and east of the coast line of New York and New Jersey. The statute and the agreement provide that this line shall run "to the main sea." These are technical words and it is well settled that when the phrase "main sea" or its equivalent "high seas," is used, it means the ocean from low water mark. *General Iron Screw Co.* v. *Schurmans*, 1 J. & H. 180; *The Saxonia*, 1 Lushington, 410; *The Franconia*, L. R. 2 Exch. Div. 63; *United States* v. *Kessler*, Baldwin, 15, 35; *Lennan* v. *Hamburg American S. S. Co.*, 73 App. Div. N. Y. 357, distinguished; 1 Blackstone Comm. 110; Bouvier, Title, High Seas; Coulsford and Forbes on Waters, 11; *United States* v. *Ross*, 1 Gallison, 624.

The agreement ratified by Congress shows on its face that it was drawn by eminent lawyers, one of whom, Benjamin F. Butler, soon after became Attorney General of the United States, and had been one of the revisers of the statute law of the State of New York. Another, Lucius Q. C. Elmer, was the author of the Digest of the Laws of New Jersey. Both of

these distinguished men were familiar with legal terms. If it had been their intention in drawing the agreement between the States to maintain the old jurisdiction of their respective States over the littoral waters within the three-mile limit, they certainly would have said so. The legislatures of the two States and Congress certainly would have used language apt for this purpose. See Art. II of treaty with Panama, Stat. 1903-04, 149 of Treaties.

Mr. Gilbert D. Lamb for defendant in error:

This court has no jurisdiction and will entertain none unless it affirmatively appears in the record that a Federal question was, of necessity, passed upon by the court below, and against the claim of plaintiff in error—actually and properly set up. *Giles* v. *Teasley*, 193 U. S. 146; *Water Co.* v. *Electric Co.*, 172 U. S. 475, 487; *Eustis* v. *Bolles*, 150 U. S. 361.

Plaintiff in error claims that the cession by the State of New Jersey to the United States of America of a certain strip of land at Sandy Hook vested in the United States exclusive legislative jurisdiction over the littoral waters extending three miles to the eastward of the coast line thereof, and that therefore a verdict should have been directed. The plaintiff in error explicitly limited its claim to exclusive Federal jurisdiction over the adjoining waters to the three-mile limit. The record, however, discloses evidence that the collision in question occurred beyond the three-mile limit.

The vessel sunk was owned by a New Jersey corporation and as such was subject with its occupants to the legislative jurisdiction and law of New Jersey, while on the high seas and wherever the situs of the collision, the verdict as rendered, was right. *Int. Nav. Co.* v. *Lindstorm*, 123 Fed. Rep. 475; *McDonald* v. *Mallory*, 77 N. Y. 546; *Crapo* v. *Kelly*, 16 Wall. 610; Code Civ. Pro. (N. Y.) § 522.

The claim of Federal jurisdiction, not being properly set up in the record, the writ of error should be dismissed. So held in *Hamburg-American S. S. Co.* v. *Lennan*, 194 U. S. 629, and

see authorities cited and *S. C.*, 73 App. Div. N. Y. 357; *The Alene*, 116 Fed. Rep. 57.

The rights of the United States at Sandy Hook extend only to low water mark. *Middleton* v. *La Compagnie &c.*, 100 Fed. Rep. 866; *Fort Leavenworth R. R.* v. *Lowe*, 114 U. S. 525.

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

The assertion by plaintiff in error that Federal questions were decided by the action of the courts below turns on the denial of the motion to direct a verdict on the two grounds above set forth.

As to the first ground, the contention is that the act of Congress of June 28, 1834, 4 Stat. 708, c. 126, giving consent to the agreement or compact between the States of New Jersey and New York in respect of their territorial limits and jurisdiction, dated September 16, 1833, vested exclusive jurisdiction in the Federal Government over the sea adjoining the two States. But there is absolutely nothing in the agreement and confirmatory statutes abdicating rights in favor of the United States, and the transaction simply amounted to fixing the boundaries between the two States. Laws New York, 1834, p. 8, c. 8; Laws New Jersey, 1834, p. 118. The first proposition raised no Federal question.

As to the second ground, the contention is that the cession by New Jersey to the United States of jurisdiction over a certain strip of land at Sandy Hook vested in the United States exclusive legislative jurisdiction over the littoral waters extending three miles to the eastward of the coast line thereof.

Yet there was evidence introduced on behalf of defendant that the collision took place outside of that limit. And the trial court was not requested to instruct the jury that if they found the collision to have occurred within that limit the verdict should be for the defendant.

The charge of the court is not before us, nor was any excep-

tion taken to any part of it, and the verdict and judgment must be held to have been rendered on the facts according to law. *Hamburg-Am. S. S. Co.* v. *Lennan,* 194 U. S. 629.

This being the situation we hesitate to retain jurisdiction. Nevertheless, as clause 17 of section 8 of Article I of the Constitution [1] may be regarded as having been properly invoked by the second proposition, we feel justified in declining to sustain the motion to dismiss. And retaining jurisdiction, we think the judgment must be affirmed.

The jurisdiction of the United States over Sandy Hook is derived from the act of the legislature of New Jersey of March 12, 1846, set forth below.[2] Laws N. J. 1846, p. 124. In 1806 and 1817 deeds of the land included in Sandy Hook were given the United States, being simple conveyances of real estate for named money consideration.

The New Jersey act of 1846 was merely one of cession,

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[1] The Congress shall have power . . . to exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of Government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings.

[2] 1. That the jurisdiction in and over all that portion of Sandy Hook, in the county of Monmouth, owned by the United States, lying north of an east and west line through the mouth of Youngs Creek at low water, and extending across the island or cape of Sandy Hook from shore to shore, and bounded on all other sides by the sea and Sandy Hook Bay, be, and the same is hereby, ceded to the said United States, for military purposes; and the said United States shall retain such jurisdiction so long as the said tract shall be applied to the military or public purposes of said United States, and no longer.

2. That the jurisdiction ceded in the first section of this act shall not prevent the execution on the said tract of land of any process, civil or criminal, under the authority of this State, except so far forth as such process may affect any of the real or personal property of the United States of America within the said tract; nor shall it prevent the operation of the public laws of this State within the bounds of the said tract, so far as the same may not be incompatible with the free use and enjoyment of the said premises by the United States for the purposes above specified.

and the operation of the general laws of New Jersey was reserved as therein provided. *Fort Leavenworth R. R. Company* v. *Lowe*, 114 U. S. 525; *Chicago, Rock Island & Pacific Railway Company* v. *McGlinn*, 114 U. S. 542.

Moreover, as was held by the Circuit Court of Appeals for the Second Circuit, in *Middleton* v. *La Compagnie Générale Transatlantique*, 100 Fed. Rep. 866, the act did not purport to transfer jurisdiction over the littoral waters beyond low water mark, and for the purposes of this case the public laws of New Jersey must be regarded as obtaining there, whether enacted prior or subsequent to the cession.

Judgment affirmed.

McDANIEL *v.* TRAYLOR.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

No. 129. Submitted January 16, 1905.—Decided February 20, 1905.

Complainants, who were heirs at law of an intestate leaving real estate the undivided interest of each being valued at over $2,000, and situated within the jurisdiction of the court, filed their bill in the proper Circuit Court of the United States against proper parties, citizens of other States, alleging that defendants had combined to procure and had fraudulently procured orders of the probate court allowing their claims against one of the heirs at law as claims against the intestate whereby such claims became liens upon the intestate's real estate; the claim of each defendant was less than $2,000 but the aggregate amount exceeded $2,000. So far as the allegations of the bill were concerned if any one of the claims was good all were good and the prosecution of one could not be enjoined unless all were enjoined. The bill prayed that the cloud on title of the intestate's real estate be removed by declaring the claims invalid and enjoining proceedings under the judgments of the probate court. The defendants were proceeded against under the act of March 3, 1875, 18 Stat. 470. The Circuit Court dismissed the bill for want of jurisdiction. *Held* error and that

It was competent for the Circuit Court upon the case made by the bill to deprive defendants acting in combination of the benefit of the orders made in the probate court allowing their respective claims.

In this case the jurisdiction of the Circuit Court does not depend, within the judiciary act of 1887, 1888, on the value of complainants' interest in the real estate from which the cloud is sought to be removed but on the aggregate amount of the liens of all of the defendants' claims which had been allowed by the probate court against the intestate's estate pursuant to the alleged combination.

THIS was a suit in equity instituted in the Circuit Court of the United States for the Eastern District of Arkansas by the appellants, citizens of Arkansas, against the appellees, more than thirty in number and respectively citizens, corporate and individual, of Tennessee, New York, Missouri, Illinois, New Jersey, Connecticut, Ohio and Georgia.

There was a demurrer to the bill by some of the defendants upon the ground, among others, that the Circuit Court had no jurisdiction of the parties and subject matter. The demurrer was sustained, and the bill dismissed for want of jurisdiction.

The question of jurisdiction depends, of course, upon the allegations of the bill. The case made by the bill is this:

On the thirteenth day of April, 1891, Hiram Evans, a resident of St. Francis County, Arkansas, died intestate and possessed of personal property exceeding $12,000 in value.

He was also seized in fee of 760 acres of land of the value of about $16,000, and left surviving him as his only heirs at law the three appellants, and three sons, James Evans, William E. Evans and John Evans.

By an order made April 21, 1891, in the Probate Court of the county, James Evans was appointed administrator of the estate of the intestate. Having duly qualified as such, he took possession of all the assets of the estate and acted as such administrator until his death.

Among the assets that came to his hands as administrator was a drug store which with its stock of goods, fixtures, book accounts and other things therein contained was sold and delivered by him to John Evans on the first day of May, 1891.

The latter conducted the business in his own name, and while doing so incurred debts and obligations to the defendants in this suit, aggregating $3,000, as well as debts and obligations to other persons, but no single one of his debts exceeded $2,000.

John Evans became insolvent and on May 27, 1892, transferred and delivered to James Evans, administrator of Hiram Evans, the drug store and all that remained of the stock of goods, fixtures and book accounts.

Thereupon, the bill alleged, the defendants herein "conspired, colluded and confederated" together and with John Evans and with James Evans, administrator, to secure the payment of their claims and demands against John Evans out of the assets of the estate of Hiram Evans, deceased, and, "so conspiring and confederating," they presented to the Probate Court their several claims and demands—and James Evans, administrator, fraudulently and illegally approved them—for allowance against the estate of Hiram Evans.

The bill also alleged that the defendants and the administrator of Hiram Evans, still conspiring and confederating together, procured the judgment of the Probate Court establishing their claims against the estate of Hiram Evans by concealing from the court the fact that they were debts and obligations of John Evans and cloaking them under the name of expenses of administration of the said estate, "all of which transactions were part of the same scheme, and were participated in by each and all of the said defendants and by said John Evans and said James Evans, administrator."

It was further alleged: "That the said judgments of said court establishing and allowing the respective claims and demands of the defendants herein against the said estate were wholly the result of the conspiracy and confederation hereinbefore mentioned, and the fraud practiced in pursuance thereof as aforesaid, and are, therefore, in equity and good conscience, void and ineffectual for any purpose whatsoever and ought not to be enforced; but that nevertheless the same are at law liens

upon the real estate hereinbefore described and charges against the respective interests" of the plaintiffs; that, in pursuance of the said conspiracy and confederation, the defendants, and John Evans and James Evans, concealed from the plaintiffs the matters and things hereinbefore complained of, and failed to disclose to them the sale of the drug store to John Evans, and the fact that the said claims and demands of defendants were the personal debts and obligations of John Evans; that it had been determined by the Supreme Court of the State in certain proceedings relating to the matters here in controversy that neither the Probate Court nor the state Circuit Court on appeal had jurisdiction to hear or determine equitable issues, and that plaintiffs' remedy lay "in an original proceeding in a court of competent chancery jurisdiction, and that the said action and ruling of the said Supreme Court was without prejudice to your orators' beginning and maintaining this bill of complaint."

The bill still further alleged that under the law of Arkansas the judgment of the Probate Court, allowing and classifying the demands of defendants, passed beyond the control of that court at the expiration of the term at which the same was rendered, and that thereafter it was not within its power to alter, amend or set aside the same; that the time within which plaintiffs might have taken an appeal, or have compelled the administrator to take an appeal from the judgment, had expired long prior to the time when they acquired knowledge of the matters and things hereinbefore complained of; that by reason thereof plaintiffs are wholly without remedy in the premises unless the relief prayed be granted them; that all the acts and doings of the defendants toward procuring the said judgments of the Probate Court were wrongful, fraudulent and inequitable, and tended to the manifest wrong, injury and oppression of plaintiffs; and that in equity and good conscience the defendants ought not to have or enjoy the benefit or advantage of the said judgments.

The relief prayed was that the judgments of the Probate

Court be set aside and held not to be valid or lawful liens upon or against the real estate herein described, nor upon the right, title or interest therein of the plaintiffs; that the defendants be enjoined from enforcing such judgments or from taking any benefit, profit or advantage by them; and that all the defendants being without the jurisdiction of the Circuit Court, an order be made directing them to be notified of this suit by publication, according to the provisions of the act of Congress of March 3, 1875. 18 Stat. 470.

By the act just referred to it was, among other things, provided: "SEC. 8. That when in any suit, commenced in any Circuit Court of the United States, to enforce any legal or equitable lien upon, or claim to, or to remove any encumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of, or found within, the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur, by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks; and in case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service or publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or de-

fendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein within such district. . . ." Rev. Stat. Supp., vol. 1, pp. 84, 85; 18 Stat. 470, c. 137.

Upon demurrer to the jurisdiction of the Circuit Court that court dismissed the suit, being of opinion that the value of the matter in dispute was not sufficient to give jurisdiction. *McDaniel* v. *Traylor*, 123 Fed. Rep. 338.

Mr. G. B. Webster and *Mr. J. R. Beasley* for appellants:

The bill being for removal of cloud on title the value of the property affected controls. As to nature of the bill see Coke Litt. 100*a*; Black's Law Dict. 214; *Welden* v. *Stickney*, 1 D. C. App. 343; Cooley on Taxation, 542; *Detroit* v. *Martin*, 34 Michigan, 170; *Bissell* v. *Kellogg*, 60 Barb. 629; *Lick* v. *Ray*, 43 California, 83 ; *Ward* v. *Dewey*, 16 N. Y. 531 ; *Byne* v. *Vivian*, 5 Ves. 604 ; *Dull's Appeal*, 113 Pa. St. 516. As to jurisdictional amount involved in such cases, see *Smith* v. *Adams*, 130 U. S. 175; *Simon* v. *House*, 46 Fed. Rep. 317; *Woodside* v. *Ciceroni*, 93 Fed. Rep. 1; *Cowell* v. *Water Supply Co.*, 96 Fed. Rep. 769; *S. C.*, 121 Fed. Rep. 53; *Fuller* v. *Grand Rapids*, 40 Michigan, 395; *Scripture* v. *Johnson*, 3 Connecticut, 211; *Queyrouse* v. *Thibodeaux*, 30 La. Ann. 1114; *Simon* v. *Richard*, 42 La. Ann. 842; *Kahn* v. *Kerngold*, 80 Virginia, 342; *Ayers* v. *Blair*, 26 W. Va. 558.

The value of the property being the test of the jurisdictional amount, the complainants could have proceeded against any of the defendants irrespective of the amount of his claim, and therefore may join all in one bill, unless that would make the bill multifarious, and in this case it does not have that effect. *Fellows* v. *Fellows*, 4 Cow. 682; Story's Eq. Pl. § 271; *Gaines* v. *Chew*, 2 How. 619.

Even though the value of the real estate is not the true test of the amount in controversy, the complainants were entitled to join the several defendants in one bill, and when so joined

the aggregate amount of their claims was the amount in controversy. 1 Pomeroy Eq. Jur., 2d ed., § 269; *Waterworks* v. *Youmans*, L. R. 2 Ch. 8; *Campbell* v. *Mackay*, 1 Myl. & Cr. 603; *Hardie* v. *Bulger*, 66 Mississippi, 577; *De Forrest* v. *Thompson*, 40 Fed. Rep. 375; *Brown* v. *Safe Dep. Co.*, 128 U. S. 403; *N. Y. & N. H. R. R. Co.* v. *Schuyler*, 17 N. Y. 592.

Even if the transactions of which complaint is made were separate as to the several defendants, yet if it is alleged that all were part of the same fraudulent scheme or conspiracy, the bill is not multifarious. *Duff* v. *Bank*, 13 Fed. Rep. 65; *Pullman* v. *Stebbins*, 51 Fed. Rep. 10; *Marshall* v. *Holmes*, 141 U. S. 589; *Shields* v. *Thomas*, 17 How. 3; *Clay* v. *Field*, 138 U. S. 479; *Handley* v. *Stutz*, 137 U. S. 369; *Davis* v. *Schwartz*, 155 U. S. 647; *Illinois Central* v. *Coffery*, 128 Fed. Rep. 770; *Walter* v. *Railroad Co.*, 147 U. S. 370; *Railroad Co.* v. *Walker*, 148 U. S. 392; *Fishback* v. *Telegraph Co.*, 161 U. S. 96; *Bank* v. *Cannon*, 164 U. S. 319 and *Gibson* v. *Shufeldt*, 122 U. S. 27, distinguished.

Mr. N. W. Norton for appellees:

Where the bill is to relieve property of a lien or charge, the amount of the lien and not the value of the property is the test of jurisdiction. *Ross* v. *Prentiss*, 3 How. 771; *Carne* v. *Russ*, 152 U. S. 250; *Farmers' Bank* v. *Hoop*, 7 Pet. 168; *Peyton* v. *Robertson*, 9 Wheat. 527; *Gibson* v. *Shufeldt*, 122 U. S. 27.

Separate cases cannot be combined to make up the jurisdictional amount. *Walter* v. *Railroad Co.*, 147 U. S. 370; *Slaver* v. *Bigelow*, 5 Wall. 208; *Russell* v. *Stansell*, 105 U. S. 303; *Trust Co.* v. *Waterman*, 106 U. S. 265; *Hawley* v. *Fairbanks*, 108 U. S. 543; *Stewart* v. *Dunham*, 115 U. S. 61; *Clay* v. *Field*, 138 U. S. 464.

The bill is against persons who must respond severally to the plaintiffs if at all and neither of the judgments is for as much as $2,000. The claims were all separate and cannot be united in one action without making it multifarious.

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

If, within the meaning of the judiciary act of 1887, 1888, the value of the matter in dispute exceeded the sum of two thousand dollars, exclusive of interest and costs (25 Stat. 433), then there was no reason for dismissing the bill for want of jurisdiction in the Circuit Court; for, diversity of citizenship was shown by the bill, and under the above act of March 3, 1875, c. 137, 18 Stat. 470, it was competent for the Circuit Court, by a final decree, to remove any encumbrance or lien or cloud upon the title to real or personal property within the district, as against persons not inhabitants thereof and not found therein, or who did not voluntarily appear in the suit.

The lands of which Hiram Evans died possessed were of the alleged value of $16,000, and we assume that the plaintiffs jointly owned one undivided half of them. Was the value of the joint interest of the plaintiffs in the lands in question to be deemed the value of the matter in dispute, or was the Circuit Court without jurisdiction if no one of the alleged fraudulent claims held by the defendants exceeded two thousand dollars, exclusive of interest and costs?

Some light will be thrown upon this question by certain cases in which this court held it to be competent for a Circuit Court, in a suit in equity, to deprive parties of the benefit of a judgment or order fraudulently obtained by them in a state court.

In *Johnson* v. *Waters*, 111 U. S. 640, 667, the question was as to the authority of a Circuit Court to set aside as fraudulent and void certain sales made by a testamentary executor under the orders of a Probate Court. Conceding that the administration of the estate there in question properly belonged to the Probate Court, and that in a general sense its decisions were conclusive, especially upon parties, Mr. Justice Bradley, speaking for this court said: "But this is not universally true. The most solemn transactions and judgments may, at the

instance of the parties, be set aside or rendered inoperative for fraud. The fact of being a party does not estop a person from obtaining in a court of equity relief against fraud. It is generally parties that are the victims of fraud. The Court of Chancery is always open to hear complaints against it, whether committed *in pais* or in or by means of judicial proceedings. In such cases the court does not act as a court of review, nor does it inquire into any irregularities or errors of proceeding in another court; but it will scrutinize the conduct of the parties, and if it finds that they have been guilty of fraud in obtaining a judgment of decree, it will deprive them of the benefit of it, and of any inequitable advantage which they have derived under it."

In *Arrowsmith* v. *Gleason*, 129 U. S. 86, 98, the question was whether the Circuit Court had jurisdiction by its decree to set aside a sale of an infant's lands fraudulently made by his guardian under authority derived from a Probate Court, and give such relief as would be consistent with equity. One of the grounds of demurrer to the bill in that case was that the Circuit Court had no authority to set aside and vacate the orders of the state court. This court said: "If by this is meant only that the Circuit Court cannot by its orders act directly upon the Probate Court, or that the Circuit Court cannot compel or require the Probate Court to set aside or vacate its own orders, the position of the defendants could not be disputed. But it does not follow that the right of Harmening, in his lifetime, or of his heirs since his death, to hold these lands, as against the plaintiff, cannot be questioned in a court of general equitable jurisdiction upon the ground of fraud. If the case made by the bill is clearly established by proof, it may be assumed that some state court, of superior jurisdiction and equity powers, and having before it all the parties interested, might afford the plaintiff relief of a substantial character. But whether that be so or not, it is difficult to perceive why the Circuit Court is not bound to give relief according to the recognized rules of equity, as administered in the courts of the

United States, the plaintiff being a citizen of Nevada, the defendants citizens of Ohio, and the value of the matter in dispute, exclusive of interest and costs, being in excess of the amount required for the original jurisdiction of such courts." "While there are general expressions in some cases apparently asserting a contrary doctrine, the later decisions of this court show that the proper Circuit Court of the United States may, without controlling, supervising, or annulling the proceedings of state courts, give such relief, in a case like the one before us, as is consistent with the principles of equity."

After citing the case of *Johnson* v. *Waters*, above, the court referred to *Reigal* v. *Wood*, 1 Johns Ch. 402, 406, in which Chancellor Kent said: "Relief is to be obtained not only against writings, deeds, and the most solemn assurances, but against judgments and decrees, if obtained by fraud and imposition." It also referred to *Bowen* v. *Evans*, 2 H. L. Cas. 257, 281, in which Lord Chancellor Cottenham said: "If a case of fraud be established, equity will set aside all transactions founded upon it, by whatever machinery they may have been effected, and notwithstanding any contrivances by which it may have been attempted to protect them. It is immaterial, therefore, whether such machinery and contrivances consisted of a decree of a court of equity, and a purchase under it, or of a judgment at law, or of other transactions between the actors in the fraud." The opinion of this court concluded: "These principles control the present case, which, although involving rights arising under judicial proceedings in another jurisdiction, is an original, independent suit for equitable relief between the parties, such relief being grounded upon a new state of facts, disclosing not only imposition upon a court of justice in procuring from it authority to sell an infant's lands when there was no necessity therefor, but actual fraud in the exercise, from time to time, of the authority so obtained. As this case is within the equity jurisdiction of the Circuit Court, as defined by the Constitution and laws of the United States, that court may, by its decree, lay hold of the parties and compel

them to do what, according to the principles of equity, they ought to do, thereby securing and establishing the rights of which the plaintiff is alleged to have been deprived by fraud and collusion."

In *Marshall* v. *Holmes*, 141 U. S. 589, 595, 596, it appeared that twenty-three judgments for different amounts were fraudulently procured to be rendered in a state court against a citizen of another State. Upon learning of the judgments the latter brought suit in one of the courts of Louisiana for a decree avoiding them as obtained upon false testimony, and thereafter filed a petition and bond for the removal of the case to the Circuit Court of the United States. The right of removal was denied, and the court dissolved the preliminary injunction which had been granted, and authorized Mayer, who had become the owner of the judgments, to proceed in their collection. Upon appeal to a higher state court, the original judgment was affirmed, and that judgment was brought here for review by writ of error. This court sustained the right of removal. After stating that the judgments aggregated more than three thousand dollars and were all held by Mayer and against the plaintiff, we said: "Their validity depends upon the same facts. If she is entitled to relief against one of the judgments, she is entitled to relief against all of them. The cases in which they were rendered were, in effect, tried as one case, so far as she and Mayer were concerned; for the parties stipulated that the result in each one not tried should depend upon the result in the one tried. As all the cases not tried went to judgment in accordance with the result in the one tried; as the property of Mrs. Marshall [the plaintiff] was liable to be taken in execution on all the judgments; as the judgments were held in the same right; and as their validity depended upon the same facts, she was entitled, in order to avoid a multiplicity of actions, and to protect herself against the vexation and cost that would come from numerous executions and levies, to bring one suit for a decree finally determining the matter in dispute in all the cases.

And as, under the rules of equity obtaining in the courts of the United States, such a suit could be brought, the aggregate amount of all the judgments against which she sought protection, upon grounds common to all the actions, is to be deemed, under the act of Congress, the value of the matter here in dispute."

The question of jurisdiction here presented arises out of facts not to be found in any case brought to our attention or of which we have knowledge.

The suit is to remove a cloud on the title to certain lands of the value of $16,000. The plaintiffs, being three of the six heirs at law of the intestate, jointly own an undivided interest of one-half of those lands, but no interest in any particular part of them. If the value of their joint undivided interest, $8,000, or the value of the undivided interest of each (one-third of $8,000), is to be taken as the value of the matter in dispute, then the Circuit Court had jurisdiction. But we are of opinion that within the meaning of the judiciary act of 1887, 1888, the jurisdiction of the Circuit Court, in this case, depended upon the value in dispute measured by the aggregate amount of the claims of the defendants.

It is contended that the jurisdiction of the Circuit Court must fail, because no one defendant has a claim of the required jurisdictional amount. In support of this contention several cases are cited of the class to which *Waller* v. *Northeastern Railroad Co.*, 147 U. S. 370, 372, 373, belongs. That was a suit by a railroad company against the treasurers and sheriffs of several counties through which its road passed, to enjoin them—separately, of course—from issuing executions against or seizing the property of the company for the purpose of collecting a tax based upon an assessment alleged to be unconstitutional and void. The court said: "It is entirely clear that, had these taxes been paid under protest and the plaintiff had sought to recover them back, it would have been obliged to bring separate actions in each county. As the amount recoverable from each county would be different, no joint

judgment could possibly be rendered. So, had a bill for injunction been filed in a state court, and the practice had permitted, as in some States, a chancery subpœna to be served in any county of the State, these defendants could not have been joined in one bill, but a separate bill would have had to be filed in each county. . . . It is well settled in this court that when two or more plaintiffs, having several interests, unite for the convenience of litigation in a single suit it can only be sustained in the court of original jurisdiction, or on an appeal in this court, as to those whose claims exceed the jurisdictional amount; and that when two or more defendants are sued by the same plaintiff in one suit, the test of jurisdiction is the joint or several character of the liability to the plaintiff."

The case before us, however, is presented by the bill in an entirely different aspect. The case may be regarded as exceptional in its facts, and may be disposed of without affecting former decisions. There is no dispute as to the amount of any particular claim. So far as the bill is concerned, if any one of the specified claims is good against the estate of Hiram Evans, then all are good; if the lands in question, or any interest in them, can be sold to pay one claim, they must be sold to pay all. The court could not, under the bill, enjoin the prosecution of one claim and leave the others untouched. The matter in dispute is whether the lands in which the plaintiffs have a joint undivided interest of one-half can be sold to pay *all* the claims, *in the aggregate*, which the defendants, by *combination and conspiracy*, procured the Probate Court to allow against the estate of Hiram Evans. The essence of the suit is the alleged fraudulent combination and conspiracy to fasten upon that estate a liability for debts of John Evans, which were held by the defendants and which they, acting in combination, procured, in coöperation with James Evans, to be allowed as claims against the estate of Hiram Evans. By reason of that combination, resulting in the allowance of all those claims in the Probate Court, as expenses of administering the estate of

Hiram Evans, the defendants have so tied their respective claims together as to make them, so far as the plaintiffs and the relief sought by them are concerned, *one* claim. The validity of all the claims depends upon the same facts. The lien on the lands which is asserted by each defendant has its origin as well in the combination to which all were parties as in the orders of the Probate Court which, in furtherance of that combination, were procured by their joint action. Those orders were conclusive against the plaintiffs, as to all the claims, if the claims could be allowed at all against the estate of Hiram Evans. A comprehensive decree by which the plaintiff can be protected against those orders will avoid a multiplicity of suits, save great expense and do justice. If the plaintiffs do not prove such a combination and conspiracy, in respect, at least, of so many of the specified claims as in the aggregate will be of the required amount, then their suit must fail for want of jurisdiction in the Circuit Court; for, in the absence of the alleged combination, the claim of each defendant must, according to our decisions, be regarded, for purposes of jurisdiction, as separate from all the others.

An instructive case on the general subject is *Shields* v. *Thomas*, 17 How. 3. That was a suit in equity in a Kentucky state court in which the plaintiffs, as the legal representatives of an intestate, sought a decree for certain proportionate amounts alleged to be due them respectively from the defendant, who had married the widow and thereby obtained possession of the property of the deceased. The defendant was charged with having converted to his own use a large amount of the intestate's property to which the legal representatives of the intestate, plaintiffs in the suit, were entitled. In that suit a decree was rendered against the defendant for a large sum of money, "the shares of the respective complainants being apportioned to them in the decree," and the defendant being required by the decree to pay to each of the plaintiffs the specific sum to which he was entitled as his portion of the property misappropriated by him. Subsequently a suit was

brought in a Circuit Court of the United States (jurisdiction being based on diversity of citizenship), to enforce the decree rendered in the Kentucky state court, and to compel the defendant to pay to the plaintiffs, respectively, the several sums which had been decreed in their favor. A decree to that effect was rendered. The whole amount which the defendant was required by the decree to pay was large enough to give this court jurisdiction on appeal, although the specific sum awarded to each plaintiff was less than the jurisdictional sum. The defendant appealed to this court, and a motion was made to dismiss the appeal on the ground "that the sum due to each complainant is severally and specifically decreed to him; and that the amount thus decreed, is the sum in controversy between each representative and the appellant, and not the whole amount for which he has been held liable."

After observing that if that view of the matter in controversy was correct, this court was without jurisdiction, Chief Justice Taney, speaking for the court, said: "But the court think the matter in controversy, in the Kentucky court, was the sum due to the representatives of the deceased collectively, and not the particular sum to which each was entitled, when the amount due was distributed among them, according to the laws of the State. They all claimed under one and the same title. They had a common and undivided interest in the claim; and it was perfectly immaterial to the appellant how it was to be shared among them. He had no controversy with either of them on that point; and if there was any difficulty as to the proportions in which they were to share, the dispute was among themselves, and not with him.

"It is like a contract with several to pay a sum of money. It may be that the money, when recovered, is to be divided between them in equal or unequal proportions. Yet if a controversy arises on the contract, and the sum in dispute upon it, exceeds two thousand dollars, an appeal would clearly lie to this court, although the interest of each individual was less than that sum.

"This being the controversy in Kentucky, the decree of that court, apportioning the sum recovered among the several representatives, does not alter its character when renewed in Iowa. So far as the appellant is concerned, the entire sum found due by the Kentucky court is in dispute. He disputes the validity of that decree, and denies his obligation to pay any part of the money. And if the appellees maintain their bill, he will be made liable to pay the whole amount decreed to them. This is the controversy on his part; and the amount exceeds two thousand dollars. We think the court, therefore, has jurisdiction on the appeal."

The doctrines of *Shields* v. *Thomas* have been frequently recognized by this court. In the recent case of *Overby* v. *Gordon*, 177 U. S. 214, 218, the court, interpreting the decision in that case, said: "It was held that where the representatives of a deceased intestate recover a judgment against an administrator for an amount in excess of the sum necessary to confer jurisdiction to review, and such recovery was had under the same title and for a common undivided interest, this court had jurisdiction, although the amount decreed to be distributed to each representative was less than the jurisdictional sum." See also *The Connemara*, 103 U. S. 754; *Handley* v. *Stutz*, 137 U. S. 366; *New Orleans Pacific Ry.* v. *Parker*, 143 U. S. 42, 51; *Texas & Pacific Ry. Co.* v. *Gentry*, 163 U. S. 353, 361; *Davis* v. *Schwartz*, 155 U. S. 631, 647.

It is said that as to any single one of the claims in question the plaintiffs in the present case could have released the lands in which they had an undivided interest, by paying that particular claim; therefore, it is argued, the value of the matter in dispute, as between the plaintiffs and such defendant, was the amount of the latter's claim. And so as to each separate claim. But that same thing could have been said as to the respective claims involved in *Shields* v. *Thomas*. The defendant there could have paid off any of the respective claims involved. This court, however, held that fact to be immaterial because the defendant disputed the validity of the

original decree holding him liable for all the claims, and had no concern as to how the whole amount decreed against him was to be distributed. So here, the plaintiffs suing to protect their common undivided interest in lands put in peril by fraudulent orders obtained by the defendants acting in combination to obtain such orders for their benefit, are only concerned in preventing the defendants from proceeding under the orders of the Probate Court, which they procured for their benefit equally, and under which they all now equally claim. The plaintiffs made no contest as to particular claims. They dispute all of them as claims against Hiram Evans' estate. If the orders of the Probate Court stand for the benefit of the respective defendants, then the plaintiffs' interests in the lands are liable for all the claims asserted by the defendants; for there is no dispute here as to the amount of any particular claim. Hence, as we have said, the value of the matter in dispute is the aggregate amount of the claims fraudulently procured by the defendants acting in combination to be allowed in the Probate Court as claims against the estate of Hiram Evans.

For the reasons stated we hold: 1. That it was competent for the Circuit Court upon the case made by the bill to deprive the defendants, acting in combination and claiming the benefit of the orders made in the Probate Court allowing their respective claims. 2. That the value of the matter in dispute in the Circuit Court was the aggregate amount of all the claims so allowed against the estate of Hiram Evans.

The decree is reversed with directions to set aside the order dismissing the suit for want of jurisdiction, to overrule the demurrer, and for further proceedings as may be consistent with this opinion and with the law.

Reversed.

CALEDONIAN COAL COMPANY *v.* BAKER.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

No. 419. Argued January 27, 1905.—Decided February 20, 1905.

In an action for mandamus against a judge of a territorial court in New Mexico, who, after the appeal, ceased to be judge and whose successor has consented that the action be revived against him, this court may, under the act of Congress of February 8, 1899, if in its judgment necessity exists for such action in order to obtain a settlement of the legal questions involved, substitute the name of the successor in place of the original appellee. In this case this court orders the substitution, the party substituted not to be liable for any costs prior hereto.

A court cannot acquire jurisdiction over the person of a defendant except by actual service of notice upon him within the jurisdiction or upon some one authorized to accept service in his behalf, or by his waiver, by general appearance or otherwise, of the want of due service.

Service of a summons in an action in a territorial court of New Mexico on the president of a railway corporation, while passing through New Mexico as a passenger on a railroad train, held insufficient as a personal service of a corporation organized under an act of Congress, having offices in New York, Kansas and Illinois, and none in New Mexico; the mere ownership of lands, the bringing of suits to protect such lands, in New Mexico does not locate the corporation in New Mexico for the purposes of a personal action against it based on such a service of the summons. Nor was such service authorized by the Compiled Laws of New Mexico, 1897.

Although the state of the statute law in respect of suits like this may operate injuriously at times the situation cannot be changed by the courts—that can only be done by legislation.

THIS appeal brings up for review a final judgment of the Supreme Court of the Territory of New Mexico denying an application to that court by the Caledonian Coal Company for a writ of mandamus to compel Benjamin S. Baker, Judge of the District Court of the Second Judicial District of that Territory, to take cognizance of a certain action brought in

that court against the Santa Fé Pacific Railroad Company and others.

The petition for mandamus makes the following case:

On the seventeenth day of February, 1904, the Caledonian Coal Company, organized under the laws of New Mexico, commenced an action in the District Court of the Second Judicial District of that Territory against the Santa Fé Pacific Railroad Company, the Atchison, Topeka and Santa Fé Railroad Company, the Colorado Fuel and Iron Company and the American Fuel Company, to recover damages for alleged violations of the Interstate Commerce Act of 1887 and the Anti Trust Act of 1890.

By the ninth section of the above act of 1887 it is provided that "any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any District or Circuit Court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. . . ." 24 Stat. 379, c. 104. And by section 7 of the above act of 1890 it was provided that "any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any Circuit Court of the United States in the District in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee." 26 Stat. 209, c. 647.

A summons was issued against the Santa Fé Pacific Railroad Company and was returned by the Marshal of the Territory, the return stating that it was served at the above district on

the thirteenth day of May, 1904, by delivering a true copy thereof, with a copy of the complaint thereto attached, to E. P. Ripley, president of the defendant corporation.

The Santa Fé Pacific Railroad Company is a corporation organized and existing under the act of Congress of March 3, 1897, defining the rights of purchasers under mortgages authorized by an act of Congress approved April 20, 1871, concerning the Atlantic and Pacific Railroad Company. 29 Stat. 622, c. 374.

When the grievances set out in the petition were committed, the Santa Fé Pacific Railroad Company was the owner of a line of railroad within the Second Judicial District of New Mexico and elsewhere within that Territory, but which line, at the commencement of this action, had been sold and transferred to, and was being operated by, the Atchison, Topeka and Santa Fé Railroad Company under a conveyance authorized by an act of Congress of June 27, 1902, 32 Stat. 405, c. 1159; was the owner of several hundred thousand acres of land within that District; and, at the commencement of the action for damages, was prosecuting in one of the counties of the Territory, within the same District, suits involving the company's title and possession of parts of those lands.

All of those lands, with the rights, privileges and franchises appertaining thereto where acquired by the Santa Fé Pacific Railroad Company as the successor of the Atlantic and Pacific Railroad Company, to which last named company they were granted by the act of Congress of July 27, 1866. 14 Stat. 292, c. 278.

The petition for mandamus alleged that by reason of the above facts the Santa Fé Pacific Railroad Company was an "inhabitant" of the Second Judicial District of New Mexico, and by reason of the presence of Ripley, its president, in that Territory and within that District and the service of summons in the above action upon him as such president, the company was "found" in the District within the meaning of the acts of Congress.

Nevertheless, the defendant Baker, Associate Justice of the Supreme Court of the Territory and Judge of the District Court of the Second Judicial District, quashed the return of the above summons and refused to assume jurisdiction of the action, so far as the Santa Fé Pacific Railroad Company was concerned, or to require that company to answer the declaration or complaint filed by petitioner.

The defendant Baker made a return to a rule issued against him to show cause. From that return it appeared that the Santa Fé Pacific Railroad Company specially appeared in the action for the purpose of moving and did move to quash the service of process, upon grounds set forth in an affidavit of its president. In that affidavit Ripley stated that when served with summons he was only a passenger on a railroad train passing through the Territory; that the company had its office in the city of New York, while its land commissioner had an office at Topeka, Kansas, and its president an office at Chicago, Illinois; that the company had no property in the Territory of New Mexico, except lands acquired by it under a foreclosure of a mortgage of the Atlantic and Pacific Railroad Company, and which lands were undisposed of; that it has had no office or place of business in the Territory since the sale of its road. This affidavit was used on the hearing of the motion to quash, and the facts stated in it were not contradicted.

The contention of the company, therefore, was that the service in question was insufficient to bring the company, personally, before the court.

The return of the judge also stated that the actions in ejectment brought by the railroad company against trespasses upon its property were instituted prior to the sale of its railroad property and franchises to the Atchison, Topeka and Santa Fé Railroad Company; and that the refusal of the judge to assume jurisdiction in the case referred to was upon the ground that the service upon Ripley as president of the company was not, in his opinion, sufficient to subject it personally to the jurisdiction of the court.

The relief sought was an alternative writ of mandamus, directing Judge Baker to assume jurisdiction of the cause, so far as the Santa Fé Railroad Company was concerned, and to require that company to plead, answer or demur.

The Supreme Court of the Territory, after hearing the case, upon the pleadings, return and the proofs, denied the petition for mandamus and dismissed the application. From that order the present appeal was prosecuted.

Mr. Neill B. Field for appellant:

The District Court had jurisdiction of the subject matter of the original action. Section 17, Organic Act, New Mexico, 9 Stat. 452; § 1910 Rev. Stat.; 26 Stat. 209; 24 Stat. 379.

If the District Courts of the Territories, when sitting for the trial of causes arising under the Constitution and laws of the United States, are not invested with jurisdiction to administer the remedy here invoked, then persons and corporations violating these statutes, and confining their operations to the Territories need not respond in damages, however flagrant their violations of the law. They cannot be sued, in the United States Circuit or District Courts, because the jurisdiction of those courts does not extend to the Territories; and if they cannot be sued in the territorial courts, they cannot be sued at all.

The District Courts of the Territories are invested with admiralty jurisdiction which is analogous on the question of jurisdiction. *City of Panama*, 101 U. S. 458; *Insurance Co.* v. *Canter*, 1 Pet. 511; and see construction of act of March 3, 1887, 24 Stat. 505, and cases cited; *In re Cooper*, 143 U. S. 494; *United States* v. *Foreman*, 5 Oklahoma, 237; *Johnson* v. *United States*, 6 Utah, 407; *United States* v. *Johnson*, 140 U. S. 703.

The Santa Fé Pacific Railroad Company is not a "foreign" corporation in New Mexico.

The fundamental error of the court below lies in the assumption that the company is a "foreign" corporation in

New Mexico. The assumption is supported by no reasoning, but that the court did so assume appears from the opinion. See act of incorporation, 29 Stat. 622. A corporation created by or under authority of an act of Congress has its domicile in every place where it may lawfully exercise its corporate powers. *Bank of Augusta* v. *Earle*, 13 Pet. 588; 1 Thomp. on Corp. § 681; 2 Morawetz, § 984; *Commonwealth* v. *Tex. & P. R. R. Co.*, 98 Pa. St. 100; *California* v. *Pac. R. R. Co.*, 127 U. S. 39.

The railroad company holds its lands in New Mexico under the authority of Congress, and that authority is clearly not subject to be circumscribed by territorial legislation. The franchise to exist as a corporation is on the same footing. *Com.* v. *Tex. & Pac. R. R. Co.*, 127 U. S. 39; *Van Dresser* v. *Oregon Ry. & Nav. Co.*, 48 Fed. Rep. 202; *Pac. R. R. Removal Cases*, 115 U. S. 1; *Bank of U. S.* v. *Roberts*, 2 Fed. Cas. 728.

The Santa Fé Pacific Railroad Company was "found" within the district in which the suit was brought.

The court below treated the railroad company as being on the same footing with a corporation chartered by a State, citing *United States* v. *Southern Pacific Railroad Company*, 49 Fed. Rep. 297, but this case does not sustain the proposition.

As to how service may be made on domestic corporations, see Comp. Laws, New Mexico, 1897, §§ 450, 2963; *Kansas R. R. City* v. *Daugherty*, 138 U. S. 298.

The contention of the railroad company must be clearly established and it affirmatively appears from the answer that service on it was sufficient, and that appellant is entitled to the relief prayed for. *New Haven &c. Co.* v. *Dowington Co.*, 130 Fed. Rep. 605; *United States* v. *Southern Pac. R. Co.*, 49 Fed. Rep. 297; *Cosmopolitan &c. Co.* v. *Walsh*, 193 U. S. 460.

Mr. Robert Dunlap for appellee:

It does not sufficiently appear that the District Court obtained jurisdiction in a personal action so as to enable it to render a personal judgment against the Santa Fé Pacific Rail-

road Company by the service made on its president while he was casually passing through the district and was not at the time representing the railroad company. The railroad company was not so identified with its president at the time in that district as to render the service of summons upon him a service upon it so as to subject it to the orders or judgments of that court. *Goldey* v. *Morning News Co.*, 156 U. S. 521; *Mex. Cent. Ry. Co.* v. *Pinkney*, 149 U. S. 209; *Harris* v. *Hardeman*, 14 How. 339; *Phillips* v. *Burlington Library Co.*, 141 Pa. St. 462.

A corporation can be said to have a technical *habitat* or place of residence only in the State or district where its corporate meetings are held. *G., H. & San Ant. Ry. Co.* v. *Gonzales*, 151 U. S. 496; *Int. Com. Comm.* v. *Tex. & Pac. Ry. Co.*, 57 Fed. Rep. 949; *Jones* v. *Scottish Accident Ins. Co.*, L. R. 17 Q. B. Div. 421; *Watkins* v. *Scottish Imperial Ins. Co.*, L. R. 23 Q. B. D. 285; *Frick Co.* v. *Norfolk & W. R. Co.*, 26 Fed. Rep. 725; *Lafayette Ins. Co.* v. *French*, 18 How. 408.

The service of summons, even upon the president of a corporation while temporarily in a State or district in which the corporation is not at the time transacting its business, is not a valid service upon the corporation, even though the local laws should authorize the same, because such president does not then represent that corporation. *Saint Clair* v. *Cox*, 106 U. S. 350; *Goldey* v. *Morning News*, 156 U. S. 518; *Construction Co.* v. *Fitzgerald*, 137 U. S. 106; *Mecke* v. *Valleytown Mineral Co.*, 93 Fed. Rep. 697; Beale on For. Corp. § 270.

The rule is the same even though the corporation at some period prior to the service had been engaged in business in the particular State or district, or that some officer of the corporation had at all times resided therein. The corporation has the right to withdraw from the State or district, and when it is no longer represented in such State or district by an agent transacting therein its ordinary business, it cannot be said to be present therein at the time. *Conley* v. *Mathieson Alkali Works*, 190 U. S. 406; *Geer* v. *Mathieson Alkali Works*, 190

U. S. 428; *DeCastro* v. *Compagnie Francaise &c.*, 76 Fed. Rep. 426; *Earle* v. *Chesapeake & Ohio R. Co.*, 127 Fed. Rep. 235; *Cady* v. *Associated Colonies*, 119 Fed. Rep. 420; *Eldred* v. *Am. Palace-Car Co.*, 105 Fed. Rep. 455; Beale on For. Corp. §§ 279, 281.

The railroad company may still own lands within the Territory of New Mexico without being represented therein by any authorized agency. Owning or holding lands in such district is not doing or transacting its business therein. *Mo. Coal & Mining Co.* v. *Ladd*, 160 Missouri, 435; nor is it doing business in the Territory by prosecuting suits. *McCall* v. *Mortgage Co.*, 99 Alabama, 427; *St. L., A. & T. Ry. Co.* v. *Fire Assn.*, 55 Arkansas, 163; *Utley* v. *Mining Co.*, 4 Colorado, 369.

The test is whether the corporation has an agency within the district transacting therein its ordinary business so that it may be said to be impersonated in or represented by such agency for general purposes, including its subjection to the service of process therein. *Saint Clair* v. *Cox*, 106 U. S. 351; *United States* v. *Am. Bell Tel. Co.*, 29 Fed. Rep. 17.

The District Court has no jurisdiction. It is a terminal court and was not included in § 9, act of February 4, 1887, 24 Stat. 382. *Reynolds* v. *United States*, 98 U. S. 145, 154; *McAllister* v. *United States*, 141 U. S. 174. As to what is a court of competent jurisdiction under act of March 3, 1887, see *Union Switch Co.* v. *Hall Signal Co.*, 65 Fed. Rep. 625, and as to what is meant by "where defendant resides or may be found" under act of July 2, 1890, see *United States* v. *Bell Tel. Co.*, 29 Fed. Rep. 34; *Maxwell* v. *A., T. & S. F. R. R. Co.*, 34 Fed. Rep. 286; *Bentlif* v. *London &c. Corporation*, 44 Fed. Rep. 667; *Clews* v. *Woodstock Iron Co.*, 44 Fed. Rep. 31; *St. Louis Wire Co.* v. *Consolidated Wire Co.*, 32 Fed. Rep. 802; *Good Hope* v. *Railway Fencing Co.*, 22 Fed. Rep. 635.

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

At the present term the appellant suggested that Judge

Baker had been succeeded in office by Judge Ira A. Abbott. And it moved that such order be made in the premises as would be conformable to the rules and practice of this court. Judge Abbott consents that the action may be revived against him as the successor of Judge Baker, and proceed to a hearing, without further summons or notice, upon the record as now presented to the court.

The first question to be considered is whether it is competent for this court, Judge Baker having ceased to be judge, to substitute the name of his successor, as the appellee.

In *United States* v. *Boutwell*, 17 Wall. 604, 607, which was a mandamus against Mr. Boutwell as Secretary of the Treasury, it appeared that after the case was brought to this court the defendant resigned his office. Thereupon a motion was made to substitute the name of his successor, Mr. Richardson. It did not appear that any previous application was made to the latter for leave to substitute his name, and he opposed the motion, which was denied.

Mr. Justice Strong delivered the opinion of the court, saying: "The office of a writ of mandamus is to compel the performance of a duty resting upon the person to whom the writ is sent. That duty may have originated in one way or in another. It may, as is alleged in the present case, have arisen from the acceptance of an office which has imposed the duty upon its incumbent. But no matter out of what facts or relations the duty has grown, what the law regards and what it seeks to enforce by a writ of mandamus, is the personal obligation of the individual to whom it addresses the writ. If he be an officer, and the duty be an official one, still the writ is aimed exclusively against him as a person, and he only can be punished for disobedience. The writ does not reach the office. It cannot be directed to it. It is, therefore, in substance a personal action, and it rests upon the averred and assumed fact that the defendant has neglected or refused to perform a personal duty, to the performance of which by him the relator has a clear right. Hence it is an imperative rule that previous

to making application for a writ to command the performance of any particular act, an express and distinct demand or request to perform it must have been made by the relator or prosecutor upon the defendant, and it must appear that he refused to comply with such demand, either in direct terms or by conduct from which a refusal can be conclusively inferred. Thus it is the personal default of the defendant that warrants impetration of the writ, and if a peremptory mandamus be awarded, the costs must fall upon the defendant." The court proceeded: "It necessarily follows from this, that on the death or retirement from office of the original defendant, the writ must abate in the absence of any statutory provision to the contrary. When the personal duty exists only so long as the office is held, the court cannot compel the defendant to perform it after his power to perform has ceased. And if a successor in office may be substituted, he may be mulcted in costs for the fault of his predecessor, without any delinquency of his own. Besides, were a demand made upon him, he might discharge the duty and render the interposition of the court unnecessary. At all events, he is not in privity with his predecessor, much less is he his predecessor's personal representative. As might be expected, therefore, we find no case in which such a substitution as is asked for now has ever been allowed in the absence of some statute authorizing it."

That case was followed by *United States* v. *Chandler*, 122 U. S. 643; *United States* v. *Lochren*, 164 U. S. 701; *Warner Valley Stock Co.* v. *Smith*, 165 U. S. 28, and *United States ex rel. &c.* v. *Butterworth*, 169 U. S. 600, 604, 605. In the latter case the court, after referring to prior cases, concluded its opinion in these words: "In view of the inconvenience, of which the present case is a striking instance, occasioned by this state of the law, it would seem desirable that Congress should provide for the difficulty by enacting that, in the case of suits against the heads of Departments abating by death or resignation, it should be lawful for the successor in office to be brought into the case by petition, or some other appropriate method."

Later, Congress, its attention being thus called to the matter, passed the act of February 8, 1899, c. 121, by which it was provided: "That no suit, action, or other proceeding lawfully commenced by or against the head of any Department or Bureau or other officer of the United States in his official capacity, or in relation to the discharge of his official duties, shall abate by reason of his death, or the expiration of his term of office, or his retirement, or resignation, or removal from office, but, in such event, the court, on motion or supplemental petition filed, at any time within twelve months thereafter, showing a necessity for the survival thereof to obtain a settlement of the questions involved, may allow the same to be maintained by or against his successor in office, and the court may make such order as shall be equitable for the payment of costs." 30 Stat. 822.

In view of the reasons assigned, in the *Boutwell* case, for the inability of the court, in mandamus proceedings, to substitute an existing public officer as a party in the place of his predecessor, who had ceased to be in office, we perceive no reason why, under the act of 1899, the successor of Judge Baker may not be now made a party in his stead. Certainly, the statute authorizes that to be done, if in the judgment of the court, there is a necessity for such action in order to obtain a settlement of the legal question involved. We think such a necessity exists in this case, and as Judge Abbott waives any formal summons and consents to the substitution of his name in place of that of Judge Baker, the motion of appellant is granted, and such substitution is ordered to be and is now made, subject, however, to the condition that he shall not be liable for any costs prior to this date.

We come now to the merits of the case.

The act under which the Territory of New Mexico was created and organized, approved September 9, 1850, provides that the legislative power of the Territory of New Mexico should extend to all rightful subjects of legislation consistent with the Constitution of the United States. The same act

divides the Territory into three judicial districts and requires a District Court to be held in each of such districts by one of the justices of the Territorial Supreme Court. It also provides: "Each of the said District Courts shall have and exercise the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the Circuit and District Courts of the United States; . . ." This provision was retained in the Revised Statutes of the United States, § 1910.

The present case clearly arises under the laws of the United States; for, the action brought in the Territorial District Court was expressly based on the Interstate Commerce Act of 1887 and the Anti Trust Act of 1890.

And the question arises upon the very face of the record whether the Territorial District Court could take cognizance at all of suits for damages authorized by those acts. We have seen that by section 9 of the above act of 1887 any person or persons alleged to have beeen damaged by a common carrier, embraced by the provisions of that act, may bring suit in his or their own behalf "in any District or Circuit Court of the United States of competent jurisdiction;" and by the above act of 1890 any person injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by that act may sue therefor "in any Circuit Court of the United States in the district in which the defendant resides or is found."

Although by the statutes in force prior to the passage of the Interstate Commerce (1887) and Anti Trust Acts (1890), the Territorial District Courts of New Mexico were given the same jurisdiction in cases arising under the Constitution and laws of the United States as is vested in the Circuit and District Courts of the United States, are those acts to be construed as excepting from the general jurisdiction of the Territorial District Courts cases that may arise under them? In other words, can a suit for damages under either of those acts be brought in any court except, under the act of 1887, in a Circuit

or District Court of the United States, and, under the act of 1890, in a Circuit Court of the United States? Did Congress intend that only courts of the United States, invested by the Third Article of the Constitution with the judicial power of the United States, *McAllister* v. *United States*, 141 U. S. 174, should have original jurisdiction of suits of that character? The questions suggested by these inquiries were not much discussed by counsel, and we pass them as being, in our view of the case, not necessary to be now decided; for, if a controversy like that raised by the plaintiff is equally cognizable by a Territorial District Court or by a Circuit or District Court of the United States, it would still remain to inquire whether the defendant company was brought before the court in which the suit was instituted in such way that a personal judgment could be rendered against it?

It is firmly established that a court of justice cannot acquire jurisdiction over the person of a defendant, "except by actual service of notice within the jurisdiction upon him or upon some one authorized to accept service in his behalf, or by his waiver, by general appearance or otherwise, of the want of due service." *Goldey* v. *Morning News*, 156 U. S. 518, 521; *Pennoyer* v. *Neff*, 95 U. S. 714; *Mexican Central Railway* v. *Pinkney*, 149 U. S. 194, 209; *United States* v. *American Bell Tel. Co.*, 29 Fed. Rep. 17. This principle is applicable to all courts.

We are of opinion that the service of summons upon Ripley, as president, while he was passing through the Territory on a railroad train was insufficient as a personal service on the company of which he was president. It is true that the company owned lands in the Territory, but its office, at which the meetings of its directors were held, was in the city of New York, while the office of its land commissioner was at Topeka, Kansas, and the office of its president was at Chicago, Illinois. The mere ownership of lands in New Mexico, or the bringing of suits there to protect its lands against trespasses, could not have had the effect to put the company into that Territory for the purposes of a personal action against it based on service

of summons upon one of its officers while passing through the Territory on a railroad train. If by the laws of New Mexico a party having a cause of action against the company, based on the acts of 1887 and 1890, could have sued out an attachment and caused it to be levied upon its lands in the Territory in order to secure the satisfaction of any judgment he might finally obtain in such action—upon which point we express no opinion—it would not follow that a personal judgment could have been rendered against the company. In such case the judgment of the court could not affect anything except the lands attached. No personal judgment could have been rendered against the company by reason merely of such attachment.

It is contended that the case is covered by section 450 of the Compiled Laws of New Mexico, 1897. That section provides that: "In suits against any corporation, summons shall be served in that county where the principal office of the corporation is kept or its principal business carried on, by delivering a copy to the president thereof, if he may be found in said county, but if he is absent therefrom, then the summons shall be served in like manner in the county, on either the vice-president, secretary, treasurer, cashier, general agent, general superintendent or stockholder, or any agent of said corporation, within such time and under such rules as are provided by law for the service of such process in suits against real persons, and if no such person can be found in the county where the principal office of the corporation is kept, or in the county where its principal business is carried on, to serve such process upon, a summons may issue from either one of such counties, directed to the sheriff of any county in this Territory where any such person may be found and served with process. If such corporation keeps no principal office in any county, and there is no county in which the principal business of such corporation is carried on, then suit may be brought against it in any county where the above-mentioned officers, or any or either of them may be found; *Provided*, That the plaintiff may,

in all cases, bring his action in the county where the cause of action accrued."

Counsel for appellant substantially concedes that this statute applies only to domestic corporations, that is, corporations created by or organized under territorial enactments. But if it is to be assumed that these provisions could be made applicable to a corporation created by an act of Congress, and that for the purposes of suit such a corporation may be deemed a domestic corporation in any State or Territory which it might lawfully enter, still, it is evident that the above section cannot avail the plaintiff. The Santa Fé Railroad Company, when sued in the Territorial District Court, was not an inhabitant of the district within the meaning of the local statute; it had no principal or other office in the Territory; nor did it have an officer who could, in a legal sense, be "found" there; nor did it, in any just sense, carry on business in the Territory. The company simply owned lands there, and that fact was not sufficient by itself to bring the case within the provisions of the territorial statute. This state of the law may sometimes operate injuriously upon those who may wish to sue the railroad company in the territorial courts. But the situation cannot be changed by the courts. That can only be done by legislation.

For the reasons stated the judgment of the Supreme Court of the Territory must be

Affirmed.

SMILEY *v.* KANSAS.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 13. Argued October 20, 21, 1904.—Decided February 20, 1905.

This court will not inquire whether the finding of the jury in the state court is against the evidence; it will take the facts as found and consider only whether the state statute involved is violative of the Federal Constitution.

The power in the state court to determine the meaning of a state statute carries with it the power to prescribe its extent and limitations as well as the method by which they shall be determined.

Where the highest court of a State has held that the acts of a person convicted of violating a state statute defining and prohibiting trusts were clearly within both the statute and the police power of the State, and that the statute can be sustained as a prohibition of those acts irrespective of the question whether its language was broad enough to include acts beyond legislative control, this court will accept such construction although the state court may have ascertained the meaning, scope and validity of the statute by pursuing a rule of construction different from that recognized by this court.

While there is a certain freedom of contract which the States cannot destroy by legislative enactment, in pursuance whereof parties may seek to further their business interests, the police power of the States extends to, and may prohibit a secret arrangement by which, under penalties, and without any merging of interests through partnership or incorporation an apparently existing competition among all the dealers in a community in one of the necessaries of life is substantially destroyed.

The act of the legislature of Kansas of March 8, 1897, defining and prohibiting trusts, is not in conflict with the Fourteenth Amendment to the Federal Constitution as to a person convicted thereunder of combining with others to pool and fix the price, divide the net earnings and prevent competition in the purchase and sale of grain.

On March 8, 1897, the legislature of Kansas passed an act, the first section of which is as follows:

"Sec. 1. A trust is a combination of capital, skill, or acts, by two or more persons, firms, corporations, or associations of persons, or either two or more of them, for either, any or all of the following purposes: First.—To create or carry out restrictions in trade or commerce or aids to commerce, or to

carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this State. Second.—To increase or reduce the price of merchandise, produce or commodities, or to control the cost or rates of insurance. Third.—To prevent competition in the manufacture, making, transportation, sale or purchase of merchandise, produce or commodities, or to prevent competition in aids to commerce. Fourth.—To fix any standard or figure, whereby its price to the public shall be, in any manner, controlled or established, any article or commodity of merchandise, produce of commerce intended for sale, use or consumption in this State. Fifth.—To make or enter into, or execute or carry out, any contract, obligation or agreement of any kind or description by which they shall bind or have to bind themselves not to sell, manufacture, dispose of or transport any article or commodity, or article of trade, use, merchandise, commerce or consumption below a common standard figure or by which they shall agree in any manner to keep the price of such article, commodity or transportation at a fixed or graded figure, or by which they shall in any manner establish or settle the price of any article or commodity or transportation between them or themselves and others, to preclude a free and unrestricted competition among themselves or others in transportation, sale or manufacture of any such article or commodity, or by which they shall agree to pool, combine or unite any interest they may have in connection with the manufacture, sale or transportation of any such article or commodity, that its price may in any manner be affected. And any such combinations are hereby declared to be against public policy, unlawful and void." Laws of Kansas, 1897, p. 481.

Subsequent sections prescribe penalties, and provide procedure for enforcing the act. On September 27, 1901, the county attorney filed in the District Court of Rush County, Kansas, an information charging that the defendant did, on November 20, 1900, "then and there unlawfully enter into an agreement, contract and combination, in the county of Rush

and the State of Kansas, with divers and sundry persons, partnerships, companies and corporations of grain dealers and grain buyers in the town of Bison, in the said county and State aforesaid, to wit, Humburg & Ahrens, the La Crosse Lumber & Grain Company, the Bison Milling Company and George Weicken, who were at the said time and place competitive grain dealers and buyers, to pool and fix the price the said grain dealers and buyers should pay for grain at the said place, and to divide between them the net earnings of the said grain dealers and buyers, and to prevent competition in the purchase and sale of grain among the said dealers and buyers." A trial was had, the defendant was found guilty and sentenced to pay a fine of $500, and to imprisonment in the county jail for three months. On appeal to the Supreme Court of the State the judgment was affirmed. 65 Kansas, 240. Whereupon this writ of error was sued out.

Mr. H. Whiteside for plaintiff in error:

The act of 1897 is unconstitutional and void.

Section one goes entirely too far and is an unwarranted attempt upon the part of the legislature to limit the rights of the individual in the matter of contracting and dealing with his fellow men. The liberty to contract is as much protected by the constitutional provisions above referred to as is the liberty of person, and any attempt to abridge or limit that right will be held void, unless such abridgement or limitation is necessary to preserve the peace and order of the community or the life, liberty and morals of individuals, in which cases it is held to be the proper exercise of the police power of the State. 2 Eddy on Combinations, §§ 679, 905; *Niagara Fire Ins. Co.* v. *Cornell,* 115 Fed. Rep. 816; *Re Grice,* 79 Fed. Rep. 627.

The United States Constitution confers upon Congress, in express terms, the power to regulate commerce with foreign nations and among the several States and with the Indian tribes. So that while Congress has that power it does not

follow that a state legislature has the same power. *Addyston Pipe & Steel Co.* v. *United States,* 175 U. S. 211, 228.

One Congress for the nation is a very different proposition from 45 separate legislatures, each local in its power, and generally hasty in its action.

The only power which a state legislature has to make any law which would impair the right to make any contract upon any subject is such as it possesses under the general police power of the State, which can only be exercised in matters which affect the peace and order of the community or the life, health and morals of individuals. So that the fact that the Federal Anti Trust Law has been held constitutional is no argument in favor of the constitutionality of the Kansas statute. But the two statutes are very dissimilar. See the cases cited in dissenting opinion of Justice Pollock of the State Supreme Court in this case.

The unconstitutionality of the act in question should not be protected by a revolutionary mode of construction. It was contrary to the holdings of the Supreme Court of Kansas until this case was passed on, and is against the great weight of authority generally.

When a statute is partly invalid the rule is that the rest cannot be upheld if the parts are mutually connected with and dependent on each other. See opinion Brewer, J., in 28 Kansas 457; *Warren* v. *Mayor,* 2 Gray (Mass.), 84; *Slauson* v. *Racine,* 13 Wisconsin, 398; *Meshmeier* v. *The State,* 11 Indiana, 482; *McCluskey* v. *Cromwell,* 11 N. Y. 601.

The legislature passed an entire statute on the supposition that it is valid as a whole and it cannot be interpreted on any other theory.

Statutes and contracts should be read and understood according to the natural and most obvious import of the language, without resorting to subtle and forced construction for the purpose of either limiting or extending their operation. Courts cannot correct supposed errors, omissions or defects in legislation or vary by construction contracts of parties.

The office of interpretation is to bring sense out of the words used, and not to bring a sense into them. Peiber's Political and Legal Hermeneutics, 87; 2 Reuth Inst., ch. 7, § 2; Story on Const. § 392; *Purdy* v. *People*, 4 Hill, 384; *Waller* v. *Harris*, 20 Wend. 562; *Newell* v. *People*, 7 N. Y. 97; *Hyatt* v. *Taylor*, 42 N. Y. 258; *Johnson* v. *H. R. R. R. Co.*, 49 N. Y. 455; *Alexander* v. *Worthington*, 5 Maryland, 485; Sutherland's Stat. Con. §§ 175, 237, and cases cited; *United States* v. *Harris*, 106 U. S. 629; *Encking* v. *Simmons*, 28 Wisconsin, 272; *State* v. *Lovell*, 23 Iowa, 304; *Woodbury* v. *Berry*, 18 Ohio St. 456; *Dudley* v. *Reynolds*, 1 Kansas, 285; *Fitzpatrick* v. *Gebhart*, 7 Kansas, 35; *Ayers* v. *Fiego County*, 37 Kansas, 240; *State* v. *Chapman*, 5 Pac. Rep. 708.

It is well known that the Federal Courts will not always follow state court constructions. *Burgess* v. *Seligman*, 107 U. S. 20; *B. & O. R. R.* v. *Baugh*, 149 U. S. 368; *Yick Wo.* v *Hopkins*, 118 U. S. 356; *Railroad & Telephone Co.* v. *Board of Equalizers*, 85 Fed. Rep. 302; *Neal* v. *Delaware*, 103 U. S. 370; *Ex parte Virginia*, 100 U. S. 339; *Henderson* v. *Mayor*, 92 U. S. 259; *N. Y. Cen. R. R.* v. *Lockwood*, 84 U. S. 17; *Myrick* v. *Mich. Cen. R. R.*, 107 U. S. 102; *M., K. & T. R. R. Co.* v. *Elliot*, 184 U. S. 531; *Rolla* v. *Holley*, 176 U. S. 408. They are disregarded in all matters of general law, or of great importance.

All agreements which may affect prices or commodities and the conduct of business are not unlawful and cannot be made so by legislatures. The law encourages and provides for combination and recognizes the economical truth that the coöperation of individuals is essential to the well being and the progress of society. *Jones* v. *Field*, 5 Florida, 510; *State* v. *Loomis*, 115 Missouri, 307; Eddy on Comb. § 262. Nor will the courts assume the purpose and effect of a combination to unduly raise prices. Such purpose must be shown affirmatively. *Shade Roller Co.* v. *Cushman*, 143 Massachusetts, 352; *Herriman* v. *Menzies*, 115 California, 16; *James* v. *Bowman*, 190 U. S. 127.

Courts should refrain from interfering with the conduct of

the affairs of individuals unless such conduct in some tangible form threatens the welfare of the public. *Leslie* v. *Lorrilard et al.*, 110 N. Y. 519. Neither are all combinations or contracts that tend to suppress competition or fix prices, illegal. *Matthews* v. *Associated Press*, 136 N. Y. 333; Eddy on Combinations, §§ 288, 332, and cases cited; *McCauley* v. *Turney*, 19 R. I. 255; *Boehm Mfg. Co.* v. *Hollis*, 54 Minnesota, 223; *Richie* v. *People*, 155 Illinois, 98; *Hopkins* v. *United States*, 171 U. S. 578; *Anderson* v. *United States*, 171 U. S. 604.

At common law only when combinations became monopolies injurious to the public, and were actually injuring the public, could they be denounced by indictment.

The conviction of plaintiff in error was without due process of law. For definition of due process of law as involved in this case, see *Dartmouth College Case*, 4 Wheat. 518; 10 Am. & Eng. Ency. Law, 2d ed., 293; *Weimer* v. *Bunbury*, 30 Michigan, 201; *Brown* v. *Commissioners*, 50 Mississippi, 468; *Re Ah Lee*, 5 Fed. Rep. 899; *Chicago &c. R. R. Co.* v. *Chicago*, 166 U. S. 266; *Pennoyer* v. *Neff*, 95 U. S. 733; *Rees* v. *Watertown*, 19 Wall. 107; *Benton* v. *Platten*, 10 U. S. App. 657; Bouvier's Law Dictionary; *Lowe* v. *Kansas*, 163 U. S. 81.

Mr. D. R. Hite, with whom *Mr. C. C. Coleman*, Attorney General of the State of Kansas, and *Mr. H. J. Bone* were on the brief, for defendant in error:

The combination to which plaintiff in error was a party constituted an unlawful restraint of trade and the investigation as to the constitutionality of the statute will be confined to his own grievance. *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 24, 43; *Clark* v. *Kansas City*, 176 U. S. 114.

This combination fell within the police powers of the State. Grain is a necessity and regulating dealings in it is for the public protection and within the powers of the States. *Munn* v. *Illinois*, 94 U. S. 113, 126; *Brass* v. *North Dakota*, 153 U. S. 391, 402. The rule applies alike to large and small combinations. *Nor. Securities* v. *United States*, 193 U. S. 197, 339,

citing *Morris Run Coal Co.* v. *Barclay Coal Co.*, 68 Pa. St. 173, 186; see dissent of Shiras, J., *United States* v. *Trans-Missouri*, 58 Fed. Rep. 84.

The act as interpreted by the Kansas Supreme Court is not repugnant to the Federal Constitution. *United States* v. *Freight Association*, 166 U. S. 290, 322; *United States* v. *Addyston Pipe Co.*, 85 Fed. Rep. 271.

Combinations and not innocent contracts are covered by this statute. See Mr. Carter's argument, *Joint Traffic Case*, 171 U. S. 505, 515; and for definitions of combination see Bouvier, Century and Standard Dictionaries under "Combine" and "Trusts"; Spelling on Trusts and Monopolies. See authorities as exhaustively reviewed in opinion of the Chief Justice of the state court in this case. As to reasonable construction of the statute in the light of surrounding circumstances, see *United States* v. *Laws*, 163 U. S. 258; *Hawaii* v. *Mankichi*, 190 U. S. 197; *United States* v. *Freight Association*, 166 U. S. 290, 311; *United States* v. *Joint Traffic Association*, 171 U. S. 505; *Northern Securities* v. *United States*, 193 U. S. 197.

We conclude that the Supreme Court of Kansas properly construed the act in question by limiting its general language to acts and cases comprising unlawful combinations to restrain the State's domestic trade and commerce, and that, thus interpreted, the act is a valid exercise of the legislative power; that the plaintiff in error was convicted of being a party to a conspiracy to prevent full and free competition in the purchase of an article of prime necessity to human life, and, therefore, is guilty of an act within the constitutional competency of the State to punish.

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

The verdict of the jury settles all questions of fact.

In *Missouri, Kansas &c. Ry. Co.* v. *Haber*, 169 U. S. 613, 639, it is said: "Much was said at the bar about the finding of

the jury being against the evidence. We cannot enter upon such an inquiry. The facts must be taken as found by the jury, and this court can only consider whether the statute, as interpreted to the jury, was in violation of the Federal Constitution. *Chicago, Burlington & Quincy Railroad* v. *Chicago*, 166 U. S. 226, 242, 246."

We pass, therefore, to a consideration of the questions of law. It is contended that the act of 1897 is in conflict with the Fourteenth Amendment to the Federal Constitution, in that it unduly infringes the freedom of contract; that it is too broad and not sufficiently definite, and that while some things are denounced which may be within the police power of the State, yet its language reaches to and includes matters clearly beyond the limits of that power, and that there is no such separation or distinction between those within and those beyond as will enable the courts to declare one part invalid and another part void. We quote from the brief of counsel for plaintiff in error:

"Section one goes entirely too far and is an unwarranted attempt upon the part of the legislature to limit the rights of the individual in the matter of contracting and dealing with his fellow men. The liberty to contract is as much protected by the constitutional provisions above referred to as is the liberty of person, and any attempt to abridge or limit that right will be held void, unless such abridgement or limitation is necessary to preserve the peace and order of the community or the life, liberty and morals of individuals, in which cases it is held to be the proper exercise of the police power of the State."

It may be conceded for the purposes of this case that the language of the first section is broad enough to include acts beyond the police power of the State and the punishment of which would unduly infringe upon the freedom of contract. At any rate we shall not attempt to enter into any consideration of that question. The Supreme Court of the State held that the acts charged and proved against the defendant were

clearly within the terms of the statute, as well as within the police power of the State; and that the statute could be sustained as a prohibition of those acts irrespective of the question whether its language was broad enough to include acts and conduct which the legislature could not rightfully restrain.

It is well settled that in cases of this kind the interpretation placed by the highest court of the State upon its statutes is conclusive here. We accept the construction given to a state statute by that court. *St. L., I. M. & St. P. Ry. Co.* v. *Paul,* 173 U. S. 404, 408; *M., K. & T. Ry. Co.* v. *McCann,* 174 U. S. 580, 586; *Tullis* v. *L. E. & W. R. R. Co.,* 175 U. S. 348. Nor is it material that the state court ascertains the meaning and scope of the statute as well as its validity by pursuing a different rule of construction from what we recognize. It may be that the views of the Kansas court in respect to this matter are not in harmony with those expressed by us in *United States* v. *Reese,* 92 U. S. 214; *Trade-Mark Cases,* 100 U. S. 82; *United States* v. *Harris,* 106 U. S. 629, and *Baldwin* v. *Franks,* 120 U. S. 678. We shall not stop to consider that question nor the reconciliation of the supposed conflicting views suggested by the Chief Justice of the State. The power to determine the meaning of a statute carries with it the power to prescribe its extent and limitations as well as the method by which they shall be determined.

The transaction, as shown by the testimony, was practically this: There were four dealers in wheat in Bison, a small village in Rush County, situated on the Missouri Pacific Railroad. Three of them owned elevators and one a mill. They were competitors in the purchase of grain. The defendant was secretary of the State Grain Dealers' Association. He was not himself in the grain business nor interested in that of either of the four dealers. He came to Bison for the purpose of investigating some claims of Bison firms against the Missouri Pacific Railroad. While there he induced these dealers to enter into an arrangement by which if one bought and shipped more grain than the others that excess purchaser would pay

them a certain per cent. As security for such agreement the parties deposited their checks for $100 each with the defendant. They made to him weekly reports of the amount of grain purchased. If one had purchased more than his share he paid the defendant three cents a bushel for the excess, and that amount was then divided among the other dealers. Upon these facts, under appropriate instructions, the jury found the defendant guilty.

That the transaction was within the letter of the statute, in that it tended to prevent competition in the purchase of merchandise, is not open to doubt. It is also within the spirit of the statute. It imposed an unreasonable restraint upon competition. It is stated by counsel for plaintiff in error in his brief that not far from Bison were a number of other small towns, at which the principal commercial business was the buying and selling of wheat. But where there were four buyers, as in Bison, apparently competing, farmers nearer to Bison than to other villages, if not farmers more remote, would naturally seek that place in order to benefit by the competition. They would find an apparent competition, and yet each buyer was restrained by this contract from seeking to purchase more than his fourth of the wheat coming to the market, or if he purchased more, must necessarily in order to make his profit, buy his wheat at three cents a bushel less than what he might otherwise pay, that being the penalty for an excess purchase. It was not an open agreement in respect to price, nor one that enabled sellers to know in advance exactly what they could get for their wheat.

Undoubtedly there is a certain freedom of contract which cannot be destroyed by legislative enactment. In pursuance of that freedom parties may seek to further their business interests, and it may not be always easy to draw the line between those contracts which are beyond the reach of the police power and those which are subject to prohibition or restraint. But a secret arrangement, by which, under penalties, an apparently existing competition among all the dealers

in a community in one of the necessaries of life is substantially destroyed, without any merging of interests through partnership or incorporation, is one to which the police power extends. That is as far as we need to go in sustaining the judgment in this case. That is as far as the Supreme Court of the State went. If other transactions are presented, in which there is an absolute freedom of contract beyond the power of the legislature to restrain, which come within the letter of any of the clauses of this statute, the courts will undoubtedly exclude them from its operation. As said by the Supreme Court of the State concerning the defendant's criticism of the breadth of this statute (p. 247):

"He cannot be heard to object to the statute merely because it operates oppressively upon others. The hurt must be to himself. The case, under appellant's contention as to this point, is not a case of favoritism in the law. It is not a case of exclusion of classes who ought to have been included, the leaving out of which constitutes a denial of the equal protection of the law, but it is the opposite of that. It is a case of the inclusion of those who ought to have been excluded. Hence, unless appellant can show that he himself has been wrongfully included in the terms of the law, he can have no just ground of complaint. This is fundamental and decisively settled. *City of Kansas City* v. *Railway Co.*, 59 Kansas, 427, affirmed under the title *Clark* v. *Kansas City*, 176 U. S. 114; *Supervisors* v. *Stanley*, 105 U. S. 305, 311; *Pittsburg &c. R. Co.* v. *Montgomery*, 152 Indiana, 1."

We see no error in the judgment of the Supreme Court of Kansas, and it is

Affirmed.

ALLEN *v.* ALLEGHANY COMPANY.

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

No. 119. Argued January 11, 1905.—Decided February 20, 1905.

The mere construction by a state court of a statute of another State and its operation elsewhere, without questioning its validity, does not necessarily involve a Federal question, or deny to the statute the full faith and credit demanded by § 709, Rev. Stat., in order to give this court jurisdiction to review.

The statutes of New York and Pennsylvania prohibit foreign corporations from doing business in those States respectively unless certain specified conditions are complied with. In an action in New Jersey the state court held that contracts made in New York and Pennsylvania by a corporation which had not complied with the statutes of either State were not *ipso facto* void and might be enforced in New Jersey. On writ of error *Held:* that

The writ must be dismissed as the validity of the New York and Pennsylvania statutes was not denied but the case turned only upon their construction and the effect to be given them in another State.

Whether, aside from a Federal question, the courts of one State should have sustained the action upon principles of comity between the States is a matter within the exclusive jurisdiction of the state court.

THIS was a suit begun in the Supreme Court of New Jersey by the Alleghany Company, to recover the amount due upon a promissory note dated at New York, July 16, 1900, given by the plaintiffs in error, under the firm name of I. N. E. Allen & Co., for $1,989.54, upon which payments amounting to $1,000 were endorsed. The declaration was upon the common counts, but annexed was a copy of the note, with a notice that the action was brought to recover the amount due thereon. The defendants pleaded four several pleas:

1. General issue.

2. That the note was executed and delivered in the State of New York to the plaintiff company, a business corporation created under the laws of North Carolina. That when said note was executed and delivered it was provided by the statute of the State of New York that:

"No foreign corporation . . . shall do business in this State without having first procured from the Secretary of State a certificate that it has complied with all the requirements of law to authorize it to do business in this State, and that the business of the corporation to be carried on in this State is such as may be lawfully carried on by a corporation incorporated under the laws of this State. . . . No foreign stock corporation doing business in this State shall maintain any action in this State, upon any contract made by it in this State until it shall have procured such certificate."

The plea further averred that at the time of the making of the note the plaintiff was a business stock corporation, foreign to the State of New York, and had not theretofore procured from the Secretary of State a certificate that it had complied with all the requirements of the law to authorize it to do business within the State, and that the business of said plaintiff was such as might be lawfully carried on by a corporation incorporated under the laws of said State for such or similar business, according to the form of the statute of New York in such case made and provided.

3. The third plea sets out that the note was made and executed in the State of Pennsylvania to the plaintiff company, a foreign corporation created under the laws of North Carolina.

That when said note was executed and delivered it was provided by the State of Pennsylvania that—

"1. No foreign corporation shall do any business in this Commonwealth until said corporation shall have established an office or offices and appointed an agent or agents for the transaction of its business therein. 2. It shall not be lawful for any such corporation to do any business in this Commonwealth, until it shall have filed in the office of the Secretary of the Commonwealth a statement under the seal of said corporation, and signed by the president or secretary thereof, showing the title and object of said corporation, the location of its office or offices, and the name or names of its authorized

agent or agents therein; and the certificate of the Secretary of the Commonwealth, under the seal of the Commonwealth, of the filing of such statement shall be preserved for public inspection by each of said agents in each and every of said offices. 3. Any person or persons, agents, officers or employés of any such foreign corporation, who shall transact any business within this Commonwealth for any such foreign corporation, without the provisions of this act being complied with, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment, not exceeding thirty days, and by a fine not exceeding one thousand dollars, or either, at the discretion of the court trying the same."

The plea further averred that at the making of the note the plaintiff was a corporation foreign to the said Commonwealth, and had not theretofore filed in the office of the Secretary a statement showing the title and object of said plaintiff, the location of its office, and the name of its authorized agent therein, according to the form of said statute; yet notwithstanding the premises, the plaintiff at the time of the making of the said note did business in the said Commonwealth of Pennsylvania, contrary to the form of the said statute.

The plaintiff demurred to the second and third pleas, and the demurrer being overruled, the cause was sent down to the Circuit Court of Hudson County for trial on an issue of fact raised by the fourth plea, which is not material here.

The trial judge there directed a verdict for the plaintiff, and upon appeal to the Court of Errors and Appeals of New Jersey the judgment of the lower court was affirmed. 69 N. J. Law, 270.

Mr. Alexander S. Bacon for plaintiffs in error, cited in support of the jurisdiction: *Finney* v. *Guy*, 189 U. S. 335; *Manley* v. *Park*, 187 U. S. 547; *Chicago &c. R. R.* v. *Ferry Co.*, 119 U. S. 615; *United States* v. *Alger*, 152 U. S. 384, distinguished; *Johnson* v. *N. Y. Life Ins. Co.*, 187 U. S. 491; and as to comity *Hilton* v. *Guyot*, 159 U. S. 113; *Snashall* v. *Met. R. R. Co.*, 12

D. C. App. 319; 22 Am. & Eng. Ency. Law, 2d ed., 1319; *Brently* v. *Whittemore*, 4 C. E. Green Eq. 462; *Watson* v. *Murray*, 8 C. E. Green, 257; Story on Conflict of Law, § 243; *Hoyt* v. *Thompson*, 5 N. Y. 320, 340; *Manufacturing Co.* v. *Truxton*, 44 Atl. Rep. 430, and cases cited; *Bank* v. *McLeod*, 38 Ohio St. 174.

Mr. James A. Gordon for defendant in error:

This court has no jurisdiction. Full faith and credit were given by the New Jersey court to the statutes of the States of New York and Pennsylvania. The case turned upon the construction of these statutes. Their validity was not called in question. *Johnson* v. *N. Y. Life Ins. Co.*, 187 U. S. 491; *Bauholzer* v. *N. Y. Life Ins. Co.*, 178 U. S. 402; *Lloyd* v. *Matthews*, 155 U. S. 222; *Glen* v. *Garth*, 147 U. S. 360.

Under the New York statute, a contract made in New York by a foreign corporation, not complying with the provisions of the act, cannot be enforced in that State, but the statute does not make the contract void, or prevent its enforcement in any other court.

The New Jersey court fully considered this statute and construed it after referring to the decisions of the New York Court of Appeals and other decisions which seemed in point, and which are cited in the opinion of the Court of Errors.

See cases cited in the opinion and *Fritz* v. *Palmer*, 132 U. S. 282. Whether the state court construed the statute correctly is not subject to review in this court.

The third plea, which sets up the Pennsylvania statutes, fails to allege that the note upon which this suit is founded had any connection with business unlawfully transacted in Pennsylvania, within the meaning of the statute, and for this reason the New Jersey court sustained the demurrer to this plea.

The Court of Errors gave the Pennsylvania statute the same construction given to it by the Pennsylvania courts, but decided that the plea did not contain sufficient allegations of fact to bring the note in suit, within the prohibition of the statute.

The decision of the New Jersey court was correct, but on this question of pleading, the decision of the state court is not reviewable in this court.

The statutes pleaded have no extra territorial effect, except upon principles of comity; and the plaintiffs in error, on the argument before the New Jersey Supreme Court, having disclaimed that the principles of comity were involved in the case, cannot now rely upon them.

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

The defendants, plaintiffs in error here, pleaded that the note upon which suit was brought was executed in the State of New York, and that under the laws of that State no foreign corporation could do business there without a certificate of the Secretary of State that it had complied with all the requirements of law to authorize it to do business there; and that no such corporation could maintain any action in that State unless, prior to the making of such contract, it had procured such certificate; that plaintiff was a foreign corporation within the meaning of the law, and had not procured a certificate.

The third plea was similar in terms, averring the note to have been made in Pennsylvania, whose statutes provided that foreign corporations should do no business in the State without filing a certain statement in the Secretary's office and procuring the certificate of the Secretary of the Commonwealth, and further providing that the agent of any foreign corporation transacting business within the State, without complying with the provisions of the law, should be deemed guilty of a misdemeanor. The plea also averred non-compliance with those provisions.

Both the Supreme Court and the Court of Errors and Appeals held that a contract made in contravention of these statutory regulations, though not enforcible in the courts of

New York and Pennsylvania, was not *ipso facto* void, and might be, notwithstanding such statutes, enforced in New Jersey.

Plaintiffs in error insist that by this ruling full faith and credit was denied by the courts of New Jersey to the statutes of New York and Pennsylvania, in contravention to section 1, Article IV, of the Constitution.

By section 709 of the Revised Statutes, authorizing writs of error to the state courts, it is declared that final judgments, where is drawn in question the *validity* of a statute of any State, or any authority exercised under any State, on the ground of their being repugnant to the Constitution, etc., and the decision is in favor of their validity, may be reëxamined here.

But the validity of these statutes was not denied. The case turned upon their construction and the effect to be given to them in another State. The New York statute directly, and the Pennsylvania indirectly, forbade the maintenance of actions "in this State." The Pennsylvania statute made it a misdemeanor to transact business without complying with the law. Neither statute declared the contract so made to be void, and it was apparently upon this ground that the New Jersey courts held that the case did not fall within those decisions, wherein it is declared that a contract void by the *lex loci contractus* is void everywhere.

In several cases we have held that the construction of a statute of another State and its operation elsewhere did not necessarily involve a Federal question. The case is practically governed by that of the *Chicago & Alton R. R.* v. *Wiggins Ferry Co.*, 119 U. S. 615. In that case suit was brought in a state court by the ferry company against the railroad to recover damages for not employing the ferry company for the transportation of persons and property across the river, as by its contract it was bound to do. The defendant pleaded that it had no power to make the contract; that the same was in violation of the laws of Illinois, contrary to the public policy

thereof and was void. The statutes were put in evidence, but their construction and operative effect were disputed. The Supreme Court of the State held that the contract was interpreted correctly by the court below, and that it was not *ultra vires*, contrary to public policy, or in restraint of trade. It was argued here by the railroad company that by law and usage of Illinois, the charter of the company in that State made the contract *ultra vires*. We held that the law of Illinois to that effect should have been proved as a fact, either by decisions of its courts or by law or usage in that State; that state courts are not charged with a knowledge of the laws of another State; but they have to be proved, and that while Federal courts exercising their original jurisdiction are bound to take notice of the laws of the several States, yet this court, when exercising its appellate jurisdiction from state courts, whatever was the matter of fact in that court is matter of fact here, citing *Hanley* v. *Donoghue*, 116 U. S. 1. We said: "Whether the charter of this company, in its operation on the contract now in suit, had any different effect in Illinois from what it would have, according to the principles of general law which govern like charters and like contracts, in Missouri and elsewhere throughout the country, was, under this rule, a question of fact in the Missouri court, as to which no testimony whatever was offered."

No proof having been offered to support the averment that the contract was in violation of the laws of Illinois, the defense relying on the general claim that the contract was illegal, it was held that no Federal question was involved, and the case was dismissed. It was said that it should have appeared on the face of the record that the facts presented for adjudication made it necessary for the court to consider the act of incorporation in view of the peculiar jurisprudence in Illinois, rather than the general law of the land.

Since the above case we have repeatedly held that the mere construction by a state court of a statute of another State without questioning its validity, does not, with possibly some

exceptions, deny to it the full faith and credit demanded by the statute in order to give this court jurisdiction. *Glenn* v. *Garth*, 147 U. S. 360; *Lloyd* v. *Matthews*, 155 U. S. 222; *Banholzer* v. *New York Life Insurance Co.*, 178 U. S. 402; *Johnson* v. *New York Life Ins. Co.*, 187 U. S. 491; *Finney* v. *Guy*, 189 U. S. 335.

The Court of Errors and Appeals, conceding the general rule both in New Jersey and New York to be that a contract, void by the law of the State where made, will not be enforced in the State of the forum. *Columbia Fire Insurance Co.* v. *Kenyon*, 37 N. J. Law 33 and *Hyde* v. *Goodnow*, 3 N. Y. 266 held that the state statute of New York did not declare the contract void, and that there was no decision in that State holding it to be so. In fact the only case in the Court of Appeals in New York, *Neuchatel Asphalte Co.* v. *Mayor*, 155 N. Y. 373, is the other way. The Court of Appeals in that case held that the purpose of the act was not to avoid contracts, but to provide effective supervision and control of the business carried on by foreign corporations; that no penalty for non-compliance was provided, except the suspension of civil remedies in that State, and none others would be implied. This corresponds with our rulings upon similar questions. *Fritts* v. *Palmer*, 132 U. S. 282.

With respect to the Pennsylvania statute, the court held that, although the Pennsylvania courts had held that a contract made in violation of the Pennsylvania statute was void, yet that the third plea did not contain allegations which showed that the note was given in pursuance of business carried on in Pennsylvania, and not in consummation of a single transaction; and although it was averred that plaintiff did business in that State, it was not averred that the note had any connection with the business carried on in Pennsylvania, or that it was given for goods sold in Pennsylvania. The admitted averments may be true, and yet the note may have been given for an obligation contracted out of the State of Pennsylvania, and consequently, not in violation of its laws.

Construing the third plea most strongly against the pleader, the conclusion was that it disclosed no defense in the action. This was purely a local question, and is not assignable as error here.

Whether, aside from the Federal question discussed, the courts of New Jersey should have sustained this action upon principles of comity between the States, was also a question within the exclusive jurisdiction of the state court. *Finney* v. *Guy*, 189 U. S. 335.

The writ of error must, therefore, be

Dismissed.

CORRY *v.* THE MAYOR AND COUNCIL OF BALTIMORE.

ERROR TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

No. 86. Argued December 8, 1904.—Decided February 20, 1905.

The sovereign that creates a corporation has the incidental right to impose reasonable regulations concerning the ownership of stock therein and it is not an unreasonable regulation to establish the situs of stock for purposes of taxation, at the principal office of the corporation whether owned by residents or non-residents, and to compel the corporation to pay the tax for the stockholders giving it a right of recovery therefor against the stockholders and a lien on the stock.

Where valid according to the laws of the State such a regulation does not deprive the stockholder of his property without due process of law either because it is an exercise of the taxing power of the State over persons and things not within its jurisdiction, or because notice of the assessment is not given to each stockholder, provided notice is given to the corporation and the statute either in terms, or as construed by the state court, constitutes the corporation the agent of the stockholders to receive notice and to represent them in proceedings for the correction of the assessment.

While the liability of non-resident stockholders for taxes on his stock may not be expressed in the charter of the company if it existed in the general laws of the State at the time of the creation of the corporation or the extension of its charter, and the constitution of the State also contained at such times the reserved right to alter, amend and repeal, those provisions of the constitution and general laws of the State are as much a part of the charter as if expressly embodied therein.

THE New York and Baltimore Transportation Line was chartered in 1847 by the general assembly of Maryland, and it still exists by virtue of an extension in 1876 of its charter. At all times the corporation has maintained its principal office in the city of Baltimore.

James C. Corry, a resident and citizen of Pennsylvania, acquired one hundred and fifty shares of the stock of the transportation line, having a face value of twenty dollars per share.

The one hundred and fifty shares standing in Corry's name, as stated, were assessed for the years 1899 and 1900 for state and the municipal taxes of the city of Baltimore, the total taxes being $43.27 for the year 1899 and $36.49 for the year 1900. Conformably to the laws of Maryland, payment of said taxes was demanded of the transportation company. To restrain compliance with this demand Corry commenced the present suit, making defendants to the bill of complaint the mayor and council of Baltimore, the treasurer of the city, the treasurer of the State, and the transportation company. The relief prayed was based on averments that the laws of Maryland under which the taxes were levied were repugnant to the state and Federal Constitutions, upon grounds specified in the bill. A decree was entered sustaining general demurrers, interposed by the various defendants, and dismissing the bill. This was affirmed by the Court of Appeals of Maryland. 96 Maryland, 310.

Mr. William P. Maulsby, with whom *Mr. Edwin G. Baetjer* was on the brief, for plaintiff in error:

While the sovereign power of taxation extends to persons residing and property situate within its boundaries and includes the right to tax *in rem* the local property of a non-resident, it does not include the right to impose a tax *in personam*, or a personal obligation on the non-resident himself. Cooley on Taxation, 3d ed., 249; *Louisville Ferry Co.* v. *Kentucky*, 188 U. S. 385, 397; *Dewey* v. *Des Moines*, 173 U. S. 193,

204; *McCulloch* v. *Maryland*, 4 Wheat. 316, 429; *State Tax on Foreign Held Bonds*, 19 Wall. 319; *Baltimore* v. *Hussey*, 67 Maryland, 112; *Coe* v. *Errol*, 116 U. S. 517, 524; *Fargo* v. *Hart*, 193 U. S. 490, 500; *Commonwealth* v. *Standard Oil Co.*, 101 Pa. St. 119; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 208; *St. Louis* v. *Ferry Co.*, 11 Wall. 423; *New York City* v. *McLean*, 170 N. Y. 374, 387; *Tappan* v. *Bank*, 19 Wall. 490, distinguished, and see *County* v. *So. Pac. R. R. Co.*, 15 Fed. Rep. 753; Cooley on Const. Lim. 3.

A State cannot require a non-resident's personal subjection to its sovereignty. *Pennoyer* v. *Neff*, 95 U. S. 733; *Paul* v. *Virginia*, 8 Wall. 168, 180; *Carfield* v. *Coryell*, 4 Wash. C. C. 380; *Slaughter House Cases*, 16 Wall. 30, 76.

The capital stock tax is a tax *in personam* on the stockholder, not a tax *in rem* on his share.

For distinction between these two classes of taxes see *Leigh* v. *Green*, 193 U. S. 79, 90. It is of special importance only as to non-resident stockholders. As to character of its taxes Maryland differs from every State of the Union. 27 Am. & Eng. Ency. Law, 632; Code of Maryland, 1888, 1903, Art. 81, §§ 2, 90, 150-162; Art. 15 Decl. of Rights.

The method of ascertaining the taxes on the shares of a corporation is never correct and always errs on the side of the excess. There is no relation between the actual and assessed value of the shares. *Bank* v. *Commonwealth*, 9 Wall. 353. Under the method of assessment the tax is not one on the shares but on the owner. *Houston* v. *New Orleans*, 119 U. S. 265, 276; *Stapleton* v. *Haggard*, 91 Fed. Rep. 93. It is also recoverable in assumpsit and is not a tax on the corporation. The tax is levied without due process of law. It has never been decided what due process requires as to taxation. *Turpin* v. *Lemon*, 187 U. S. 51; *Glidden* v. *Harrington*, 189 U. S. 255. But see Cooley on Taxation, 363; *Railroad Tax Cases*, 13 Fed. Rep. 752, under which opportunity to the person taxed to question the validity or amount of the tax is requisite.

The notice need not be personal, but it may be by publication, or a statute may give notice by fixing the time and place of hearing. *W. & St. Peters L. Co.* v. *Minnesota*, 159 U. S. 526, 536; *Merchants' Bank* v. *Pennsylvania*, 167 U. S. 461, 466; *Pittsburg Ry.* v. *Backus*, 154 U. S. 421, 425. The time and place for hearing must be in some way prescribed. *Railroad Tax Cases*, 92 U. S. 575, 610; *Plamer* v. *McMahon*, 133 U. S. 669; *Hagar* v. *Reclam. Dist.*, 111 U. S. 701, 710; *Monticello Co.* v. *Baltimore*, 90 Maryland, 416, 428.

The Maryland statute does not afford these opportunities. It only gives the corporation and not the shareholders the right to be heard. *Clark Distilling Co.* v. *Cumberland*, 95 Maryland, 468, 475.

The elements of such opportunity or due process, are Federal questions on which the Supreme Court would not consider the decision of the state court conclusive. *State Bank* v. *Knopp*, 16 How. 391; *Wright* v. *Nagle*, 101 U. S. 793; *McCullough* v. *Virginia*, 172 U. S. 109.

The corporation is not really the agent for the stockholder as held by the state court. Cook on Stockholders, § 11. The whole tax is a mere nullity, as *ultra vires* and void. It is twofold and not provided for by law. *Pennoyer* v. *Neff*, 95 U. S. 714.

Whether the State has the right to exercise the powers; or whether the exercise is *ultra vires;* whether it has the power to so tax a non-resident; whether the tribute exacted by its revenue laws is taxation or spoliation, is a Federal question. *Dewey* v. *Des Moines*, 173 U. S. 193, 201; *Louisville Ferry Co.* v. *Kentucky*, 188 U. S. 385; *Fargo* v. *Hart*, 193 U. S. 490; *State Tax on Foreign Held Bonds*, 15 Wall. 300; *Santa Clara* v. *So. Pac. R. R.*, 18 Fed. Rep. 385.

Mr. Albert C. Ritchie, with whom *Mr. W. Cabell Bruce* was on the brief, for defendants in error:

The tax statute has been construed and upheld by the Maryland courts.

A State has the power to fix the situs of shares of stock held in its corporations by non-residents of the State, at the place in the State where the corporation has its principal office, and to provide for the taxation of such non-resident stockholders on account of their shares at such place, and no right granted or secured by the Constitution of the United States is violated thereby.

This court will not set aside the Maryland statutes here in question, unless they encroach upon legitimate national authority or violate some right granted or secured by the Constitution of the United States. *Lake Erie R. R. Co.* v. *Pennsylvania*, 153 U. S. 628, 641; *Kirtland* v. *Hotchkiss*, 100 U. S. 490, 498.

The only question before this court, is the power and authority of the State to declare that Maryland is the situs for purposes of taxation of stock in Maryland corporations held by non-residents and that such stock shall be there taxed. If the State possesses this power, its right to exercise it is in no way affected by the fact that the non-resident stockholder may or may not be taxed upon his stock in the State of his domicile. *Blackstone* v. *Miller*, 188 U. S. 189, 205, and cases cited.

Movable personal property is always subject to taxation in the State where it is situated. *Coe* v. *Errol*, 116 U. S. 517; *Am. Refrigerator Co.* v. *Hall*, 174 U. S. 70; *Union Refrigerator Co.* v. *Lynch*, 177 U. S. 149. Shares of stock, however, are personal property of an intangible nature. They represent property invested in the corporation, which should pay its share of the expenses of the State. The corporation derives its existence from the State creating it. Its shares are authorized to be issued by, and are subject to, the control of the laws of the State and can be subjected to taxation by the State. *Bank* v. *Commonwealth*, 9 Wall. 353, 361; *Tappan* v. *Merchants' Bank*, 19 Wall. 490; *New Orleans* v. *Stempel*, 175 U. S. 309, 320; *Bristol* v. *Washington County*, 177 U. S. 133, 144; *St. Albans* v. *National Car Co.*, 57 Vermont, 68; *Pullman Co.*

v. *Pennsylvania*, 141 U. S. 18, 22; *Adams Express Co.* v. *Ohio*, 166 U. S. 185, 224; *Loan Society* v. *Multonomah County*, 169 U. S. 421; *Travellers Ins. Co.* v. *Connecticut*, 185 U. S. 364; *State Tax on Foreign Held Bonds*, 15 Wall. 300, distinguished, see *Matter of Bronson*, 150 N. Y. 1. The tax cannot impair the obligation of any contract. See also *Delaware R. R. Tax Case*, 18 Wall. 206; *Murray* v. *Charleston*, 96 U. S. 432; *Kirtland* v. *Hotchkiss*, 100 U. S. 491; *Erie R. R. Co.* v. *Pennsylvania*, 153 U. S. 628.

Although the laws of Maryland make no provision for notice to the individual stockholders of a Maryland corporation, or for any opportunity to be heard by them, upon the question of the valuation of their stock for purposes of taxation, yet ample provision is made for notice to, and an opportunity to be heard by, the corporation itself, and inasmuch as the corporation, under the Maryland system of taxation, acts for and as the representative of the stockholders, the Maryland statute gratifies the requirement of due process of law. *Turpin* v. *Lemon*, 187 U. S. 51, 58; *Glidden* v. *Harrington*, 189 U. S. 255, 258; *Bank* v. *Pennsylvania*, 167 U. S. 461, 466; *Am. Casualty Co. Case*, 82 Maryland, 535; *Clark Distilling Co.* v. *Cumberland*, 95 Maryland, 468, 474.

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

The subjects and methods of taxation of property within the State of Maryland are regulated generally by article 81 of the Code of Public General Laws of that State.

A tax for state purposes and one for local purposes is laid upon all property. In each year the officers of domestic corporations are required to furnish information respecting the value of the shares of stock in such corporations to the state tax commissioner, who determines the aggregate value thereof, deducts therefrom the assessed value of the real estate owned by the corporation, and the quotient, obtained by dividing

the remainder by the total number of shares of stock, is treated as the taxable value of each share, subject, however, to correction on appeal to the state comptroller and state treasurer after notice to the corporation of the valuation fixed by the tax commissioner. The rate of the state tax is determined by the general assembly, and that for municipal purposes in Baltimore is fixed by the mayor and council of that city. The levy on property in Baltimore, both for state and city purposes, is made by the municipal authorities. In case of stock in Maryland corporations owned by non-residents the statutes declare that the situs of such stock, for the purpose of taxation, shall be at the principal office of the corporation in Maryland, and such shares are there assessed at their value to the owners. The statutes undoubtedly impose upon a Maryland corporation the duty of paying for and on account of the owners the taxes assessed in respect of the shares, and compel such payment without reference to the dividends, giving to the corporation a lien upon the shares of stock, and entitling the corporation, when it pays the taxes, to proceed by a personal action to recover the amount paid. *Dugan* v. *Mayor of Baltimore*, 1 G. & J. 499, 502; *Mayor &c.* v. *Howard*, 6 H. & J. 383, 394; *American Coal Co.* v. *Allegany Co. Comrs.*, 59 Maryland, 185; *Hull* v. *Southern Development Co.*, 89 Maryland, 8, 11.

The Maryland decisions have also settled that the tax is on the stockholder personally because of his ownership of the stock, and is not on the stock *in rem* or on the corporation. The Maryland doctrine on the subject is shown by the opinion of the Court of Appeals of Maryland in *United States Electric Power & Light Company* v. *State*, 79 Maryland, 63, where the court said (p. 70):

"But the tax is not a tax upon the stock or upon the corporation, but upon the owners of the shares of stock, though the officers of the corporation are made the agents of the State for the collection of the state tax. It is not material what assets or other property make up the value of the shares.

Those shares are property, and under existing laws are taxable property. They belong to the stockholders respectively and individually, and when for the sake of convenience in collecting the tax thereon, the corporation pays the state tax upon these shares into the state treasury, it pays the tax not upon the company's own property, nor for the company, but upon the property of each stockholder and for each stockholder respectively, by whom the company is entitled to be reimbursed. Hence when the owner of the shares is taxed on account of his ownership and the tax is paid for him by the company, the tax is not levied upon or collected from the corporation at all."

See, also, *Hull* v. *Southern Development Co., supra.*

Substantially similar laws for the taxing of stock in Maryland corporations were in force in Maryland at the time of the incorporation of the transportation company, and have been in force ever since.

All the claims of Federal right here asserted are embraced in and will be disposed of by passing on two propositions, which we shall consider separately.

The first proposition is that, as the authority of the State of Maryland to tax is limited by the effect of the Fourteenth Amendment to the Constitution of the United States to persons and property within the jurisdiction of the State, and as the tax in question was not *in rem* against the stock but was *in personam* against the owner, the power attempted to be exercised as it imposed a personal liability was wanting in due process of law.

The Court of Appeals of Maryland disposed of this contention by deciding that it was in the power of the State of Maryland to fix for the purposes of taxation the situs of stock in domestic corporations held by a non-resident. It also held that, as such corporations were created by the State and were subject to its regulating authority, it was within its power to impose, as a condition to the right to acquire stock in such corporations, the duty of paying the taxes assessed on the

stock, and, moreover, that the State might compel the corporation to pay such taxes on behalf of the stockholder, and confer upon the corporation a right of action to obtain reimbursement from a stockholder when the payment was made. The court, in its opinion in this case, did not expressly elaborate the foregoing considerations, but contented itself by referring to previous decisions by it made. Among the cases so referred to was the case of *American Coal Company* v. *Alleghany County Comrs.*, 59 Maryland, 185, 193, where it was said:

"The appellant is a Maryland corporation, deriving its existence, and all its powers and franchises, from this State. And such being the case, it is settled, that the sovereign power of taxation extends to everything which exists by the authority of the State, or which is introduced by its permission, except where such power is expressly or by necessary implication excluded. The separate shares of the capital stock of the corporation are authorized to be issued by the charter derived from the State, and are subject to its control in respect to the right of taxation; and every person taking such shares, whether resident or non-resident of the State, must take them subject to such state power and jurisdiction over them. Hence the State may give the shares of stock, held by individual stockholders, a special or particular situs for purposes of taxation, and may provide special modes for the collection of the tax levied thereon."

That it was rightly determined that it was within the power of the State to fix, for the purposes of taxation, the situs of stock in a domestic corporation, whether held by residents or non-residents, is so conclusively settled by the prior adjudications of this court that the subject is not open for discussion. Indeed, it was conceded in the argument at bar that no question was made on this subject. The whole contention is that, albeit the situs of the stock was in the State of Maryland for the purposes of taxation, it was nevertheless beyond the power of the State to personally tax the non-resident owner for and on account of the ownership of the stock, and to compel the

corporation to pay and confer upon it the right to proceed by a personal action against the stockholder in case the corporation did pay. Reiterated in various forms of expression, the argument is this, that as the situs of the stock within the State was the sole source of the jurisdiction of the State to tax, the taxation must be confined to an assessment *in rem* against the stock, with a remedy for enforcement confined to the sale of the thing taxed, and hence without the right to compel the corporation to pay or to give it, when it did pay, a personal action against the owner.

But these contentions are also in effect long since foreclosed by decisions of this court. *National Bank* v. *Commonwealth*, 9 Wall. 353; *Tappan* v. *Merchants' National Bank*, 19 Wall. 490. In *National Bank* v. *Commonwealth* (pp. 361, 362), it was said:

"If the State cannot require of the bank to pay the tax on the shares of its stock it must be because the Constitution of the United States, or some act of Congress, forbids it.

* * * * * * * *

"If the State of Kentucky had a claim against a stockholder of the bank who was a non-resident of the State, it could undoubtedly collect the claim by legal proceeding, in which the bank could be attached or garnished, and made to pay the debt out of the means of its shareholder under its control. This is, in effect, what the law of Kentucky does in regard to the tax of the State on the bank shares."

And it was further observed (p. 363):

"The mode under consideration is the one which Congress itself has adopted in collecting its tax on dividends, and on the income arising from bonds of corporations. It is the only mode which, certainly and without loss, secures the payment of the tax on all the shares, resident or non-resident; and, as we have already stated, it is the mode which experience has justified in the New England States as the most convenient and proper, in regard to the numerous wealthy corporations of those States."

But it is insisted that these rulings concerned taxation by the States of the shares of stock in national banks under the provisions of the national banking act, and are therefore not applicable. The contention is thus expressed:

"This act forms a part of the charter of the national banks, and provides for this liability. Charters can and frequently do undoubtedly provide for a personal liability of stockholders in various forms; the liability to creditors of the corporation is one of the common illustrations, and the liability may be thus imposed for a tax as well as for any other debt or obligation. The court therefore held [in the *Tappan* case, 19 Wall. 500] that under the national banking act the shareholders were liable, because that act 'made it the law of the property.' The liability arose, not out of the taxing power of the sovereign, but from the subscription or charter contract of the subject."

In substance, the contention is that the conceded principle has no application to taxation by a State of shares of stock in a corporation created by it, because by the Constitution of the United States the States are limited as to taxation to persons and things within their jurisdiction, and may not, therefore, impose upon a non-resident, by reason of his property within the State, a personal obligation to pay a tax. By the operation, therefore, of the Constitution of the United States it is argued the States are restrained from affixing, as a condition to the ownership of stock in their domestic corporations by non-residents, a personal liability for taxes upon such stock, since the right of the non-resident to own property in the respective States is protected by the Constitution of the United States, and may not be impaired by subjecting such ownership to a personal liability for taxation. But the contention takes for granted the very issue involved. The principle upheld by the rulings of this court to which we have referred, concerning the taxation by the States of stock in national banks, is that the sovereignty which creates a corporation has the incidental right to impose reasonable regulations

concerning the ownership of stock therein, and that a regulation establishing the situs of stock for the purpose of taxation, and compelling the corporation to pay the tax on behalf of the shareholder, is not unreasonable regulation. Applying this principle, it follows that a regulation of that character, prescribed by a State, in creating a corporation is not an exercise of the taxing power of the State over persons and things not subject to its jurisdiction. And we think, moreover, that the authority so possessed by the State carries with it the power to endow the corporation with a right of recovery against the stockholder for the tax which it may have paid on his behalf. Certainly, the exercise of such a power is no broader than the well-recognized right of a State to affix to the holding of stock in a domestic corporation a liability on a non-resident as well as a resident stockholder *in personam* in favor of the ordinary creditors of the corporation. *Flash* v. *Conn*, 109 U. S. 371; *Whitman* v. *Oxford National Bank*, 176 U. S. 559; *Nashua Savings Bank* v. *Anglo-American L. M, & A. Co.*, 189 U. S. 221, 230, and cases cited; *Platt* v. *Wilmot*, 193 U. S. 602, 612.

Whilst it is true that the liability of the non-resident stockholder in the case before us, as enforced by the laws of Maryland, was not directly expressed in the charter of the corporation, it nevertheless existed in the general laws of the State at the time the corporation was created, and, be this as it may, certainly existed at the time of the extension of the charter. This is particularly the case, since the constitution of Maryland, for many years prior to the extension of the charter of the transportation company, contained the reserved right to alter, amend and repeal. From all the foregoing it resulted that the provisions of the general laws and of the constitution of Maryland were as much a part of the charter as if expressly embodied therein. Nor can this conclusion be escaped by the contention that, as the provisions of the statute imposing on non-resident stockholders in domestic corporations a liability for taxes on their stock violated the Constitution of the United

States, therefore such unconstitutional requirements cannot be treated as having been incorporated in the charter, for this argument amounts only to reasserting the erroneous proposition which we have already passed upon.

Having disposed of the first proposition we come to consider the second, which is that the legislation of the State of Maryland is repugnant to the Constitution of the United States, because of the omission to directly require the giving of notice to the non-resident stockholder of assessments on his stock and opportunity for contest by him as to the correctness of the valuation fixed by the taxing officers. The highest court of the State of Maryland has construed the statutory provisions in question as in legal effect constituting the corporation the agent of the stockholders to receive notice and to represent them in proceedings for the correction of an assessment. Thus in *Clark Distilling Co.* v. *Cumberland,* 95 Maryland, 468, the court said (p. 474):

"A notice to each shareholder is unnecessary because the corporation represents the shareholders. The officers of the corporation are required by the Code to make an annual return to the state tax commissioner, and upon the information disclosed by that return the valuation of the capital stock is placed each year. If the valuation is not satisfactory an appeal may be taken by the corporation for the shareholders. An opportunity is thus afforded for the shareholders to be heard through the corporation, and that gratifies all the requirements of law. If each and every shareholder in the great number of companies throughout the State had a right to insist upon a notice before an assessment of his shares could be made, and if each were given a separate right of appeal, it would be simply impossible to fix annually a valuation on shares of capital. The policy of the law is to treat the corporation not merely as tax collector after the tax has been levied, but to deal with it as the representative of the shareholder in respect to the assessment of the shares; and when notice has been given to the corporation, and it has the right to be heard

on appeal, notice is thereby given to the shareholders, and they are accorded a hearing. This is so in every instance where the assessment is made by the state tax commissioner, because the revenue laws throughout treat the corporation as the representative of the shareholders, and as no official other than the tax commissioner has power to assess capital stock, no notice other than the one given by him is necessary; and as no notice other than the one given by him is necessary, a notice by the municipality to each shareholder is not requisite."

If a tax was expressly imposed upon the corporation the stockholders, though interested in the preservation of the assets of the corporation, could not be heard to object that the statute did not provide for notice to them of the making of the assessment. The condition attached by the Maryland law to the acquisition of stock in its domestic corporations, that the stockholders, for the purpose of notice of the assessment of the stock and proceedings for the correction of the valuation thereof, shall be represented by the corporation, is not in our opinion an arbitrary and unreasonable one, when it is borne in mind that the corporation, through its officers, is by the voluntary act of the stockholders constituted their agent and vested with the control and management of all the corporate property, that which gives value to the shares of stock and in respect to which taxes are but mere incidents in the conduct of the business of the corporation. The possibility that the state taxing officials may abuse their power and fix an arbitrary and unjust valuation of the shares, and that the officers of the corporation may be recreant in the performance of the duty to contest such assessments, does not militate against the existence of the power to require the numerous stockholders of a corporation chartered by the State, particularly those resident without the State, to be represented in proceedings before the taxing officials through the agency of the corporation.

As we conclude that the legislation of the State of Maryland

in question does not contravene the due process clause of the Fourteenth Amendment to the Constitution of the United States, the judgment of the Court of Appeals of Maryland is *Affirmed.*

VANDERBILT *v.* EIDMAN.

CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 206. Argued October 13, 14, 1904.—Decided February 20, 1905.

Where a legacy under the will of one dying in September, 1899, was to be held in trust by the executors, the legatee only to receive the income until he reached a specified age, which would be subsequent to 1902, when he was to receive the principal, §§ 29 and 30 of the war revenue act of June 13, 1898, 30 Stat. 464, did not authorize the assessment or collection, prior to the time when, if ever, such rights or interests should become absolutely vested in possession and enjoyment, of any tax with respect to any of the rights or interests of the legatee with the exception of his present right to receive the income until the age specified.

The amendatory act of March 2, 1901, 31 Stat. 946, as to the questions involved in this suit reënacted §§ 29 and 30 of the act of 1898 and did not enlarge them so as to embrace subjects of taxation not originally included therein, and did not justify the new construction thereafter placed upon the act by the Government, that death duties should become due within one year as to legacies and distributive shares not capable of being immediately possessed and enjoyed and therefore not subject to taxation under the original act. The refunding act of June 27, 1902, 32 Stat. 406, passed after §§ 29 and 30 of the act of 1898 had been repealed by the act of April 12, 1902, 32 Stat. 96, was in a sense declaratory of the construction now given by this court to those sections of the act of 1898 and was a legislative affirmance of such construction of the act as it had been adopted by the Government prior to the amendatory act of March 2, 1901, and a repudiation of the opposite construction adopted thereafter.

CORNELIUS VANDERBILT died in the city of New York on September 12, 1899, leaving a will, which was admitted to probate, the seventeenth clause of which provides as follows:

"Seventeenth: All the rest, residue and remainder of all

the property and estate, real, personal and mixed, of every description, and wheresoever situated, of which I may die seized or possessed, or to which I may be entitled at the time of my decease, including all lapsed legacies and the principal of any annuities which may terminate and any part of my estate which may not have been effectually devised or bequeathed or from any other source, I give, devise and bequeath to my executors, hereinafter named, and the survivors and survivor of them, IN TRUST, to hold said estate and invest and reinvest the same and to collect the rents, issues, income and profits therefrom for the use of my son Alfred G., and to apply so much of said net income as may be in their judgment advisable, to his support, maintenance and education, and for the care and maintenance of his property during his minority, and to accumulate any surplus income, such accumulations to be paid to him when he arrives at the age of twenty-one years and thereafter to pay the net income of said estate to him as received until he arrives at the age of thirty years, when he shall be put in full possession of one-half the portion of said estate to be set apart for that purpose by my executors and survivors of them. And upon further trust thereafter to pay to my said son, Alfred G. the income from the balance remaining of said estate until he shall arrive at the age of thirty-five years, when he shall be put in possession of the balance of said trust estate, and the said trustees shall be discharged from any and all liability and responsibility in respect thereof. If my son Alfred G. should die before attaining the age of thirty-five years, leaving issue, such portion of the estate as shall not then have come into his possession shall be divided by my executors into as many equal shares as he may leave children surviving, and one share shall be held by my executors to the use of each such child or children until he or she shall attain the age of twenty-one years, when it shall be paid to such child; but if he shall die without child or children, or if none of his children shall attain majority, then it is my will that my son Reginald C. shall in all respects, as to

said residuary estate stand in the place and stead of his brother Alfred G., and that if Alfred G. shall die without issue before he attains the age of thirty years, then Reginald C. shall receive the income from said estate until he attains the age of thirty years, when he shall be put in possession of one-half of the residuary estate, and thereafter Reginald C. shall receive the net income of the remaining one-half of my estate, and on arriving at the age of thirty-five years he shall be put in possession of the whole of said estate, and my said executors shall hold said estate upon such trust, and I give and devise the same accordingly. If Alfred G. and Reginald C. shall both die before being put into possession of said estate, and without issue, I give whatever then remains of my residuary estate to my daughters Gertrude and Gladys Moore, share and share alike; and if either of my said daughters be then dead leaving issue, her issue to take his or her mother's share, *per stirpes* and not *per capita;* and in default of issue, the survivor shall take the principal."

This clause contains the only provisions in the will relating to or in any manner affecting the disposition of the residuary estate of the testator, and determining the extent and character of the interests therein.

All of the children of Cornelius Vanderbilt, named in the seventeenth clause of his will, were living at the time this suit was brought. At the time of the death of Cornelius Vanderbilt his son, Alfred G. Vanderbilt, was between twenty-two and twenty-three years of age, and his son, Reginald C. Vanderbilt, was between nineteen and twenty years of age, and both were unmarried.

The appraised value of the residuary personal estate at the time of the testator's death was $18,972,117.46.

The right of Alfred G. Vanderbilt to the beneficial enjoyment, as provided in the will, until he became thirty years of age, was appraised at $5,119,612.43, and upon this sum the executors paid a death duty under sections 29 and 30 of the act of June 13, 1898, 30 Stat. 448, 464, at the rate of two and

one-fourth per cent, the tax amounting to $115,191.28. After payment of this amount and subsequently to the passage on March 2, 1901, 31 Stat. 938, of an amendment to the war revenue act of 1898, the Commissioner of Internal Revenue, considering that by that amendment Alfred G. Vanderbilt had become immediately liable for a tax on his right to succeed to the whole residue if he lived to the ages of thirty and thirty-five years respectively, assessed a death duty based upon that hypothesis. In making this assessment as by the mortality tables it was shown that Alfred G. Vanderbilt had a life expectancy beyond the ages of thirty and thirty-five years, the Commissioner assessed the interest as a vested estate equal in value to the sum of the entire residuary estate, viz., $18,972,117.46. Upon this valuation a tax was levied of two and one-fourth per cent, producing $426,872.64. On this amount, however, credit was allowed for the sum of the tax previously paid, leaving the balance due $311,681.36. On September 3, 1901, this balance was paid by the executors under protest, "and upon compulsion of the collector's threat of distraint and sale." The executors thereupon made the statutory application to the Commissioner of Internal Revenue for the refunding of the amount, and it being refused, commenced in the Circuit Court of the United States for the Southern District of New York this action to recover the payment.

The facts, as above stated, were averred, and the right to recover was based upon the ground that, as Alfred G. Vanderbilt only had the enjoyment presently of the revenues of the residuary estate up to the period when he might attain the age of thirty years, he was only liable to be assessed upon that beneficial interest. For this reason it was charged that the assessment made of the bequest to Alfred G. Vanderbilt of the whole residuary estate, upon condition that he reached the ages of thirty and thirty-five years respectively, was unwarranted.

The Circuit Court, on the ground that the complaint did not

state a cause of action, sustained a demurrer to that effect filed by the Government, and dismissed the action. 121 Fed. Rep. 590. The Circuit Court of Appeals stated the facts as above recited, and certified certain questions.

Mr. Howard Taylor, with whom *Mr. Henry B. Anderson* and *Mr. Chandler P. Anderson* were on the brief, for plaintiffs in error:

Sections 29 and 30 of the act of June 13, 1898, imposed a legacy tax as distinguished from a probate tax; that is, they provided for the imposition of a tax upon the right to take a beneficial interest in the property of a decedent, arising in the manner prescribed in the act, which tax was directed to be assessed at a certain rate per cent of the clear value of such beneficial interest, the rate being primarily determined by the relationship of the beneficiary to the testator. Where property is limited in trust they did not provide for the imposition of a tax upon the passing to the trustees of the bare legal title to the property regardless of the character of the beneficial interest or interests therein.

See *Knowlton* v. *Moore*, 178 U. S. 41, as to the rights and objects upon which death duties are imposed and the right of Congress to levy such taxes, the form of the tax under this particular act and its mode of assessment, and that the tax is imposed not upon the whole bulk of the estate but with respect to each separate legacy and is paid out of the legacy with respect to which it is assessed. *Fitzgerald* v. *Rhode Island Trust Co.*, 52 Atl. Rep. 814. Nor is the tax upon the property passing but on the succession. *United States* v. *Perkins*, 163 U. S. 625; *Magoun* v. *Illinois Trust &c. Bank*, 170 U. S. 283; *Snyder* v. *Bettman*, 190 U. S. 249.

It therefore appears that the tax imposed with respect to a legacy under the act of 1898 is a tax upon the interest in property to which a person succeeds upon another's death, and that such interest must be a present beneficial interest of a legatee and not merely a trustee's interest as custodian of

the property, which is not a beneficial interest and has no clear value upon which to compute the tax, and conversely it appears that the tax is not upon the property itself, nor upon the mere passing of property, nor upon an interest in property which ceased by reason of death. It is further evident that, under this act a legacy tax has nothing to do with the bulk or value of the estate of the testator, but only with the legatee's interest in the particular legacy out of which the tax is payable, and, although it is payable out of such legacy, it is not computed upon the value of the property passing under such legacy, but only upon the clear value of the beneficial interest in such legacy, and consequently, that unless and until such interest has a clear value, no tax can be assessed.

The tax was intended to attach only to present interests and the assessment and collection of taxes upon future rights or interests which are contingent, or which if vested are subject to conditions subsequent which may prevent them ever coming into possession, must be postponed until they become absolutely vested.

Similar state statutes have been so construed. *Matter of Swift*, 137 N. Y. 77, 88; *Matter of Davis*, 149 N. Y. 539; *Matter of Curtis*, 142 N. Y. 219; *Matter of Roosevelt*, 143 N. Y. 120; *Matter of Hoffman*, 143 N. Y. 327; *Matter of Cager*, 111 N. Y. 342; *Matter of Vanderbilt*, 172 N. Y. 69, 72; *Matter of Brez*, 172 N. Y. 609; *Billings* v. *People*, 189 Illinois, 472; *People* v. *McCormick*, 208 Illinois, 437.

The subsequent acts of Congress relating to the war revenue act show that it was intended to be construed and applied as imposing a tax assessable only upon beneficial interests and collectible only when such interests are actually perfected either in possession or enjoyment.

By the seventeenth clause of the will Alfred G. Vanderbilt has four separate and distinct interests in the residuary estate, one of which, namely, his right to receive the income in the entire residue until he becomes thirty years of age, is vested and subject to taxation, and three of which, namely, his right

to receive one-half of the principal of the residue upon becoming thirty years of age, his right to receive the income in the other half of the residue until he shall become thirty-five years of age, and his right to receive the principal of the other half of the residue upon reaching that age, are all future interests and not presently taxable.

As to whether a gift is future or contingent or there is an immediate vested interest, see *Leake* v. *Edwards*, 2 Mer. 363; *Warner* v. *Durant*, 76 N. Y. 133, 136; *Smith* v. *Edwards*, 88 N. Y. 92, 103; *Goebel* v. *Wolf*, 113 N. Y. 405, 412; *Zartman* v. *Ditmars*, 37 App. Div. N. Y. 173; *Vawdry* v. *Geddes*, 1 Russ. & M. 203; *Greenland* v. *Waddell*, 116 N. Y. 234; *Schlereth* v. *Schlereth*, 173 N. Y. 453; *Matter of Seaman*, 147 N. Y. 69; *Campbell* v. *Stokes*, 142 N. Y. 23; *Stevenson* v. *Lesley*, 70 N. Y. 512; *Rudd* v. *Cornell*, 171 N. Y. 114; *Matter of Vanderbilt*, 172 N. Y. 69; *Matter of Tracy*, 179 N. Y. 519, and cases cited.

These interests, being future and conditional, and likely to be defeated before they can vest in possession or enjoyment, no tax can be assessed or collected with respect to them under the war revenue law until they vest absolutely. Whether they are called contingent or vested, or by whatever name they are designated, the fact is that they are not rights of actual ownership and they have no clear value upon which a tax can be computed. They should therefore be treated in the same way that the remainder interests were treated in the case of *Knowlton* v. *Moore*, *supra*, where no tax was assessed with respect to such interests in the residue, pending the termination of the intervening interests therein.

The present "clear value" of all the beneficiary's interests in the residue, the enjoyment of two of which are conditional upon his reaching the age of thirty years, and the enjoyment of one of which is conditional upon his reaching the age of thirty-five years, cannot now accurately be determined but obviously is not equal to the full cash value of the property comprising the entire residue.

The war revenue law does not require the collection of a

tax imposed thereunder until the beneficiary becomes entitled to the actual possession or enjoyment of the legacy.

Mr. Assistant Attorney General Robb for defendant in error:

Vested remainders are taxed by the war revenue law, *Knowlton* v. *Moore*, 178 U. S. 41, 71. The history of the legacy tax legislation and analysis of this statute show this. See construction of act of 1866 in *Mason* v. *Sargent*, 104 U. S. 689; *Pennsylvania Company* v. *McClain*, 105 Fed. Rep. 367; *S. C.*, 108 Fed. Rep. 618. Vested remainders are taxed upon vesting. *Land Title Co.* v. *McCoach*, 127 Fed. Rep. 381, 386; *Brown* v. *Kinney*, 128 Fed. Rep. 310; *Peck* v. *Kinney*, 128 Fed. Rep. 313. Such a tax results in no injustice. *United States* v. *Perkins*, 163 U. S. 625; *Plummer* v. *Coler*, 178 U. S. 115; *United States* v. *Fox*, 94 U. S. 315; *Snyder* v. *Bettman*, 190 U. S. 249. The uniformity clause of the Constitution is not violated. *Knowlton* v. *Moore*, 178 U. S. 41; *License Tax Case*, 5 Wall. 472; *United State* v. *Singer*, 15 Wall. 111; *Head Money Cases*, 112; U. S. 580. Subsequent legislation of Congress shows this was the intent. See also the New York cases cited on brief of plaintiff in error construing New York statute and *Matter of Stewart*, 131 N. Y. 274; *Matter of Davis*, 149 N. Y. 139. The tax is collectible when the remainder vests. The interests of the beneficiary are vested remainders. See in Federal courts *Price* v. *Watkins*, 1 Dallas, 8; *Carver* v. *Astor*, 4 Pet. 1; *Crane* v. *Morris*, 6 Pet. 598; *Coxall* v. *Shererd*, 5 Wall. 268; *Doe* v. *Considine*, 6 Wall. 458; *Cropley* v. *Cooper*, 19 Wall. 167; *Daniel* v. *Whartenby*, 17 Wall. 639; *Clapp* v. *Mason*, 94 U. S. 589; *McArthur* v. *Scott*, 113 U. S. 340; *Thaw* v. *Ritchie*, 136 U. S. 519; *Williams* v. *Hedrick*, 96 Fed. Rep. 657; *Tirrell* v. *Bacon*, 3 Fed. Rep. 62; *In re* Wood, 98 Fed. Rep. 972; *In re Haslett*, 116 Fed. Rep. 680; *In re McHarry*, 11 Fed. Rep. 498; and New York cases, *Doe* v. *Provoost*, 4 Johns. 61; *Hone's Executors* v. *Van Schaick*, 20 Wend. 564; *Moore* v. *Lyons*, 25 Wend. 119; *Everitt* v. *Everitt*, 29 N. Y. 39; *Moore* v. *Little*, 41 N. Y. 66; *Manice* v. *Manice*, 43 N. Y. 303; *Livington* v. *Greene*,

52 N. Y. 118; *Warner* v. *Durant*, 76 N. Y. 133; *Monargue* v. *Monargue*, 80 N. Y. 320; *Radley* v. *Kuhn*, 97 N. Y. 26; *Van Brunt* v. *Van Brunt*, 111 N. Y. 178; *Goebel* v. *Wolf*, 113 N. Y. 405; *Campbell* v. *Stokes*, 142 N. Y. 23. The cases cited by plaintiff in error can be distinguished. The interests were taxed according to their clear value.

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

The four questions certified are as follows:

"I. Is the tax imposed by sections 29 and 30 of the act of Congress of June 13, 1898, entitled 'An act to provide ways and means to meet war expenditures, and for other purposes,' with respect to Alfred G. Vanderbilt's interest under the seventeenth clause of the will of Cornelius Vanderbilt, a tax upon the transmission to and receipt by the trustees of the property passing to them as trustees under the legacy out of which such interest arises?

"II. If the preceding question is answered in the negative, is the tax imposed under said act with respect to Alfred G. Vanderbilt's interest under said seventeenth clause a tax upon the transmission to and receipt by said Alfred G. Vanderbilt of his beneficial interest in the property passing under such legacy?

"III. Did sections 29 and 30 of said act authorize the assessment and collection of a tax with respect to any of the rights or interests of Alfred G. Vanderbilt as a residuary legatee of the personal estate of Cornelius Vanderbilt under the seventeenth clause of the will, with the exception of his present right to receive the income of such estate until he attains the age of thirty years, prior to the time when, if ever, such rights or interests shall become absolutely vested in possession or enjoyment?

"IV. If the tax under sections 29 and 30 of said act was presently assessable and collectible upon all the interests of

Alfred G. Vanderbilt in said legacy, was the clear value of all such interests, for the purposes of computing the tax, equal to the full value of the property comprised in the legacy out of which such interests arose?"

Whilst the questions, apparently, present distinct matters, yet underlying and involved in them all is the fundamental consideration whether the burden imposed by the war revenue act was confined to the interest of which Alfred G. Vanderbilt had the beneficial right of immediate enjoyment, or whether that burden also bore upon the right to the residue which Alfred G. Vanderbilt might possess or enjoy in the future, if he lived to the ages specified in the will, upon the theory that the right so to possess or enjoy in the future was technically vested. To avoid repetition we therefore come at once to the consideration of this subject in order that when we have disposed of it we may be able, in the light of the correct construction of the statute, to respond to the questions propounded, in so far as it may be found necessary to do so.

Before coming to the statute we put aside as not directly decisive of the question here presented a case referred to by both parties, that is, *Knowlton* v. *Moore*, 178 U. S. 41. Whilst that case involved the constitutionality of the act of Congress, with whose meaning we are here concerned, it required a construction of that act only to the extent necessary to enable it to be decided what was the subject upon which the law levied the tax, and whether the statute required the tax levied to be progressively increased by reference to the whole amount of the estate of the decedent, or alone by reference to the particular legacy or distributive share upon the right to succeed to which the tax bore. The case did not, therefore, pass on the controversies here arising.

To state briefly the conflicting contentions of the parties as to the meaning of the statute may serve to accentuate and narrow the question for decision. The proposition of the Government is thus stated in the argument:

"First, vested remainders are taxed by the law of June 13,

1898, the tax attaching at the time of vesting; second, the tax is to be assessed and collected at the time of vesting; third, the interest of Alfred G. Vanderbilt in the principal of the residue, which the will provides he shall be put in full possession of, one-half at the age of 30, and the other half at the age of 35, is a vested remainder."

The contrary contentions are as follows: First. That Congress in the act in question did not concern itself with the mere technical vesting of the title to possibly possess or enjoy in the future personal property; but, on the contrary, the act subjected to the death duties which it imposed only real and beneficial interests. In other words, the proposition is that the act did not make subject to taxation a gift, which, even if technically vested in title, was yet subject to be defeated in possession or enjoyment by the happening of a contingency stated in the will. The argument, therefore, is that where such a gift was made by will, no tax could be imposed until the time when, by the happening of the contingency stated, the right to possess or enjoy had accrued. Second. That even if the statute imposed a tax upon vested remainders the interest in question was a contingent and not a vested remainder.

The provisions of the act of 1898, which require elucidation for the purpose of disposing of these contentions, are contained in sections 29 and 30. They are reproduced in the margin.[1]

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[1] Act of June 13, 1898, c. 448.

SEC. 29. That any person or persons having in charge or trust, as administrators, executors, or trustees, any legacies or distributive shares arising from personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of ten thousand dollars in actual value, passing, after the passage of this act, from any person possessed of such property, either by will or by the intestate laws of any State or Territory, or any personal property or interest therein, transferred by deed, grant, bargain, sale, or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainor, to any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise, shall be, and hereby are, made subject to a duty or tax, to be paid to the

It will be observed that the duties imposed in section 29 have relation to two classes, first, legacies or distributive shares passing by death and arising from personal property; and, second any personal property or interest therein trans-

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United States, as follows—that is to say: Where the whole amount of said personal property shall exceed in value ten thousand dollars and shall not exceed in value the sum of twenty-five thousand dollars, the tax shall be:

First. Where the person or persons entitled to any beneficial interest in such property shall be the lineal issue or lineal ancestor, brother, or sister to the person who died possessed of such property, as aforesaid, at the rate of seventy-five cents for each and every hundred dollars of the clear value of such interest in such property.

Second. Where the person or persons entitled to any beneficial interest in such property shall be the descendent of a brother or sister of the person who died possessed, as aforesaid, at the rate of one dollar and fifty cents for each and every hundred dollars of the clear value of such interest.

Third. Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister of the father or mother, or a descendent of a brother or sister of the father or mother, of the person who died possessed as aforesaid, at the rate of three dollars for each and every hundred dollars of the clear value of such interest.

Fourth. Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister of the grandfather or grandmother, or a descendant of the brother or sister of the grandfather or grandmother, of the person who died possessed as aforesaid, at the rate of four dollars for each and every hundred dollars of the clear value of such interest.

Fifth. Where the person or persons entitled to any beneficial interest in such property shall be in any other degree of collateral consanguinity than as hereinbefore stated, or shall be a stranger in blood to the person who died possessed, as aforesaid, or shall be a body politic or corporate, at the rate of five dollars for each and every hundred dollars of the clear value of such interest: *Provided*, That all legacies or property passing by will, or by the laws of any State or Territory, to husband or wife of the person died possessed, as aforesaid, shall be exempt from tax or duty.

Where the amount or value of said property shall exceed the sum of twenty-five thousand dollars, but shall not exceed the sum or value of one hundred thousand dollars, the rates of duty or tax above set forth shall be multiplied by one and one-half; and where the amount or value of said property shall exceed the sum of one hundred thousand dollars, but shall not exceed the sum of five hundred thousand dollars, such rates of duty shall be multiplied by two; and where the amount or value of said property shall exceed the sum of five hundred thousand dollars, but shall not exceed the sum of one million dollars, such rates of duty shall be multiplied by two and one-half; and where the amount or value of said property shall exceed

ferred by deed, grant, bargain, sale or gift, to take effect in possession or enjoyment after the death of the grantor or bargainor, in favor of any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise. As to this

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the sum of one million dollars, such rates of duty shall be multiplied by three.

SEC. 30. That the tax or duty aforesaid shall be a lien and charge upon the property of every person who may die as aforesaid for twenty years, or until the same shall, within that period, be fully paid to and discharged by the United States; and every executor, administrator, or trustee, before payment and distribution to the legatees, or any parties entitled to beneficial interest therein, shall pay to the collector or deputy collector of the district of which the deceased person was a resident the amount of the duty or tax assessed upon such legacy or distributive share, and shall also make and render to the said collector or deputy collector a schedule, list, or statement, in duplicate, of the amount of such legacy or distributive share, together with the amount of duty which has accrued, or shall accrue, thereon, verified by his oath or affirmation, to be administered and certified thereon by some magistrate or officer having lawful power to administer such oaths, in such form and manner as may be prescribed by the Commissioner of Internal Revenue, which schedule, list, or statement shall contain the names of each and every person entitled to any beneficial interest therein, together with the clear value of such interest, the duplicate of which schedule, list, or statement shall be by him immediately delivered, and the tax thereon paid to such collector; and upon such payment and delivery of such schedule, list, or statement said collector or deputy collector shall grant to such person paying such duty or tax a receipt or receipts for the same in duplicate, which shall be prepared as hereinafter provided. Such receipt or receipts, duly signed and delivered by such collector or deputy collector, shall be sufficient evidence to entitle such executor, administrator, or trustee to be credited and allowed such payment by every tribunal which, by the laws of any State or Territory, is, or may be, empowered to decide upon and settle the accounts of executors and administrators. And in case such executor, administrator, or trustee shall refuse or neglect to pay the aforesaid duty or tax to the collector or deputy collector, as aforesaid, within the time hereinbefore provided, or shall neglect or refuse to deliver to said collector or deputy collector the duplicate of the schedule, list, or statement of such legacies, property, or personal estate, under oath, as aforesaid, or shall neglect or refuse to deliver the schedule, list, or statement of such legacies, property, or personal estate, under oath, as aforesaid, or shall deliver to said collector or deputy collector a false schedule or statement of such legacies, property, or personal estate, or give the names and relationship of the persons entitled to beneficial interest therein untruly, or shall not truly and correctly set forth and state therein

second class, the statute specifically makes the liability for taxation depend, not upon the mere vesting in a technical sense of title to the gift, but upon the actual possession or enjoyment thereof. By any fair construction the limitation as to possession or enjoyment expressed as to one class must be applied to the other, unless it be found that the statute, whilst treating the two as one and the same for the purpose of the imposition of the death duty, has yet subjected them

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the clear value of such beneficial interest, or where no administration upon such property or personal estate shall have been granted or allowed under existing laws, the collector or deputy collector shall make out such lists and valuation as in other cases of neglect or refusal, and shall assess the duty thereon; and the collector shall commence appropriate proceedings before any court of the United States, in the name of the United States, against such person or persons as may have the actual or constructive custody or possession of such property or personal estate, or any part thereof, and shall subject such property or personal estate, or any portion of the same, to be sold upon the judgment or decree of such court, and from the proceeds of such sale the amount of such tax or duty, together with all costs and expenses of every description to be allowed by such court, shall be first paid, and the balance, if any, deposited according to the order of such court, to be paid under its direction to such person or persons as shall establish title to the same. The deed or deeds, or any proper conveyance of such property or personal estate, or any portion thereof, so sold under such judgment or decree, executed by the officer lawfully charged with carrying the same into effect, shall vest in the purchaser thereof all the title of the delinquent to the property or personal estate sold under and by virtue of such judgment or decree, and shall release every other portion of such property or personal estate from the lien or charge thereon created by this act. And every person or persons who shall have in his possession, charge, or custody any record, file, or paper containing, or supposed to contain, any information concerning such property or personal estate, as aforesaid, passing from any person who may die, as aforesaid, shall exhibit the same at the request of the collector or deputy collector of the district, and to any law officer of the United States, in the performance of his duty under this act, his deputy or agent, who may desire to examine the same. And if any such person, having in his possession, charge, or custody any such records, files, or papers, shall refuse or neglect to exhibit the same on request, as aforesaid, he shall forfeit and pay the sum of five hundred dollars: *Provided*, That in all legal controversies where such deed or title shall be the subject of judicial investigation, the recital in said deed shall be prima facie evidence of its truth, and that the requirements of the laws had been complied with by the officers of the Government.

to different rules. A consideration of the subsequent provisions of the section leaves no room for such a contention, since immediately following the designation of the two classes there are five distinct paragraphs, subjecting the passing of the property taxed in both classes to a different rate of tax, dependent upon the degree of relationship of the beneficiary to the decedent, and in each it is specifically provided that a tax is to be levied in respect only of a beneficial interest having a clear value. Moreover, the meaning of the statute, fairly to be deduced from the reiteration in each of the five paragraphs of the beneficial interest and clear value as the subject of the tax, is greatly strengthened by the inference to be drawn from the fact that nowhere in the section is there contained language referring to technical estates in personalty or treating them as subject of taxation, despite the absence of the right to immediate possession or enjoyment. And coming to consider section 30, relating to the collection of the duty or tax imposed by section 29, the meaning of section 29, as just indicated, is made clearer. Thus by section 30 it is provided that "every executor, administrator or trustee, before payment and distribution [of a legacy or distributive share] to the legatees, or any parties entitled to beneficial interest therein, shall pay to the collector of the district of which the deceased person was a resident the amount of the duty or tax assessed upon such legacy or distributive share." It also requires that the schedule, etc., to be furnished by an executor, administrator or trustee to a collector or deputy collector shall contain the name of each person having a beneficial interest in the property in the charge or custody of the executor, etc., with a statement "of the clear value of such interest."

These provisions harmonize with the meaning which we have ascribed to section 29, since they clearly import that the tax is to be deducted from a beneficial interest which the beneficiary was entitled to enjoy, and from which, before payment or distribution, a deduction of the duty was to be made.

In view of the express provisions of the statute as to possession or enjoyment and beneficial interest and clear value, and of the absence of any express language exhibiting an intention to tax a mere technically vested interest in a case where the right to possession or enjoyment was subordinated to an uncertain contingency, it would, we think, be doing violence to the statute to construe it as taxing such an interest before the period when possession or enjoyment had attached. And such is the construction which has been affixed to some state statutes, the text of which lent themselves more strongly to the construction that it was the intention to subject to immediate taxation merely technical interests, without regard to a present right to possess or enjoy. *Matter of Curtis*, 142 N. Y. 219, 222; *Matter of Roosevelt*, 143 N. Y. 120.

In the *Matter of Hoffman*, 143 N. Y. 327, the court was called upon to construe the meaning of a statute, enacted in 1892, providing that "all taxes imposed by this act shall be due and payable at the time of the transfer, provided, however, that taxes upon the transfer of any estate, property or interest therein limited, conditioned, dependent or determinable upon the happening of any contingency or future event, by reason of which the fair market value thereof cannot be ascertained at the time of the transfer as herein provided shall accrue and become due and payable when the persons or corporations beneficially entitled thereto shall come into actual possession or enjoyment thereof." Laws 1892, chap. 399, sec. 3. The court said:

"We are obliged to follow one of two lines of construction. We must open all the nice and difficult questions which arise under a will as to the vesting of technical legal estates, although future and contingent, and assess the tax upon what are in reality only possibilities and chances, and so complicate the statute with the endless brood of difficult questions which gather about the construction of wills; or we must construe it in view of its aim and purpose and the object it seeks to ac-

complish, and so subordinate technical phrases to the facts of actual and practical ownership. For taxation is a hard fact, and should attach only to such ownership, and may properly be compelled to wait until chances and possibilities develop into the truth of an actual estate possessed, or to which there exists an absolute right of future possession. I am not shutting my eyes to the statutory language, which is quite broad. The property taxed may be an estate 'for a term of years or for life or determinable upon any future or contingent estate,' or 'a remainder, reversion or other expectancy,' and the tables of mortality may be resorted to for the ascertainment of values. And yet, it is the 'fair market value,' the 'fair and clear market value,' which is to be assessed, and with the proviso that if that value cannot be at once ascertained, the appraisal is to be adjourned. I can scarcely imagine a contingency depending upon lives which mathematics could not solve by the doctrine of chances and the averages of mortality, and there could hardly be an adjournment unless upon some rare contingency having no averages, and the results in cases dependent upon lives might still leave the 'fair and clear market value' in doubt and yield sums which no sale in the market would produce."

So, also, the Supreme Court of Illinois, in construing an inheritance tax law of that State, containing language identical in some respects with that found in the act of Congress, observed in *Billings* v. *The People*, 189 Illinois, 472, 487:

"The tax imposed by section 1 of our statute is fixed upon the 'clear market value of the property received by each person' at the prescribed rate,—that is, as shown by the context, the clear market value of the beneficial interest so received. Surely, by such language it was not intended by the legislature that the courts should undertake to ascertain the clear market value of a mere possible interest which, from its very nature, could not have any market value, and which, for all practical purposes, such as taxation, is incapable of valuation. The courts, in order to enforce the immediate collection of such

taxes, as the statute seems to contemplate shall be done, cannot change the tax from one on succession to one on property; nor can they classify such remote and contingent interests, and fix the tax or rate of tax upon the whole class, as possibly the law-making power might do or provide for. No other course is left open in the practical administration of the statute than to postpone, as was done in this case, the assessing and collecting of the tax upon such remote and contingent interests as are incapable of valuation and as to which the rate and the exemptions cannot be determined."

And see also *Howe* v. *Howe*, 179 Massachusetts, 546, 550.

Indeed, in accord with its text and in harmony with the principles of construction expounded in the cases just cited, the act of 1898 was primarily construed by the officers charged with its administration as taxing only beneficial interests where the right to possess or enjoy had accrued. The rulings of the Internal Revenue Department to this effect were without deviation for several years.

The practice followed in carrying out the statute was illustrated by the assessment which was made in the case considered in *Knowlton* v. *Moore*, 178 U. S. 41, as exhibited in the schedule on page 44 of the report of that case. It was also by this construction that the tax in this case was originally assessed only upon the beneficial interest which was being enjoyed by Alfred G. Vanderbilt.

The change of construction was made because the administrative officers deemed it was required by the amendment of March 2, 1901, to the act of 1898. 31 Stat. 946. This is shown by a ruling made by the Commissioner of Internal Revenue on October 17, 1901, in which it was said (Treasury Decisions, Internal Revenue, vol. 4, p. 209):

"This office formerly held that the tax on reversionary interests was payable when the beneficiaries entered into the possession and enjoyment of their legacies.

"The amendment to section 30 of the war-revenue law, approved March 2, 1901, which went into effect July 1, 1901,

necessitated a change in this ruling, and on July 20, 1901, this office ruled that reversionary interests which are vested are taxable on their present worth."

The case therefore reduces itself to this: Did the amendatory act of 1901 enlarge the act of 1898 so as to cause that act to embrace subjects of taxation which were not included prior to the amendment? The amendatory act, so far as necessary to be considered for the purposes of this question, reënacted sections 29 and 30 of the original act. The amendments which the administrative officers decided made subject to taxation vested interests where the right of immediate possession or enjoyment had not accrued, and which had been treated as not taxable prior to the amendment were that the tax or duty should be due and payable in one year after the death of the person from whom the estate had passed, and that the executor, administrator or trustee should make return of the estate in his control within thirty days after taking charge thereof. Giving to these provisions their natural import, they imply only that a uniform period was fixed within which the obligation should arise of paying the tax authorized to be levied by the original act, that is, the obligation of paying the duty on each beneficial interest which in effect had vested in possession or enjoyment. The amendments, therefore, did not, in our opinion, justify the construction that Congress intended by adopting them to cause death duties to become due within one year as to legacies and distributive shares which were not capable of being immediately possessed or enjoyed, and were therefore not subject to taxation under the original act. This conclusion irresistibly follows when it is observed that no word is found in the amendatory act importing an intention to change the administrative construction which had theretofore prevailed from the beginning. On the contrary, the amendatory act reiterated without alteration the provisions found in the original act as to possession or enjoyment and beneficial interest and clear value. Indeed the amendatory act contained new provisions not expressly found in the original act,

supporting and adding cogency to the prior administrative construction, such as the proviso at the close of section 30, as follows:

"Any tax paid under the provisions of sections twenty-nine and thirty shall be deducted from the particular legacy or distributive share on account of which the sum is charged;" a provision plainly importing a practically contemporaneous right to receive the legacy or distributive share, and one which would be impracticable of execution if the tax was to be assessed and collected before the beneficiary and the rate of tax could certainly be ascertained.

Further elucidation as to the meaning of the amendatory act of 1901 is unnecessary in view of the subsequent legislation of Congress. By the act of April 12, 1902, 32 Stat. 96, section 29 of the act of 1898, as amended on March 2, 1901, was repealed to take effect on July 1, 1902. The repealing act, however, saved "All taxes or duties imposed by section 29 of the act of June 13, 1898, and the amendments thereof, prior to the taking effect of this act." On June 27, 1902, 32 Stat. 406, an act was adopted, the third section of which reads as follows:

"SEC. 3. That in all cases where an executor, administrator, or trustee, shall have paid, or shall hereafter pay, any tax upon any legacy or distributive share of personal property under the provisions of the act approved June thirteenth, eighteen hundred and ninety-eight, entitled 'An act to provide ways and means to meet war expenditures, and for other purposes,' and amendments thereof, the Secretary of the Treasury be, and he is hereby, authorized and directed to refund, out of any money in the Treasury, not otherwise appropriated, upon proper application being made to the Commissioner of Internal Revenue, under such rules and regulations as may be prescribed, so much of said tax as may have been collected on contingent beneficial interests which shall not have become vested prior to July first, nineteen hundred and two. And no tax shall hereafter be assessed or imposed under said act,

approved June thirteenth, eighteen hundred and ninety-eight, upon or in respect of any contingent beneficial interest which shall not become absolutely vested in possession or enjoyment prior to said July first, nineteen hundred and two."

In view of the provision for refunding we see no escape from the conclusion that this statute was in a sense declaratory of what we hold was the true construction of the act of 1898, and which, as we have seen, had prevailed prior to the amendment of March 2, 1901, and which was only departed from by the administrative officer under a misconception of the import of that amendatory act. There is no suggestion that any prior practice prevailed in the enforcement of the act of 1898, calling for the enacting of the refunding clause, except the mistaken construction placed on the amendatory act of 1901. The act of 1902 was, therefore, a legislative affirmance of the construction given to the act of 1898, prior to the amendment of 1901. It follows that the act of 1902 was, moreover, a legislative repudiation of the construction of the act of 1898, now insisted on by the Government. It is, we think, incontrovertible that the taxes which the third section of the act of 1902 directs to be refunded and those which it forbids the collection of in the future are one and the same in their nature. Any other view would destroy the unity of the section and cause its provisions to produce inexplicable conflict. From this it results that the taxes which are directed in the first sentence to be refunded, because they had been wrongfully collected on contingent beneficial interests which had not become *vested* prior to July 1, 1902, were taxes levied on such beneficial interests as had not become *vested in possession or enjoyment* prior to the date named, within the intendment of the subsequent sentence. In other words, the statute provided for the refunding of taxes collected under the circumstances stated and at the same time forbade like collections in the future.

In view of the text of the act of 1898 and the other considerations to which we have referred, we have not deemed it

necessary to advert to a contention made by the Government in argument, that the true meaning of the act of 1898 is shown by the administrative construction placed upon the act of July 1, 1862, levying legacy taxes, 12 Stat. 432, 485, of which in effect the act of 1898 was a reproduction. It is undoubtedly true that both under the act of 1862 and the act of June 30, 1864, 13 Stat. 223, 285, there was an administrative construction by which vested interests, although unaccompanied with the right of immediate possession or enjoyment, were treated as at once taxable. Without entering into details on the subject, we content ourselves with saying that it is also true that the correctness of that construction was in effect repudiated by legislative action (act of July 13, 1866, 14 Stat. 98, 140), and was, moreover, in substance, treated as unsound by the reasoning of the opinion in *Clapp* v. *Mason*, 94 U. S. 589.

Thus, by legislative action and judicial interpretation, it came to pass that the acts of 1862 and 1864 signified exactly what we now construe the act of 1898 to mean. It was doubtless this concordance of legislative action and judicial interpretation concerning the earlier acts which caused the administrative department of the Government, when the act of 1898 was adopted, to interpret that act, not as the acts of 1862 and 1864 had been originally erroneously interpreted in administration, but in accord with the subsequent legislative and judicial construction which had been placed upon the language of those acts, and which language in effect was repeated in the act of 1898.

Concluding, as we do, that there was no authority under the act of 1898 for taxing the interest of Alfred G. Vanderbilt, given him by the residuary clause of the will, conditioned on his attaining the ages of thirty and thirty-five years, respectively, it is unnecessary to determine whether such interest was technically a vested remainder, as claimed by counsel for the Government. In passing, however, we remark that in a case recently decided by the Court of Appeals of New York, *Matter of Tracy*, 179 N. Y. 501, it was declared

that such interest was a contingent and not a vested remainder.

Coming to apply the construction which we have given the statute to the solution of the questions propounded by the Court of Appeals, it follows that the first, second and fourth questions are unnecessary to be answered, and the third question should be answered in the negative.

And it is so ordered.

WESTERN TIE AND TIMBER COMPANY *v.* BROWN.

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

No. 232. Argued January 5, 1905.—Decided February 20, 1905.

The bankrupt was largely indebted to a corporation whose laborers purchased supplies from him; periodically he rendered the corporation a statement of amounts due from its laborers which it deducted from their wages and remitted to him in a lump sum. Prior to, and within four months of, the filing of the petition, the corporation several times deducted from its pay-roll, amounts aggregating over $2,000, so due by its laborers but did not pay them over, and on filing its claim it embodied as an integral part thereof the amounts so deducted and retained as a proper credit or offset. The Circuit Court of Appeals found that the corporation retained the amounts with the knowledge of the bankrupt's insolvency and with the intention to secure a preference to that extent thereby, but that the bankrupt had no such intention, and ordered that the entire claim be expunged unless the corporation paid the amount so retained to the trustee. On appeal objections were taken to the jurisdiction of this court. *Held:* that

As the claim to set-off is controlled by and is necessarily based on the provisions of § 68 of the Bankrupt Act and its construction is necessarily involved, and the question is one which might have been taken to this court on appeal or writ of error from the highest court of a State, this court has jurisdiction of the appeal.

Under the facts as found below the deductions from pay-roll did not give rise to a voidable preference nor was the corporation entitled to credit them as a set-off as they were not mutual debts and credits within the set-off clause of the bankrupt act, but were collections made independ-

ently of other transactions and as trustee for the bankrupt. The corporation was entitled to prove its gross debt with the alleged set-off eliminated and was a debtor to the bankrupt for the amount of such deductions, and the court below has power to protect the bankrupt's estate in respect to dividends to the corporation in case it should not discharge its obligations.

THIS is an appeal from a decree of the Circuit Court of Appeals for the Eighth Circuit, affirming, as modified, an order of the District Court of the United States for the Eastern District of Arkansas, directing that the claim of the Western Tie and Timber Company against the estate of S. F. Harrison, a bankrupt, be expunged, unless the company paid to the trustee in bankruptcy a specified sum, found to have been transferred to the company by the bankrupt and decided to have operated a voidable preference. 129 Fed. Rep. 728.

The facts were thus found by the Circuit Court of Appeals:

"1. On February 24, 1903, a petition to procure an adjudication that S. Frank Harrison was a bankrupt was filed in the District Court of the United States for the Eastern District of Arkansas, and Harrison was then adjudged a bankrupt.

"2. The Western Tie and Timber Company was a corporation and a creditor of Harrison. It presented a claim against his estate in bankruptcy of $24,358. The trustee moved to expunge this claim on the ground that the tie company had secured a voidable preference. The District Court ordered the claim expunged unless the tie company should pay to the trustee $2,210.73, and an appeal from this order was taken.

"3. For some years prior to February 24, 1903, the tie company and Harrison had been engaged in removing timber from land of the former and converting it into ties, which the company received and sold. For many months prior to October, 1902, Harrison had owned and conducted stores in the vicinity of the places where the work of cutting and hauling the ties was carried on, and had furnished the laborers engaged in that work with groceries and other supplies. These laborers and Harrison were paid by the tie company in this way: Once in two or four weeks an inspector sent to the tie company a pay

roll, on which the name of each laborer, the amount he had earned and the value of the supplies he had received from Harrison, appeared. The company deducted from the earnings of each laborer the value of the supplies the laborer had received and sent him a check for the balance. At the same time it sent to Harrison a check for the aggregate amount of the supplies which he had furnished to the laborers.

"4. Four months before the filing of the petition in bankruptcy, or October 24, 1902, Harrison owed the tie company more than $20,000.

"5. Between December 27, 1902, and February 24, 1903, the company refused to pay to Harrison, retained and credited on its claim against him $2,210.73, which was due him for supplies he had furnished to the laborers subsequent to November 30, 1902.

"6. At all times, when the amounts which aggregate $2,210.73 became due and were retained by the company, Harrison was insolvent, the tie company knew that fact, and it intended by retaining these amounts to secure to itself a preference over the other creditors of the insolvent, but Harrison had no such intention.

"7. After the company had retained several hundred dollars of the amount due Harrison for the supplies, it advanced to him $75 under a new and further credit."

An appeal to this court was allowed by the presiding circuit judge of the Circuit Court of Appeals.

Mr. Joseph Wheless, Mr. George M. Block, Mr. F. H. Sullivan and *Mr. Charles Erd,* for appellant:

This court has jurisdiction of this appeal upon the finding of facts and conclusions of law below. Act of 1898, § 25*b*; General Orders in Bankruptcy, XXXVI; *Pirie* v. *Chicago Title & Trust Co.*, 182 U. S. 438; *New York County Bank* v. *Massey*, 192 U. S. 138.

The bankrupt had no intention to prefer appellant, and without such intention on his part there could be no preference

arising from his sale of goods to appellant's employés. Act of 1898, § 57*g*, as amended February 5, 1903, and 60*b* ; Act of 1841, § 2 ; Act of 1867, Rev. Stat. §§ 5084, 5128 ; *Buckingham* v. *McLean*, 13 How. 169; *Wilson* v. *City Bank*, 17 Wall. 487; *Clark* v. *Iselin*, 21 Wall. 375; *Barbour* v. *Priest*, 103 U. S. 293; *Rice* v. *Grafton Mills*, 117 Massachusetts, 228.

The sale of the supplies here in question, by the bankrupt, resulted in an indebtedness from appellant to him, was not payment of, nor security for, appellant's demand, and hence was not a preference, but a case of mutual debts to be set off, the one against the other. Opinion of Circuit Court of Appeals in this case; *Hendrick* v. *Lindsay*, 93 U. S. 149; *Hecht* v. *Caughron*, 46 Arkansas, 132; Century Digest vol. II, tit. Contracts, § 798; Act of 1898, § 1, def. 25 and 68; *New York County Bank* v. *Massey*, *supra*.

Mr. John M. Moore, *Mr. C. F. Henderson*, *Mr. H. L. Ponder*, *Mr. M. M. Stuckey* and *Mr. S. M. Stuckey*, for appellee.

This court does not have jurisdiction of this appeal. *Hutchinson* v. *Otis*, 123 Fed. Rep. 14; *Denver National Bank* v. *Klug*, 186 U. S. 202; *Holden* v. *Stratton*, 191 U. S. 115.

An intention on the part of the bankrupt to give a preference by means of a transfer he makes is not indispensible to the existence of a voidable preference. Act of 1898, §§ 57*g*, 60*a*, 60*b*; Ch. 487, §§ 12, 13; Collier on Bankruptcy, 4th ed., pp. 387, 537; *Swarts* v. *Fourth National Bank*, 117 Fed. Rep. 1, *S. C.*, 54 C. C. A. 387; Opinion of Circuit Court of Appeals in this case.

The sale of supplies by bankrupt to the laborers and the appellant deducting the amount of them from the pay rolls and retaining same did not create an indebtedness from appellant to bankrupt, but was a voidable transfer of bankrupt's property and a preference, and was not a case of mutual debts to be set off the one against the other. Act of 1898, § 1 (def. No. 25), 60*a*, 60*b* and 68; *In re Christainsen*, 101 Fed. Rep. 802; *In re Ryan*, 105 Fed. Rep. 760; *Libbey* v. *Hopkins*, 104 U. S.

303; *Re Tacoma Shoe & Leather Co.*, 3 Nat. B. N. & Rep. 9; *Sawyer* v. *Hoag*, 17 Wall. 610, 622.

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

Before coming to the merits we dispose of an objection to the jurisdiction.

The appeal was prosecuted under clause *b* (1) of section 25 of the bankrupt act of July 1, 1898, 30 Stat. 544, 553, providing that from any final decision of a Court of Appeals, allowing or rejecting a claim under the act, an appeal may be had "where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of a State to the Supreme Court of the United States."

The provision of the Revised Statutes regulating the revision of judgments and decrees of state courts, which is relied upon, in conjunction with the portion of the bankruptcy act just quoted, is that portion of section 709, which authorizes the reëxamination of a final judgment or decree in any suit in the highest court of a State in which a decision in the suit can be had "where any title, right, privilege, or immunity is claimed under . . . any . . . statute of . . . the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed, by either party, under such . . . statute, . . ."

The appellee does not question that this appeal is from a decree rejecting a claim, within the meaning of the statute, and that the requisite jurisdictional amount is involved, but the particular objection urged is that a right was not claimed under an act of Congress, nor was a right of that nature denied by the lower court.

The objection is not tenable. It clearly appears from the record that in the claim filed on behalf of the tie company there

was embodied, as an integral part thereof, as a proper credit or set-off, the sum retained from the wages of employés for supplies furnished by the bankrupt, and the rejection of the claim was based upon the denial of the right to set-off. As the right of set-off is controlled by the provisions of section 68 of the bankrupt act, the assertion of such a right, in a proceeding in bankruptcy, as was the case here, is necessarily based upon those provisions of the act of Congress, and in this case the construction of such statutory provision was undoubtedly involved. That the Circuit Court of Appeals understood that reliance was had by the tie company upon the set-off clauses of the act is shown by its opinion, where, after sustaining the claim of the trustee that the credits in question constituted a preference, it prefaced a particular discussion of the contention, as to a right of set-off, by the following statement:

"Finally, it is said that this $2,210.73 was a credit to Harrison, and that the company should be permitted to set it off against his debt to it, and should be allowed to prove its claim for the balance remaining without restriction, on the ground that these claims were mutual debts and credits under section 68 of the bankrupt law."

The record, we think, sufficiently presented a claim of Federal right, *Home for Incurables* v. *New York*, 187 U. S. 155, and the objection to the jurisdiction is therefore overruled.

Passing to the merits of the controversy:

We must, at the outset, in the light of the facts found below, determine the exact relation existing between the bankrupt and the tie company, in order to fix the true import of the transactions by which the tie company, in making its claim against the bankrupt estate, asserted a right to retain and set off the sums which, in its proof of claim, it described as "deductions from pay rolls."

We think the findings establish that Harrison sold the goods, not to the tie company, but to the laborers, and therefore the result of the sale was to create an indebtedness for the price

alone between Harrison and the employés. This is not only the necessary consequence of the facts stated, but likewise conclusively flows from the nature of the proof of claim made by the tie company, since that proof, so far as the items concerning the price of the goods sold to the employés are concerned, based the indebtedness by the tie company to Harrison, not upon any supposed original obligation on the part of the tie company towards Harrison to pay for the goods, but upon the "deductions from pay rolls," made by the tie company in paying its employés. The effect of this was to trace and limit the origin of the debt due by the tie company to Harrison solely to the fact that the tie company had deducted, in paying its employés, money due to Harrison by the employés which, from the fact of the deduction, the tie company had become bound to pay to Harrison. We think, also, the facts found establish that the course of dealing between Harrison and the tie company concerning the deductions from pay rolls was that the tie company, when it made the deductions, was under an obligation to remit the money collected from the laborers for account of Harrison to him, irrespective of any debt which he might owe the tie company. This follows from the finding that, although there was a debt existing between Harrison and the tie company, the course of dealing between them was that when the tie company made deductions from the wages of the laborers of sums of money due by them to Harrison the tie company regularly remitted the proceeds of the deductions to Harrison. This conclusion, moreover, is the result of the finding that Harrison had no intention to give the tie company a preference, for if Harrison, being insolvent, to the knowledge of the company, within the prohibited period, gave to the tie company authority to collect the sums due to him by the laborers for goods sold them, with the right, or even the option, to apply the money to a prior debt due by Harrison to the company, the necessary result of the transaction would have been to create a voidable preference. And if the inevitable result of the transaction would have been to

create such a preference, then the law would conclusively impute to Harrison the intention to bring about the result necessarily arising from the nature of the act which he did. *Wilson* v. *City Bank*, 17 Wall. 473, 486. To give effect, therefore, to the finding that there was no intention on the part of Harrison to prefer, we must consider that the authority given by him to the tie company to collect from the laborers did not give that company the right or endow it with the option, when it had collected, to retain the money for its exclusive benefit, and to the detriment of the other creditors of Harrison.

The result of the facts found then is this: Harrison sold his goods to the laborers and agreed with the tie company that that company when it paid the laborers should deduct the amount due by the laborers from the wages which the tie company owed them, and after making the deduction should remit to Harrison the amount thus deducted, irrespective of any indebtedness otherwise due by Harrison to the tie company. Did this give rise to a voidable preference within the intendment of sections 57*g* and 60*b* of the bankrupt act?

In view of the necessary result of the findings which we have previously pointed out, it is, we think, beyond doubt that the agreement was not a voidable preference within the meaning of the statute, since, considering the agreement alone, it brought about no preference whatever. This leaves only for consideration the question whether the tie company was entitled to prove its claim, as it sought to do, for the balance owing, after crediting as a set-off the "deductions from pay rolls," to which we have referred. Now, as we have seen, from the facts found, it must be that the agreement between Harrison and the tie company obligated the latter, when it made the deductions from pay rolls, to remit to Harrison the amount of such deductions irrespective of the account between itself and Harrison. It follows that as to such deductions the tie company stood towards Harrison in the relation of a trustee, and, therefore, the case was not one of mutual credits and debts within the meaning of the set-off clause of the bankrupt law.

Libby v. *Hopkins*, 104 U. S. 303. And, irrespective of the trust relation which the findings establish, it is equally clear from general considerations that the right to set-off did not exist. To allow the set-off under the circumstances disclosed would violate the plain intendment of the inhibition contained in clause *b* (2) of section 68 of the bankrupt act, which forbids the allowance to any debtor of a bankrupt of a set-off or counterclaim which "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 is insolvent or had committed an act of bankruptcy." That is to say, whether or not the trust relation was engendered, the result would still be that the tie company, within the prohibited period and with knowledge of the insolvency of Harrison, acquired the claims of the latter against the laborers, with a view to using the same by way of payment or set-off, so as to obtain an advantage over the other creditors, which it was not lawfully entitled to do.

As we have concluded that under the findings there was no voidable preference, we think the court below erred in refusing to allow the tie company to prove its claim, unless it surrendered the sums which it owed Harrison and his bankrupt estate. Section 57*g* of the bankrupt act, as amended by the act of February 5, 1903, 32 Stat. 797, 799, empowering the court to compel creditors to surrender preferences as a prerequisite to the proof of claims against the estate of the bankrupt, relates only to those creditors "who have received preferences viodable under section sixty, subdivision *b*." But it also is demonstrated, from what we have said, that the tie company was not entitled to prove its claim as it sought to do, embracing, as it did, the assertion of a right to set-off, and thus extinguish the sum which it owed to the bankrupt estate, resulting from the deductions from pay rolls. Whilst, therefore, because of the error in imposing the condition of prerequisite surrender of the alleged preference, the judgment below was erroneous, nevertheless the court was correct in refusing

to allow the alleged set-off, and in refusing to permit proof to be made which embraced and asserted such set-off. It follows that although the judgment below must be reversed for the reasons stated, the case should be remanded with directions to disregard the alleged claim of set-off, to reject any proof of claim asserting the same, and to permit a claim to be filed for the gross indebtedness to the tie company, with the alleged set-off eliminated. The result will be that the tie company will be a creditor of the estate for the whole amount of its claim, and will be at the same time a debtor to the estate for the amount of the deductions from the pay-rolls collected by it, the court below, of course, having power to take such steps as may be lawful to protect the estate in respect to the payment of dividends to the tie company, in the event that company does not discharge its obligations to the bankrupt estate.

The decrees of both courts are reversed and the case is remanded to the District Court with directions to allow the proof of claim, rejecting the alleged set-off, and for further proceedings in conformity with this opinion.

UNITED STATES *v.* ENGARD.

APPEAL FROM THE COURT OF CLAIMS.

No. 136. Argued January 18, 1905.—Decided February 20, 1905.

The Navy Department has no power to disregard the provisions of Rev. Stat. §§ 1556, 1571, and Pars. 1154, 1168, naval regulations and either deprive an officer of sea pay by assigning him to a duty mistakenly qualified as shore duty but which is in law sea duty, or to entitle him to receive sea pay by assigning him to duty which is essentially shore duty and mistakenly qualifying it as sea duty.

Where, however, the assignment of an officer to duty by the Navy Department expressly imposes upon him the continued discharge of his sea duties and qualifies the shore duty as merely temporary and ancillary to the regular sea duty, the presumption is that the shore duty is tempo-

rary and does not operate to interfere with or discharge the officer from the responsibilities of the sea duties to which he is regularly assigned and he is entitled to sea pay during the time of such temporary shore duty.

SOMEWHAT condensing the facts below found, they are as follows: In February, 1897, Chief Engineer Albert C. Engard was performing duty as the chief engineer of the United States receiving ship Richmond, at League Island, Pennsylvania. On the eleventh of February he received the following order from the Navy Department:

"NAVY DEPARTMENT,
"Washington, February 11, 1897.

"SIR: Report by letter, to the president of the Steel Inspection Board, navy yard, Washington, D. C., for temporary duty in connection with the inspection of steel tubes for the boilers of torpedo boat No. 11, at Findlay, Ohio, and at Shelby, Ohio.

"You are authorized to perform such travel between League Island, Pa., and Findlay, Ohio, and between League Island, Pa., and Shelby, Ohio, as may be necessary in the performance of this duty.

"Keep a memorandum of the travel so performed by you, certifying to its necessity, and submit the same to the Department, from time to time, for its approval.

"This duty is in addition to your present duties.

"Very respectfully,
"W. MCADOO, *Acting Secretary.*

"Chief Engineer Albert C. Engard, U. S. Navy,
"U. S. R. S. Richmond, Navy Yard, League Island, Pa."

Complying with this order, Chief Engineer Engard made two round trips between League Island and Ohio, in order to discharge the additional duty referred to in the order. The total number of days in which he was engaged in this work between February 24, 1897, and August 14, 1897, was 122. On an application to be allowed mileage for the trips, amounting to $172.80, the Auditor of the Navy Department deducted from the claim $133.70, and allowed only $39.10. The sum

disallowed was deducted on the theory that the chief engineer was only entitled to be paid for shore duty instead of for sea service during the time referred to. This suit was brought to recover the amount of the deduction, and the right to so recover was sustained by the Court of Claims. 38 C. Cl. 712.

Mr. Special Attorney John Q. Thompson, with whom *Mr. Assistant Attorney General Pradt* was on the brief, for the United States:

The cases construing §§ 1556 and 1571, Rev. Stat., have established as general principles: First, that the pay of a naval officer is not determined by the nature of the order assigning him to duty, but, on the other hand, is determined by the nature of the duties actually performed by the officer. Second, that where the services performed are partly sea duty and partly shore duty, the *paramount* duty should determine the pay where it is possible to segregate the time spent in sea service from the time spent on shore duty. As a corollary, it may be said that an order from the Secretary of the Navy may have the effect of relieving an officer from either shore duty or sea duty, notwithstanding the fact that the order does not do so *eo nomine.*

Pay is not determined by the order. *Symonds* v. *United States,* 21 C. Cl. 148; *S. C.,* 120 U. S. 46; *Pierce* v. *United States,* 33 C. Cl. 294; *Wyckoff* v. *United States,* 34 C. Cl. 288; *McGowan's Case,* 36 C. Cl. 69; *Hannum* v. *United States,* 36 C. Cl. 99; *Taussig* v. *United States,* 38 C. Cl. 112. The paramount duty should determine pay. The services were not performed at sea and the mere fact that the order did not contain express words detaching him from sea service during the time he was temporarily employed on those services does not change the character of shore services to sea service. *Schoonmaker* v. *United States,* 19 C. Cl. 170.

Mr. William B. King, with whom *Mr. George A. King* was on the brief, for appellee:

An officer sent temporarily to hospital without detach-

ment from his vessel, is held even by the Treasury Department entitled to sea pay. The Comptroller decided, 2 Comp. Dec. 299, that it would be absurd to hold that every time an officer was compelled by ill health to go into hospital for temporary treatment he is thereby detached from the service to which he had been ordered by the Secretary. It rests with the Secretary to so detach him and place him upon "leave or waiting orders." That decision in its application to temporary absence on account of illness has been followed by the Court of Claims in *Collins* v. *United States*, 37 C. Cl. 222. If an officer temporarily absent from his vessel in hospital is entitled to sea pay during his absence, so much the more is sea pay due to an officer whose responsibilities as an officer of a vessel continue while he has, in addition to these, other duties ashore.

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

A higher rate of pay is allowed to a chief engineer as well as to other naval officers when performing sea duty than when engaged on shore duty. Rev. Stat. § 1556. And Rev. Stat. § 1571 provides as follows:

"No service shall be regarded as sea service except such as shall be performed at sea, under the orders of a Department and in vessels employed by authority of law."

The Government did not dispute at bar, however, that where an officer assigned to sea duty within the purview of the foregoing provision is called upon, without a change in his sea assignment, to perform merely temporary service ashore, he is entitled to sea pay. And this is in accord with the naval regulations, wherein it is provided:

Paragraph 1154:

"(1.) Officers shall be entitled to sea pay while attached to and serving on board of any ship in commission under control of the Navy Department, the Coast Survey, or the Fish Commission. . . .

"(3.) Any officer temporarily absent from a ship in commission to which he is attached shall continue to receive sea pay. . . ."

Paragraph 1168:

"A temporary leave of absence does not detach an officer from duty nor affect his rate of pay."

It is settled that the Navy Department has no power to disregard the statute and to deprive an officer of sea pay by assigning him to a duty mistakenly qualified as shore duty, but which is in law sea duty. *United States* v. *Symonds*, 120 U. S. 46; *United States* v. *Barnette*, 165 U. S. 174. And of course the converse is also true that the Navy Department has no power to entitle an officer to receive sea pay by assigning him to duty which is essentially shore duty and mistakenly qualifying it as sea duty. But there is no conflict between these rulings, and the conceded principle that where an officer is assigned to a duty which is essentially a sea service that he does not lose his right to sea pay whenever he is called upon to perform a mere temporary service ashore. In the present case it cannot be denied that the officer was assigned to sea duty and that the order of the Department, instead of detaching him therefrom, simply ordered him to discharge a temporary service ashore in addition to his sea service. The whole contention of the Government is that this temporary shore service was necessarily incompatible with the continued performance of the officer's duty on the ship to which he continued to be attached, and therefore that the shore duty was paramount to the sea service, and necessarily by operation of law affected the detachment of the officer so as to permanently relieve him from the sea duty to which he continued to be regularly assigned.

There is no finding in the record, however, which justifies this argument, and as urged at bar it rests upon the mere assumption of the incompatibility between the sea duty to which the officer was regularly assigned and the temporary shore duty which he was called upon by the Department to

discharge. In effect, the proposition is that it must be assumed as a matter of law, in the absence of a finding to that effect, that the temporary shore duty was of such a permanent character as to render it impossible for the officer to continue to perform duty under his permanent sea assignment, and, therefore, as a matter of law caused such assignment to terminate. We think the converse is true, and that where the assignment of an officer to duty by the Navy Department expressly imposed upon him the continued discharge of his sea duties and qualified the shore duty as merely temporary and ancillary to the regular sea duty, that the presumption is that the shore duty was temporary and did not operate to interfere with or discharge the officer from the responsibilities of his sea duty to which he was regularly assigned.

Affirmed.

THOMPSON *v.* FAIRBANKS.

ERROR TO THE SUPREME COURT OF THE STATE OF VERMONT.

No. 114. Submitted January 6, 1905.—Decided February 20, 1905.

Whether, and to what extent, a chattel mortgage, which includes after acquired property, is valid is a local and not a Federal question, and in such a case this court will follow the decisions of the state court.

The enforcement of a lien by the mortgagee taking possession, with the consent of the mortgagor, of after acquired property covered by a valid mortgage made and recorded prior to the passage of the act, is not a conveyance or transfer under the bankrupt act; and, where it does not appear that it was done to hinder, delay or defraud creditors, it does not constitute a preference under the act although at the time of the enforcement the mortgagee may have known that the mortgagor was insolvent and considering going into bankruptcy and the petition was filed within four months thereafter.

THE plaintiff in error, by this writ, seeks to review a judgment of the Supreme Court of the State of Vermont in favor of the defendant in error. 75 Vermont, 361. The facts upon

which the judgment rests are as follows: On the thirtieth day of June, 1900, Herbert E. Moore, of St. Johnsbury, in the State of Vermont, filed his voluntary petition in bankruptcy in the United States District Court for the District of Vermont, and on the third day of July, 1900, Moore was by the court duly adjudged a bankrupt, and on the fifteenth of September, 1900, the plaintiff in error was appointed a trustee in bankruptcy of Moore's estate, and duly qualified. He commenced this action in the County Court of Caledonia County, in the State of Vermont, on the first Tuesday of June, 1901, against the defendant Fairbanks, to recover from him the value of certain personal property alleged to have belonged to the bankrupt Moore on the sixteenth day of May, 1900, and which was, as alleged, sold and converted by Fairbanks, on that day, to his own use, the value of the property being $1,500, as averred in the declaration. The defendant filed his plea and gave notice that upon the trial of the case he would give in evidence and rely upon, in defense of the action, certain special matters set up in the plea. The case was, by order of the County Court, and by the consent of the parties, referred to a referee to hear the cause and report to the court. It was subsequently heard before the referee, who filed his report, finding the facts upon which the decision of the case must rest. He found that before June, 1886, the bankrupt Moore bought a livery stock and business in St. Johnsbury village, in the State of Vermont. At the time of this purchase the defendant was the lessor of the buildings in which the business was conducted, and it continued to be carried on in those buildings. Moore, in making the purchase, had assumed a mortgage then outstanding on the property, and a short time before March 1, 1888, the defendant assisted him to pay this mortgage by signing a note with him for $1,425, payable to the Passumpsic Savings Bank of St. Johnsbury. Subsequently defendant signed notes, which, with accrued interest, were merged in one dated March 1, 1900, for $2,510.75, due on demand to said savings bank signed by the bankrupt

and by the defendant as his surety. This note had not been paid when the case was referred to the referee. The defendant also signed other notes payable to the First National Bank of St. Johnsbury, which were merged into one, and by various payments made by Moore, it was reduced to $525, and on June 4, 1900, it was paid by the defendant. All these notes had been signed by the defendant to assist Moore in carrying on, building up and equipping his livery stable and livery business, and as between them the notes belonged to Moore to pay. On April 15, 1891, Moore gave the defendant a chattel mortgage on the livery property to secure him for these and other debts and liabilities. The property was described in the mortgage as follows: "All my livery property, consisting of horses, wagons, sleighs, vehicles, harnesses, robes, blankets, etc., also all horses and other livery property that I may purchase in my business or acquire by exchange."

The condition contained in the mortgage was, that if Moore should "well and truly pay, or cause to be paid, to the said Henry Fairbanks all that I now owe him, or may owe him hereafter by note, book account, or in any other manner, and shall well and truly save the said Henry Fairbanks harmless, and indemnify him from paying any commercial paper on which he has become or may hereafter become holden in any manner for my benefit as surety, indorser or otherwise, then this deed shall be void, otherwise of force."

This mortgage was acknowledged and the affidavit as provided by the Vermont statute was appended, showing the justice of the debt and the liability contemplated to be secured by the mortgage, and the mortgage was duly recorded on the eighteenth day of April, 1891, in the St. Johnsbury clerk's office by the town clerk thereof. On March 5, 1900, Moore gave the defendant another chattel mortgage on this livery stock, which, on March 23, 1900, defendant assigned to the Passumpsic Savings Bank, and that bank has ever since been its holder and owner. This mortgage was given to secure defendant against all his liabilities for Moore.

On the seventh of May, 1900, one John Ryan sued out a writ in assumpsit against Moore to recover some $500, and an attachment on the livery stock was levied in that suit by the deputy sheriff. This attachment remained in force until dissolved by the bankruptcy proceedings, and the suit is still pending in the state court of Vermont.

Under the agreement contained in the chattel mortgage of April, 1891, Moore made sales, purchases and exchanges of livery stock to such an extent that on March 5, 1900, there only remained of the livery property on hand April 15, 1891, two horses. These sales, exchanges and purchases were sometimes made by Moore without communication with or advice from the defendant, and frequently after consultation with him. The livery stock, as it existed on May 16, 1900, was all acquired by exchange of the original stock or with the avails of the old stock or from the money derived from the business. Some years after the execution of the chattel mortgage of April 15, 1891, Moore became embarrassed, and finally, shortly prior to March 5, 1900, he became and continued wholly insolvent. On May 16, 1900, the defendant, acting under the advice of counsel, and with the consent of Moore, took possession under the mortgage of April 15, 1891, of all the livery property then on hand, and on June 11, 1900, caused the same to be sold at public auction by the sheriff. It is for the net avails of this sale, amounting to $922.08, which the sheriff paid over to the defendant, that this suit is brought. The Passumpsic Savings Bank on September 15, 1900, proved its note of $2,510.75 as an unsecured claim against the bankrupt estate of Moore, as the mortgage held by the bank as security had been given by Moore in March, 1900, to defendant, and by him assigned to the bank, within four months of the filing of the petition in bankruptcy.

For the purpose of defeating the effect of the defendant taking possession of the livery property under his chattel mortgage of April, 1891, the trustee in bankruptcy presented a petition to the United States District Court of Vermont for

leave to intervene as plaintiff in the Ryan attachment suit, and to have the lien of Ryan's attachment preserved for the benefit of the general creditors. This petition was dismissed by that court. The referee found that the defendant and his counsel knew when he took possession of the livery property, under his mortgage, that Moore was insolvent and was considering going into bankruptcy. The referee also found that he did not intend to perpetrate any actual fraud on the other creditors, or any of them, but he did intend thereby to perfect his lien on the livery property and make it available for the payment of his debt before other complications, by way of attachment or bankruptcy arose, and he understood at that time that it was probable that the Ryan attachment would hold good as against his mortgage. All the property of which defendant took possession was acquired by Moore with the full understanding and intent that it should be covered by the defendant's mortgage of April 15, 1891.

Mr. Edward H. Deavitt for plaintiff in error.

Mr. Charles A. Prouty, *Mr. Harry Blodgett* and *Mr. Jonathan Ross* for defendant in error.

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

This is a contest between a trustee in bankruptcy representing the creditors of the bankrupt, and the defendant, the mortgagee in a chattel mortgage dated and executed April 15, 1891, and duly recorded April 18 of that year. The defendant has paid some $500 of the indebtedness of the bankrupt for which defendant was liable as endorser on a note, and he remains liable to pay the note of $2,510.75, held by the Passumpsic Savings Bank, which was signed by him as surety.

The property taken possession of by the defendant under the chattel mortgage was sold by a deputy sheriff on the

eleventh of June, 1900, and the net avails of the sale, amounting to $922.08, have been paid over by the officer who made the sale, to the defendant.

This suit is brought by the trustee to recover from the defendant those net avails on the theory that the action of the defendant in taking possession and making the sale of the property was unlawful under the provisions of the bankrupt act.

The defendant had assisted the bankrupt in the purchase of the property and had endorsed notes for him in order to enable him to carry on the business of conducting a livery stable. This mortgage, to secure him for these payments and liabilities, was given some seven years before the passage of the bankrupt act, and at the time it was given it was agreed by the parties to it that the bankrupt might sell or exchange any of the livery stock covered by it as he might desire, and should by purchase or exchange keep the stock good, so that the defendant's security should not be impaired, and it was also agreed that all after-acquired livery property should be covered by the mortgage as security for the debts specified therein.

Under this agreement the bankrupt made sales, purchases and exchanges of livery stock to such an extent that on May 16, 1900, there remained but two horses of the property originally on hand. The stock as it existed on the above date was all acquired by exchange of the original stock, or with the avails of the old stock sold, or the money derived from the business. There is no pretense of any actual fraud being committed or contemplated by either party to the mortgage. Instead of taking possession at the time of the execution of the mortgage, the defendant had it recorded in the proper clerk's office, and the record stood as notice to all the world of the existence of the lien as it stood when the mortgage was executed, and that the defendant would have the right to take possession of property subsequently acquired as provided for in the mortgage. The bankrupt was, therefore, not holding himself out

as unconditional owner of the property, and there was no securing of credit by reason of his apparent unconditional ownership. The record gave notice that he was not such unconditional owner. There was no secret lien, and if defendant cannot secure the benefit of this mortgage, which he obtained in 1891, as a lien upon the after-acquired property, yet prior to the title of the trustee for the benefit of creditors, it must be because of some provision of the bankruptcy law, which we think the court ought not to construe or endeavor to enforce beyond its fair meaning.

In Vermont it is held that a mortgage, such as the one in question, is good. The Supreme Court of that State has so held in this case, and the authorities to that effect are also cited in the opinion of that court. And it is also there held that when the mortgagee takes possession of after-acquired property, as provided for in this mortgage, the lien is good and valid as against every one but attaching or judgment creditors prior to the taking of such possession.

At the time when the defendant took possession of this after-acquired property, covered by the mortgage, there had been a breach of the condition specified therein, and the title to the property was thereby vested in the mortgagee, subject to the mortgagor's right in equity to redeem. This has been held to be the law in Vermont (aside from any question as to the effect of the bankrupt law), both in this case and in the cases also cited in the opinion of the Supreme Court of Vermont. The taking of possession of the after-acquired property, under a mortgage such as this, is held good, and to relate back to the date of the mortgage, even as against an assignee in insolvency. *Peabody* v. *Landon*, 61 Vermont, 318, and other cases cited in the opinion of the Supreme Court.

Whether and to what extent a mortgage of this kind is valid, is a local question, and the decisions of the state court will be followed by this court in such case. *Dooley* v. *Pease*, 180 U. S. 126.

The question that remains is, whether the taking of posses-

sion after condition broken, of these mortgaged chattels before, and within four months of filing the petition in bankruptcy, was a violation of any of the provisions of the bankrupt act?

The trustee insists that such taking possession of the after-acquired property, under the mortgage of 1891, constituted a preference under that act. He contends that the defendant did not have a valid lien against creditors, under that act; that his lien might under other circumstances have been consummated by the taking of possession, but as that was done within four months of the filing of the petition in bankruptcy, the lien was not valid.

Did this taking of possession constitute a preference within the meaning of the act?

It was found by the referee that when the defendant took possession of the property he knew that the mortgagor was insolvent and was considering going into bankruptcy, but that he did not intend to perpetrate any actual fraud on the other creditors, or any of them, but did intend thereby to perfect his lien on the property, and make it available for the payment of his debts before other complications, by way of attachment or bankruptcy arose. He then understood that Ryan's attachment would probably hold good against his mortgage. The question whether any conveyance, etc., was in fact made with intent to defraud creditors, when passed upon in the state court, is not one of a Federal nature. *McKenna* v. *Simpson*, 129 U. S. 506; *Cramer* v. *Wilson*, 195 U. S. 408. It can scarcely be said that the enforcement of a lien by the taking possession, with the consent of the mortgagor, of after-acquired property covered by a valid mortgage is a conveyance or transfer within the bankrupt act. There is no finding that in parting with the possession of the property the mortgagor had any purpose of hindering, delaying or defrauding his creditors, or any of them. Without a finding to the effect that there was an intent to defraud, there was no invalid transfer of the property within the provisions of sec-

tion 67*e* of the bankruptcy law. *Sabin* v. *Camp*, 98 Fed. Rep. 974.

In the case last cited the court, upon the subject of a preference, held that though the transaction was consummated within the four months, yet it originated in October, 1897, and there was no preference under the facts of that case. "What was done was in pursuance of the preëxisting contract, to which no objection is made. Camp furnished the money out of which the property, which is the subject of the sale to him, was created. He had good right, in equity and in law, to make provision for the security of the money so advanced, and the property purchased by his money is a legitimate security, and one frequently employed. There is always a strong equity in favor of a lien by one who advances money upon the property which is the product of the money so advanced. This was what the parties intended at the time, and to this, as already stated, there is, and can be, no objection in law or in morals. And when, at a later date, but still prior to the filing of the petition in bankruptcy, Camp exercised his rights under this valid and equitable arrangement to possess himself of the property and make sale of it in pursuance of his contract, he was not guilty of securing a preference under the bankruptcy law."

The principle that the taking possession may sometimes be held to relate back to the time when the right so to do was created, is recognized in the above case. So in this case, although there was no actual existing lien upon this after-acquired property until the taking of possession, yet there was a positive agreement, as contained in the mortgage and existing of record, under which the inchoate lien might be asserted and enforced, and when enforced by the taking of possession, that possession under the facts of this case, related back to the time of the execution of the mortgage of April, 1891, as it was only by virtue of that mortgage that possession could be taken. The Supreme Court of Vermont has held that such a mortgage gives an existing lien by contract, which may

be enforced by the actual taking of possession, and such lien can only be avoided by an execution or attachment creditor, whose lien actually attaches before the taking of possession by the mortgagee. Although this after-acquired property was subject to the lien of an attaching or an execution creditor, if perfected before the mortgagee took possession under his mortgage, yet if there were no such creditor, the enforcement of the lien by taking possession would be legal, even if within the four months provided in the act. There is a distinction between the bald creation of a lien within the four months, and the enforcement of one provided for in a mortgage executed years before the passage of the act, by virtue of which mortgage and because of the condition broken, the title to the property becomes vested in the mortgagee, and the subsequent taking possession becomes valid, except as above stated. A trustee in bankruptcy does not in such circumstances occupy the same position as a creditor levying under an execution, or by attachment, and his rights, in this exceptional case, and for the reasons just indicated, are somewhat different from what they are generally stated. *Mueller* v. *Nugent*, 184 U. S. 1.

It is admitted on the part of the counsel for the plaintiff in error that the rule in Vermont, in cases of chattel mortgages of after-acquired property (where possession by the mortgagee is necessary to perfect his title as against attaching or execution creditors), is that although such possession be not taken until long after the execution of the mortgage, yet the possession, when taken (if it be before the lien of the attaching or execution creditor), brings the property under the cover and operation of the mortgage as of its date—the time when the right of possession was first acquired. It was also admitted that the Supreme Court of Vermont has held that when a chattel mortgage requiring possession of the mortgaged property, to perfect it as to third persons, was executed more than four months before the commencement of insolvency proceedings, the taking of actual possession of the mortgaged property within the four months' period brought that prop-

erty under the mortgage as of its date, and so did not constitute a preference voidable by the trustee, although the other elements constituting a preference were present. Many decisions of the Supreme Court of Vermont are cited to this effect. It will be observed, also, that the provisions of the state insolvency law in regard to void and voidable preferences and transfers were identical with similar provisions of the bankruptcy act of 1867. *Gilbert* v. *Vail*, 60 Vermont, 261.

Under that law it was held that the assignee in bankruptcy stood in the shoes of the bankrupt, and that "except where, within a prescribed period before the commencement of proceedings in bankruptcy, an attachment has been sued out against the property of the bankrupt, or where his disposition of his property was, under the statute, fraudulent and void, his assignees take his real and personal estate, subject to all equities, liens and encumbrances thereon, whether created by his act or by operation of law." *Yeatman* v. *Savings Institution*, 95 U. S. 764. See also *Stewart* v. *Platt*, 101 U. S. 731; *Hauselt* v. *Harrison*, 105 U. S. 401. Under the present bankrupt act, the trustee takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt, except in cases where there has been a conveyance or encumbrance of the property which is void as against the trustee by some positive provision of the act. *In re Garcewich*, 115 Fed. Rep. 87, 89, and cases cited.

It is true that in the case in 95 U. S. 764, the savings institution had a special property in the certificates which were the subject of dispute, and had possession of them at the time of the bankruptcy proceedings, and it was held that the institution was not bound to return them, either to the bankrupt, the receiver or the assignee in bankruptcy, prior to the time of the payment of the debt for which the certificate was held. So the state court held in this case, where the defendant took possession under the circumstances detailed, by virtue of his mort-

gage, and where he had the legal title to the property mortgaged, after condition broken, that the possession thus taken related back to the date of the giving of the mortgage, and in thus enforcing his lien there was not a violation of any of the provisions of the bankruptcy act.

In *Wilson* v. *Nelson*, 183 U. S. 191, it was held that the bankrupt had committed an act of bankruptcy, within the meaning of the bankrupt law, by failing, for at least five days before a sale on the execution issued upon the judgment recovered, to vacate or discharge the judgment, or to file a voluntary petition in bankruptcy. The judgment and execution were held to have been such a preference, "suffered or permitted" by the bankrupt, as to amount to a violation of the bankrupt act. Although the judgment was entered upon the power of attorney given years before the passage of the bankrupt act, it was nevertheless regarded as "suffering or permitting" a preference, within that act. This is not such a case. As we have said, there is no finding that the defendant had reasonable cause to believe that by the change of possession it was intended to give a preference. As the state court has said, it was rather a recognition of what was regarded as a right under the previous agreement contained in the mortgage.

Nor does the existence of the Ryan attachment, or the chattel mortgage of March 5, 1900, executed by the bankrupt and delivered to the defendant and by him assigned on the twenty-third of March, 1900, to the bank, create any greater right or title in the trustee than he otherwise would have. The trustee moved under section 67*f*, on notice to the defendant, for an order that the right or lien under the Ryan attachment should be preserved, so that the same might pass to the trustee for the benefit of the estate, as provided for in that section. This was denied. And unless such permission had been granted, the lien of the attachment was not preserved by the act, but, on the contrary, it was dissolved under section 67*c*.

The mortgage assigned to the bank, and the attachment

obtained by Ryan having been dissolved by the bankrupt proceedings, the defendant's rights under his mortgage of April 15, 1891, stood the same as though there had been no subsequent mortgage given, or attachment levied. This is the view taken by the state court of the effect of the dissolution of the mortgage and attachment liens under the bankrupt act, and we think it is the correct one. It is stated in the opinion of the state court as follows:

"It is urged that with the annulment of the attachment, the property affected by it passed to the trustee as a part of the estate of the bankrupt under the express provisions of section 67*f*. There would be more force in this contention were it not for the provision that, by order of the court, an attachment lien may be preserved for the benefit of the estate. If there is no other lien on the property, there can be no occasion for such order; for on the dissolution of the attachment, the property, unless exempt, would pass to the trustee anyway. It is only when the property for some reason may not otherwise pass to the trustee as a part of the estate that such order is necessary. We think such is the purpose of that provision, and that unless the lien is preserved, the property, as in the case at bar, may be held upon some other lien and not pass to the trustee. *In re Sentenne & Green Co.*, 120 Fed. Rep. 436."

We think the judgment of the Supreme Court of Vermont was right, and it is

Affirmed.

OKLAHOMA CITY *v.* McMASTER.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

No. 137. Argued January 18, 19, 1905.—Decided February 20, 1905.

The review by this court of final judgments in civil cases of the Supreme Court of the Territory of Oklahoma is not controlled by the act of 1874 in regard to territorial courts but by § 9 of the act of May 2, 1890, 26 Stat. 81, 85, providing the territorial government for Oklahoma, and in an action at law where a jury has been waived the review is by writ of error as in the case of a similar judgment of a Circuit Court, and not by appeal.

Where no formal judgment has been entered the plea of *res judicata* has no foundation; neither the verdict of a jury nor the findings of a court even though in a prior action, upon the precise point involved in a subsequent action and between the same parties constitutes a bar.

There was no permit for entry of lands in Oklahoma for town sites under the act of 1889 or until the town site act was passed May 14, 1890, and an agreement among a portion of the people who on April 22, 1889, chose lots upon a projected town site did not and could not vest an absolute title in persons selecting lots or make a plat or map of town final or conclusive; but the selectors took their lots subject to changes and conditions that might obtain—in this case as to location of streets—when the township patent was issued to, and a map finally approved by, the township trustees under the act of May 14, 1890.

THE facts are stated in the opinion.

Mr. Frank Dale, with whom *Mr. S. A. Magginnis*, *Mr. C. Porter Johnson* and *Mr. A. G. C. Bierer* were on the brief, for plaintiff in error:

The so-called findings and judgment of the District Court of Canadian County clearly did not constitute a judgment that could be set up as *res judicata*. *Child* v. *Morgan*, 52 N. W. Rep. 1127; *Auld* v. *Smith*, 23 Kansas, 65; *Massing* v. *Ames*, 36 Wisconsin, 409; *Taylor* v. *Runyan*, 3 Iowa, 474, 480; *Whilewell* v. *Hoover*, 3 Michigan, 84; *Lincoln* v. *Cross*, 11 Wisconsin, 94; § 5, 24 Am. & Eng. Ency. of Law, 2d ed., 717; *Masterman* v. *Masterman*, 51 Pac. Rep. 277; *Gordon* v. *Ken-*

nedy, 36 Iowa, 167; *Talesky* v. *State Ins. Co.*, 70 N. W. Rep. 187. McMaster did not acquire a vested right in the ground in the streets of Oklahoma City. *The Beamer Case*, 3 Oklahoma, 652, was rightly decided and the cases cited in the opinion of the Supreme Court of the Territory do not sustain the decision.

The power to correct the survey of Oklahoma town site vested exclusively in the political and not the judicial department of the Government. *McDaid* v. *Oklahoma Territory*, 150 U. S. 209, 220; *Knight* v. *United States Land Ass'n*, 142 U. S. 161; town site act of May 14, 1890, § 1; §§ 441, 443, 2478, Rev. Stat.

The writ of error and appeal were both taken to this court as a matter of precaution; as to which is proper practice and the effect of findings of the court below, see *Stringfellow* v. *Cain*, 99 U. S. 610; *Cannon* v. *Pratt*, 99 U. S. 619; cases cited by defendant in error; *Gray* v. *Howe*, 108 U. S. 12; *Salina Stock Co.* v. *Irrigation Co.*, 163 U. S. 190; *Teckendorf* v. *Teckendorf*, 171 U. S. 686; *United States* v. *Hooe*, 1 Cranch, 318; *Davis* v. *Fredericks*, 104 U. S. 618; *Thompson* v. *Ferry*, 180 U. S. 484; *Stone* v. *United States*, 164 U. S. 380; *Dickinson* v. *Bank*, 16 Wall. 250; *Insurance Co.* v. *Tweed*, 7 Wall. 44; *Haws* v. *Victoria Copper Mining Co.*, 160 U. S. 303, 313; *Gildersleeve* v. *New Mexico Mining Co.*, 161 U. S. 573.

Mr. Chester Howe, with whom *Mr. Francis J. Kearful* was on the brief, for defendant in error:

There being but one cause it cannot be in this court both by writ of error and by appeal. Either one proceeding or the other will have to be dismissed. *Hurst* v. *Hollingsworth*, 94 U. S. 111; *S. C.*, 100 U. S. 100; *Plymouth Mining Co.* v. *Amador Canal Co.*, 118 U. S. 264; *Files* v. *Brown*, 124 Fed. Rep. 133; *Lockman* v. *Long*, 132 Fed. Rep. 1. The writ of error should be dismissed. *Stringfellow* v. *Cain*, 99 U. S. 610; *Hecht* v. *Boughton*, 105 U. S. 235; *Story* v. *Black*, 119 U. S. 235; *Idaho Land Co.* v. *Bradbury*, 132 U. S. 509, 514. The judgment

should be affirmed as the testimony cannot be considered on an appeal but the consideration of this court is confined to the statement of facts and rulings certified by the court below. *Hecht* v. *Boughton*, 105 U. S. 235; *Marshall* v. *Burtis*, 172 U. S. 630. The judgment against the town site trustees was properly admitted and the matter was *res judicata*. It is permissible to assume from the general findings that defendant in error was entitled to the lot and the deed was arbitrarily withheld. *Fayerweather* v. *Ritch*, 195 U. S. 276, 307.

Mr. Justice Peckham delivered the opinion of the court.

On the twenty-second day of September, 1899, this action of ejectment was commenced by defendant in error in the District Court of the Third Judicial District of Oklahoma Territory, in Oklahoma County. It was brought to recover lands situated in a public street in the city of Oklahoma City. Judgment was entered for the defendant in error for the recovery of the land, and that judgment was affirmed by the Supreme Court of the Territory, and the plaintiff in error has brought the case here, both by writ of error and appeal, taking both courses as a precaution, in order to bring the case before us. It was tried by the court, a jury having been waived by the parties, and the defendant in error contends that where a case is thus tried in a territorial court, an appeal to this court is the only proper proceeding to obtain a review. Act of Congress, 1874, 18 Stat. 27, 28. The contention of defendant is not correct in this case. The manner of reviewing judgments, in civil cases, of the Supreme Court of the Territory of Oklahoma is specially provided for by the ninth section of the act of May 2, 1890, 26 Stat. 81, 85, providing a territorial government for Oklahoma, and is not governed by the act of Congress of 1874. *Comstock* v. *Eagleton*, 196 U. S. 99. The ninth section of the act of 1890 provides that writs of error and appeal from the final decision of the Supreme Court of the Territory will be allowed and may be taken to the Supreme

Court of the United States "in the same manner and under the same regulations as from the Circuit Courts of the United States," and it was held in the above case that final judgment in an action at law in the Circuit Court of the United States, can only be reviewed by writ of error. The assumption that because this case was tried before the court, a jury having been waived by consent, that therefore it ought to go up by appeal, is a mistaken one. In *Deland* v. *Platte County*, 155 U. S. 221, the case was an action at law where a jury had been waived and trial had before the court. Nevertheless, it was held that, as it was an action at law and the case came from a Circuit Court of the United States, it could only be reviewed by this court on writ of error. This case must, therefore, be reviewed by writ of error because it is an action at law, although tried by the court upon a waiver of a jury. The record shows a sufficient bill of exceptions, however, and the case is to be reviewed upon the record as thus presented.

Upon the trial, for the purpose of proving the issue upon his part, by means of evidence of a former adjudication, the plaintiff introduced in evidence what he contended was a judgment in his favor for the recovery of the same land in an action in which he was plaintiff and Edgar N. Sweet et al., town site trustees, defendants, and which was entered in the District Court of the Second Judicial District, county of Canadian, Territory of Oklahoma, on or before May 11, 1892, and recorded on the fourteenth day of May, 1892, in the county of Oklahoma. The plaintiff argued that the defendant (plaintiff in error) in the case at bar was bound as a privy by the adjudication in the former action. The paper was received in evidence by the court, and it is set forth at length in the record. It is evidently nothing but a finding of facts by the judge trying the cause. There was also a paper offered and received in evidence, signed by the trial judge in the same case, and dated the thirteenth day of October, 1893. This was an order made in the case by him at Kingfisher, in Kingfisher County, and was entered in that county on the thirteenth day of October, 1893,

the day of its date. The order directs the defendant to make, execute and deliver to Frank McMaster, the plaintiff, a trustee's deed, "as decreed by this court on the fourteenth day of November, 1892, of the following described premises and real estate." It is attempted to piece these two documents together, the finding of facts filed in Canadian County and thereafter recorded in the county of Oklahoma, and the order made in Kingfisher County and filed therein October 13, 1893, and to regard the whole as a judgment. It is plain that there has been no formal judgment entered in the case, and that these two separate documents, filed in different clerks' offices, cannot be pieced together and made a formal and complete judgment. Without a judgment the plea of *res judicata* has no foundation; and neither the verdict of a jury nor the findings of a court, even though in a prior action, upon the precise point involved in a subsequent action and between the same parties, constitute a bar. In other words, the thing adjudged must be by a judgment. A verdict, or finding of the court alone, is not sufficient. The reason stated is, that the judgment is the bar and not the preliminary determination of the court or jury. It may be that the verdict was set aside, or the finding of facts amended, reconsidered, or themselves set aside or a new trial granted. The judgment alone is the foundation for the bar. *Springer* v. *Bien*, 128 N. Y. 99.

Without resort to this (asserted) judgment in the action against the town site trustees, it is not urged that the defendant in error made out his case upon the trial. There was no judgment, and the "finding of facts" should not have been held to be such. For the error in the admission of the so-called judgment the case must be reversed.

We do not decide, even if there had been a technical and formal judgment entered, that such a judgment would be conclusive in favor of the plaintiff upon the trial of this action against the city of Oklahoma City. Whether the plaintiff in error would be regarded as a privy to such judgment, and, therefore, bound by it, it is not now necessary to decide.

The court is, however, indisposed to let the case rest upon the error pointed out. The question will arise upon another trial, as to the right of the plaintiff to recover upon the facts stated in the finding of facts in the action against the town site trustees. We think it proper to now look into those findings simply for the purpose of determining whether, assuming them to be facts, the plaintiff below made out a case which would entitle him to recover the land in suit. The Supreme Court of the Territory is of opinion that he did. Among the facts found on the trial of the case against the trustees are the following:

The trustees, appointed under the act of May 14, 1890, 26 Stat. 109, entered the land in the local land office at Oklahoma City, September 3, 1890, covering, among other lots, the premises in question, in trust for the "use and benefit of the occupants thereof." A patent from the United States was, on the first of October, 1890, issued to the trustees, for the land (covering over 160 acres), which patent was by its terms, in trust for the occupants of the town site, according to their respective interests. At neither date was the plaintiff below an occupant of the land in suit.

Prior to this time, and on the twenty-second day of April, 1889, the land had been opened for settlement under the proclamation of the President, pursuant to the act of Congress, approved March 2, 1889. 25 Stat. 980, § 13, p. 1005. The land in question, together with other lots, was settled upon and occupied as a town site shortly after noon of April 22, 1889, and has continued to be and is still so held and occupied.

A portion of the occupants of the tract, on the twenty-second day of April, 1889, tacitly agreed to a plat of the land into lots, blocks, streets and alleys, and the plaintiff on that day legally entered upon and occupied the piece or parcel of land, particularly described in the plat as his lots, and being the land recovered by him in this action. Subsequently to such occupancy, and prior to the entry of the land by the trustees, and to the conveyance by the Government to the trustees a different plat making a different arrangement of

streets, etc., was adopted and enforced by the parties occupying the town site. By the latter plat the parcel of land claimed by the plaintiff was thrown into the street called Grand avenue. The plaintiff did not consent, but objected to the second plat, and has never consented thereto or acquiesced therein. He was by the city authorities forcibly removed from the parcel of ground selected by him, and has since that time been forcibly kept from the occupancy thereof.

On the twenty-first day of April, 1891, he applied to the trustees of the city for a deed to the lot, but they declined to award it. The city of Oklahoma City has appropriated the land as a street, and did so appropriate the same long prior to the conveyance of the land by the United States to the trustees. The plaintiff was not an occupant of the tract at the time the United States conveyed the same to the trustees, but it was at the time used and occupied as a street by the city.

On these facts the plaintiff below did not make out his case. There was no unconditional vesting of title to the particular lot chosen by him on the twenty-second of April, by tacit agreement of some of the settlers, even though a map were made of the land showing the plaintiff in possession of a lot not in any public street of the city. Subsequently to the agreement upon a plat by some of the settlers, and prior to the conveyance to the trustees by the patent from the United States (October 1, 1890), the plat was altered and another plat adopted, by which the lot selected by the defendant in error became a part of a public street in the city. The defendant in error, in common with all others, chose lots upon a site which was intended as a town site, and took his lot subject to the conditions which might thereafter obtain. There was no portion of the Territory of Oklahoma open to settlement prior to the date fixed by the proclamation of the President under the act of March 2, 1889. That date was April 22, 1889. 26 Stat. 1544. It was provided by the act that after the proclamation, and not before, the Secretary of the Interior might permit the entry of land for town sites under Rev. Stat. sections 2387,

2388. The Secretary of the Interior gave no permit for entry of lands for town sites under the act of 1889. Again, the sections of the Revised Statutes plainly refer to an organized State or Territory, and Oklahoma was neither, on the twenty-second day of April, 1889. It was organized as a Territory May 2, 1890, 26 Stat. 81, and the special act to provide for town site entries in Oklahoma was not passed until May 14, 1890. 26 Stat. 109. Regulations for carrying out that act were promulgated by the Secretary of the Interior June 18 and July 10, 1890. 10 L. D. 666; 11 L. D. 24. It may be assumed that on April 22, 1889, it was supposed that the land now embraced in the city of Oklahoma City would be a town site, as it was stated on the argument at bar, and not disputed, that there was at that date a railroad station there, and there was every probability that a town would exist at that site. But there was no law for a present selection of land or lots for town sites on the twenty-second day of April, 1889. There was but a supposition that land actually selected on that day for a town site would eventually be approved. On May 14, 1890, more than a year after the lands were open to entry, and just twelve days after the act was passed providing for the temporary government of the Territory, an act providing for town site entries was passed. 26 Stat. 109. That act provided for trustees, to be appointed by the Secretary of the Interior, who were authorized to make entry for town sites on so much of the public lands, situate in the Territory of Oklahoma and then open to settlement, as might be necessary to embrace all the legal subdivisions covered by actual occupancy, for the purpose of trade and business, not exceeding twelve hundred and eighty acres in each case, for the several use and benefit of the occupants thereof, and the entry was to be made under the provisions of section 2387 of the Revised Statutes, as near as might be, and when such entry was made the Secretary of the Interior was to provide regulations for the proper execution of the trust by such trustees, including the survey of the land into streets, alleys, squares, blocks and lots when neces-

sary, or the approval of such survey as may already have been made by the inhabitants thereof, the assessment upon the lots of such sum as might be necessary to pay for the land embraced in such town site, the costs of the survey, the conveyances of lots, and other necessary expenses, including the compensation of the trustees. The maps and plats of streets, etc., to be surveyed were to be approved by the trustees, or they might approve the survey already made by the inhabitants thereof.

It seems, therefore, plain that a mere agreement among a portion of the people selecting lots for or in a projected town site, on April 22, 1889, did not and could not vest an absolute and unconditional title in the persons who thus selected such lots. The persons going on the land on that date and under the circumstances then existing did not have any law for the vesting of title to a lot as within a town site, by the mere selection of land at that time. There was general confusion and there were thousands of people entering the territory embraced within the proclamation, on that date. In *City of Guthrie* v. *Oklahoma*, 1 Oklahoma, 188, 194, the Supreme Court of the Territory, in speaking of these crowds, said:

"They were aggregations of people, associated together for the purpose of mutual benefit and protection. Without any statute law, they became a law unto themselves and adopted the forms of law and government common among civilized people, and enforced their authority by the power of public sentiment. They had no legal existence; they were nonentities; they could not bind themselves by contracts, or bind any one else."

The whole thing was experimental and conditional.

The selection of the lots in a proposed town site, made on the twenty-second day of April, 1889, not being final, neither was the plat or map of the proposed town site, as then, or soon after, agreed upon by some of the people, final or conclusive. The agreement upon the plat or map was liable to alteration; there was no absolute right to any particular lot, as it was

subject to future survey. It was all in the air. When thereafter, the trustees, under the statute, made a survey of the land into the streets, etc., or approved a survey already made by which the plaintiff's lot was placed in the public street of the city, it was his misfortune, where all had taken their chances, that he should draw a blank. The approval of a survey by the trustees, which placed this lot in a public street of the city, gives to the city the right to the possession of it, and to keep it open as such public street. The plaintiff not being an occupant of the lot at the time that the trustees made entry of the land, nor when the conveyance was made to the trustees by the Government, was not one of the parties included in the statute, which directed the entry for the town sites to be made by the trustees "for the several use and benefit of the occupants thereof."

The Supreme Court in *City of Guthrie* v. *Beamer,* 3 Oklahoma, 652, has held substantially the same views which we now state in the case at bar. We are unable to see any real difference in the principle governing the two cases, and we think the *Beamer* case was rightly decided.

The judgment of the Supreme Court of Oklahoma must be reversed, and the case remanded with directions for a new trial.

Reversed.

CITY OF WORCESTER *v.* WORCESTER CONSOLIDATED STREET RAILWAY COMPANY.

SAME *v.* SAME.

SAME ET AL. *v.* SAME.

SAME ET AL. *v.* SAME.

SAME *v.* SAME.

ERROR TO THE SUPREME JUDICIAL AND THE SUPERIOR COURTS OF THE COMMONWEALTH OF MASSACHUSETTS.

Nos. 144, 145, 146, 147 and 148. Argued January 23, 24, 1905.—Decided February 20, 1905.

The city is the creature of the State. A municipal corporation is simply a political subdivision of the State existing by virtue of the exercise of the power of the State through its legislative department.

While a municipal corporation may own property not of a public or governmental nature which is entitled to constitutional protection, the obligation of a railroad company to pave and repair streets occupied by it based on accepted conditions of a municipal ordinance granting rights of location is not private property beyond legislative control.

Chapter 578, Laws of Massachusetts of 1898, providing for taxation of street railway companies is not void, as violating the impairment of obligation clause of the Federal Constitution, so far as this case is concerned, because it relieved a railroad company from the obligation to pave and repair streets under the terms and conditions of certain municipal ordinances which the company had duly accepted.

THESE five cases were brought here by writs of error, sued out by the city of Worcester, for the purpose of reviewing the several judgments of the Supreme and Superior Courts of the Commonwealth of Massachusetts, respectively, affirming the judgments of the trial courts in favor of the railroad company, the defendant in error. The five cases involve the same questions and were brought for the purpose of answering any possible objection to the particular mode adopted in any one case for the purpose of obtaining the relief sought by the plaintiff in error. 182 Massachusetts, 49. The first two cases were petitions for writs of mandamus against the railroad

company, which petitions were demurred to, and the demurrers sustained. Of the three other cases, two were suits in equity, and were brought by the city against the railroad company, and were heard upon the bills and demurrers thereto, the court sustaining the demurrers; the fifth case was an action on contract originally brought by the city against the railroad company, in the Superior Court and heard upon demurrer to the complaint, which was sustained and judgment ordered for defendant from which judgment plaintiff appealed to the Supreme Judicial Court of the Commonwealth.

The defendant in error is a street railroad corporation, organized and doing business under the laws of the State of Massachusetts, and it owned and operated in the city of Worcester and in numerous outlying cities and towns a street railway system, parts of which had previously belonged to other similar corporations and had been acquired by the consolidated company in 1901, by the purchase of the franchises and properties of such other companies under the general provisions of the street railway laws of the Commonwealth. Under the general laws of the Commonwealth, as they existed, from 1891 to 1893, it was provided that a street railway company might apply to the board of aldermen of a city, or the selectmen of a town, for the location of the tracks of the railway company in the streets of the city or town, and, after hearing, it was provided that the board might grant the petition "under such restrictions as they deem the interests of the public may require; and the location thus granted shall be deemed and taken to be the true location of the tracks of the railway, if an acceptance thereof by said directors in writing is filed with said mayor and aldermen or selectmen within thirty days after receiving notice thereof." Section 7 of chap. 113 of the Massachusetts Public Statutes.

The law also provided (section 21 of above act) that the board of aldermen or the selectmen might, from time to time, "under such restrictions as they deem the interests of the public may require, upon petition, authorize a street railway

company whose charter has been duly accepted and whose tracks have been located and constructed, or its lessees and assigns, to extend the location of its tracks within their city or town, without entering upon or using the tracks of another street railway company; and such extended location shall be deemed to be the true location of the tracks of the company, if its acceptance thereof in writing is filed in the office of the clerk of the city or town within thirty days after receiving notice thereof."

Section 32 of the act made it the duty of every street railway company to keep in repair, to the satisfaction of the superintendent of streets, "the paving, upper planking or other surface material of the portions of streets, roads and bridges occupied by its tracks, and if such tracks occupy unpaved streets or roads, (the company) shall, in addition, so keep in repair eighteen inches on each side of the portion occupied by its tracks," etc.

As the law then stood, the railroad company, on several different occasions, between 1891 and 1893, made applications for and was granted the privilege of extending the location of its tracks. On the eleventh day of May, 1891, the defendant in error, upon application, was duly granted an extension of its location for its tracks in certain streets in the city of Worcester, which extension of location was stated in the order or decree of the board of aldermen to be granted "upon the following conditions;" eight different conditions then follow, among which is:

"Second. That block paving shall be laid and 'maintained between the rails of its track and for a distance of eighteen inches outside of said rails for the entire distance covered by this location.' "

This order or decree was duly accepted in writing by the defendant in error, and its acceptance filed with the clerk of the city of Worcester. Other extensions of locations were applied for and granted during this time, some of which were upon the condition or restriction that the paving should be

between the rails and outside thereof to the street curb, and these conditions were accepted and the acceptance duly filed in the city clerk's office.

Subsequently and in 1898, (chap. 578 of the Massachusetts Laws of that year), provision was made for a somewhat different system of taxation than that which prevailed at the time these several extensions of locations were granted and accepted by the railroad company. It was provided by section 11 of that act as follows:

"SEC. 11. Street railway companies shall not be required to keep any portion of the surface material of streets, roads and bridges in repair, but they shall remain subject to all legal obligations imposed in original grants of locations, and may, as an incident to their corporate franchise, and without being subject to the payment of any fee or other condition precedent, open any street, road or bridge in which any part of their railway is located, for the purpose of making repairs or renewals of the railway, or any part thereof, the superintendent of streets or other officer exercising like authority, or the board of aldermen or selectmen, in any city or town where such are required, issuing the necessary permits therefor."

After the passage of this act of 1898 the railroad company consented and conformed to its requirements, and thereafter omitted to make the repairs in the streets which had been required of it at the time when its extended locations were granted during the period from 1891 to 1893. The city thereafter sought by these various actions or proceedings to compel the street railway company to repair and maintain the surface of the streets, as provided for by the law in force when the extended locations were given and accepted. During the time that the railroad company had since the passage of the act of 1898, omitted to make the repairs provided for as a condition for the granting of its application for extended locations, the city had incurred expenses in renewing and repairing various portions of the pavements, because of the omission and refusal

of the railroad company to do so, and one of these actions was brought to recover the expenses thus incurred by the city in making such repairs and renewing such pavement.

Mr. Arthur P. Rugg, with whom *Mr. John R. Thayer* was on the brief, for plaintiff in error:

The conditions contained in the grants of extensions were legally imposed, the city and the railroad company were empowered to enter into contracts and the acceptance of the location with the conditions constituted a contract and the obligation to pave assumed by the contract is a property right which cannot be taken from the city without due process of law.

As to what is a property right within the Fourteenth Amendment see *Campbell* v. *Holt,* 115 U. S. 620. Restrictions constitute valuable property rights. *Soulard* v. *United States,* 4 Pet. 511; *Metropolitan City Ry. Co.* v. *Chicago,* 87 Illinois, 317. Under the Massachusetts laws the municipality has certain property rights with reference to highways and the repair thereof. Rev. Laws, c. 51, §§ 1, 17, 18, 23; *Butman* v. *Newton,* 179 Massachusetts, 1, 6; *Perry* v. *Worcester,* 6 Gray, 544; *Deane* v. *Randolph,* 132 Massachusetts, 475; *Hill* v. *Boston,* 122 Massachusetts, 344; *Pratt* v. *Weymouth,* 147 Massachusetts, 245, 254; *Brookfield* v. *Reed,* 152 Massachusetts, 568; *Collins* v. *Greenfield,* 172 Massachusetts, 78, 81; *Tindley* v. *Salem,* 137 Massachusetts, 171. Under the laws of Massachusetts the municipality has authority to arrange for the repair of streets. *Morrison* v. *Lawrence,* 98 Massachusetts, 219; *Sampson* v. *Boston,* 161 Massachusetts, 288; *Cavanagh* v. *Boston,* 139 Massachusetts, 426; *Smith* v. *Rochester,* 76 N. Y. 506; *Anthony* v. *Adams,* 1 Metc. 284.

This property right cannot be taken from the city by the legislature. Legislative power over the municipality is very extensive, but it is not universal and does not extend to property acquired for special purposes or to rights of immunity, in which respect the city has the same rights as the individual

to his private property. *Mt. Hope Cemetery* v. *Boston*, 158 Massachusetts, 509, and cases cited on p. 512; *Commissioners* v. *Lucas*, 93 U. S. 108; *Mt. Pleasant* v. *Beckwith*, 100 U. S. 514, 533; *Broughton* v. *Pensacola*, 93 U. S. 266; *New Orleans, M. & T. R. Co.* v. *Ellerman*, 105 U. S. 166, 172; *Richmond* v. *Telephone Co.*, 174 U. S. 761, 777.

These property interests and pecuniary rights of a municipality as to a public way, when taken in conjunction with the contract power of the municipality with reference to the repair of streets, *Brookfield* v. *Reed*, 152 Massachusetts, 568, places the property rights of the city, in respect of highways, upon the same basis as its property rights in sewer systems and water works. Property rights of municipalities in sewers are recognized in a multitude of cases. *Johnston* v. *District of Columbia*, 118 U. S. 19; *Maxmilian* v. *Mayor*, 62 N. Y. 164; *Coan* v. *Marlborough*, 164 Massachusetts, 206; *Child* v. *Boston*, 4 Allen, 41. As to water works see *Hand* v. *Brookline*, 126 Massachusetts, 324; *Johnson* v. *Worcester*, 172 Massachusetts, 122; *Lynch* v. *Springfield*, 174 Massachusetts, 430; *Esberg Gunst Co.* v. *Berlin*, 55 Pac. Rep. 961; *S. C.*, 34 Oregon, 282; *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1. As to wharves, *Mersey Docks Board* v. *Gibbs*, 11 H. L. Cases, 686; *Petersburg* v. *Applegarth*, 28 Gratt. 321; *Pittsburgh* v. *Grier*, 22 Pa. St. 54. As to gas works, *Western Savings Fund Society* v. *Philadelphia*, 31 Pa. St. 183; *San Francisco Gas Co.* v. *San Francisco*, 9 California, 483; *Middleborough* v. *N. Y., N. H. & H. R. R. Co.*, 179 Massachusetts, 520.

The city of Worcester has a special proprietary right in the property of the defendant in error reserved to it in the original statute incorporating the railroad company, Chap. 148, Mass. Laws of 1861, in regard to its right of purchase of the railroad company's property. This is property. *Richardson* v. *Sibley*, 11 Allen, 65; *Cambridge* v. *Railroad Co.*, 10 Allen, 50; *Boston & Albany R. R. Co.* v. *Cambridge*, 159 Massachusetts, 283; *Water Supply Co.* v. *Braintree*, 146 Massachusetts, 482; *Water Co.* v. *Rockport*, 161 Massachusetts, 279.

A municipal corporation is a "person" within the meaning of that word as used in the Fourteenth Amendment.

The word "corporation" as used in certain statutes, includes a municipal corporation. *Loeb* v. *Columbia Township*, 179 U. S. 472, 486; *Andes* v. *Ely*, 158 U. S. 312; 1 Dillon on Mun. Corp., 4th ed., §§ 18, 19, 20; Mass. P. S., c. 3, § 3, cl. 16; Mass. R. L., c. 8, § 5, cl. 16; *Covington & L. Turnpike R. R. Co.* v. *Sandford*, 164 U. S. 578, 592; *Pembina Consol. Mining Co.* v. *Pennsylvania*, 125 U. S. 181.

The act of the Massachusetts legislature should not be construed to have abrogated the municipality's contract with the railroad company and this court can so hold notwithstanding the construction placed on the act by the state court.

Where the validity of the state statute is attacked upon the very ground that it was in conflict with the contract clause of the Federal Constitution this court examines *de novo* the meaning of the statute and places its own interpretation upon it. *McCullough* v. *Virginia*, 172 U. S. 102, 109; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Mobile & Ohio R. Co.* v. *Tennessee*, 153 U. S. 486; *Wilson* v. *Standefer*, 184 U. S. 399, and cases cited on p. 411. The legislative history of the act shows that it was not intended to abrogate the rights of the municipality.

Mr. Bentley W. Warren for defendant in error:

The board of aldermen of Worcester in imposing the so-called conditions, claimed by the city to amount to contracts, contained in the orders of location acted, so far as it was intrusted with any power in relation to the location and construction of the defendant's railway, not in the capacity of officers or representatives of the city of Worcester, but as public officers under authority delegated to them by the legislature. The city of Worcester, as a municipal corporation, had no power, whether acting by its board of aldermen, by its city government, or otherwise, with respect to street railway locations within its limits. Municipal corporations in Massachusetts possess only such powers and rights as are ex-

pressly or by implication granted by the State. *Spaulding* v. *Peabody*, 153 Massachusetts, 129; Opinion of Justices, 150 Massachusetts, 592; *Swift* v. *Falmouth*, 167 Massachusetts, 115; *Bangs* v. *Snow*, 1 Massachusetts, 180, 189.

Without express legislative authority a town cannot appropriate money for defense against an invading enemy, *Stetson* v. *Kempton*, 13 Massachusetts, 272, 279; nor to build a county highway, *Parsons* v. *Goshen*, 11 Pick. 396; nor to celebrate Cornwallis's surrender, *Tash* v. *Adams*, 10 Cush. 252; nor to purchase company uniforms, *Claflin* v. *Hopkinton*, 4 Gray, 502; nor to celebrate the Fourth of July, *Hood* v. *Lynn*, 1 Allen, 103; *Gerry* v. *Stoneham*, 1 Allen, 319; *Morrison* v. *Lawrence*, 98 Massachusetts, 219; nor to pay expenses incurred in promoting or opposing the annexation of one municipality to another. *Minot* v. *West Roxbury*, 112 Massachusetts, 1; *Coolidge* v. *Brookline*, 114 Massachusetts, 592.

The powers of a municipality are only such as they can be clearly shown to possess. *Minturn* v. *Lane*, 23 How. 435; *Detroit* v. *Citizens' Street Ry. Co.*, 184 U. S. 368, 388. Every reasonable doubt is against the power. This doctrine is vital to the public welfare. *Pearsall* v. *Great Northern Railway Co.*, 161 U. S. 646, 664; *Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659, 666; *Citizens' Street Ry. Co.* v. *Detroit Ry. Co.*, 171 U. S. 48, 54.

Assuming that the board of aldermen impose the conditions in form and manner as they attempted to do, nevertheless they represented said city in its corporate capacity as a mere governmental agency, and not in its private corporate capacity, so that, if said city became the obligee in any contract to which the railway company was obligor, the rights of said city thereunder were held not as its private property, but in trust as a governmental agency for the public in general, and were, therefore, subject at all times to the control of the legislature. Cities have almost no private property. *South Dakota* v. *North Carolina*, 192 U. S. 286; 2 Dillon Mun. Corp., 656, 683; *Brimmer* v. *Boston*, 102 Massachusetts, 19; *Agawan* v. *Hampden County*, 130 Massachusetts, 528, and cases cited on p. 530;

citing *Freeland* v. *Hastings*, 10 Allen, 570, 579; *Rawson* v. *Spencer*, 113 Massachusetts, 40, 45; *Stone* v. *Charlestown*, 114 Massachusetts, 214, 223; *Coolidge* v. *Brookline*, 114 Massachusetts, 592; *Hill* v. *Boston*, 122 Massachusetts, 344, 349, 355; *Laramie* v. *Albany*, 92 U. S. 307; *Tippecanoe Commissioners* v. *Lucas*, 93 U. S. 108, 114; *New Orleans* v. *Clark*, 95 U. S. 644, 654; *Meriwether* v. *Garrett*, 102 U. S. 472; *Prince* v. *Crocker*, 166 Massachusetts, 347; *Browne* v. *Turner*, 176 Massachusetts, 9.

The burden of proof is strongly upon the party asserting such private ownership by a municipality. *Proprietors of Mt. Hope Cemetery* v. *Boston*, 158 Massachusetts, 509, as cited and distinguished in *Browne* v. *Turner*, 176 Massachusetts, 9, 13.

Whatever may have been the state of the law at the time the extensions of location involved in these suits were granted, the legislature, by enacting c. 578 of the acts of 1898, relieved defendant from obligation to keep in repair any part of the surface material of the streets included in any of said extended locations.

Assuming the statute abrogated the obligations (if they were such) set out in the five cases, the legislature of Massachusetts did not, in so abrogating the obligations, violate any provisions of the Constitution of the United States. If such obligations were property such property was not private municipal property and was subject to legislative control. *East Hartford* v. *Bridge Co.*, 10 How. 511; *Laramie County* v. *Albany County*, 92 U. S. 307; *Meriwether* v. *Garrett*, 102 U. S. 472; *Browne* v. *Taylor*, 176 Massachusetts, 9, and cases cited on p. 14; *People* v. *Kerr*, 27 N. Y. 188; *Clinton* v. *Cedar Rapids R. Co.*, 24 Iowa, 455.

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

The defendant in error makes no objection to the form in

which the question to be decided comes before us. Whether one or the other action or proceeding is proper and appropriate need not, therefore, be considered.

The contention on the part of the plaintiff in error is that, by virtue of the restrictions or conditions placed by it upon granting the various extensions of locations of the tracks of the railroad company, and by the acceptance of the same by the company, a contract was entered into between the city and the railroad company, which could not be altered without the consent of both parties, and that as the city had never consented to any alteration of the obligation of the railroad company to make the repairs in the streets as provided for in those restrictions or conditions, the subsequent legislation contained in the act of 1898 impaired the obligation of that contract, and was therefore void, as a violation of the Constitution of the United States.

In the view we take of this subject it may be assumed, for the purpose of argument, that the city of Worcester had power, under the legislation of the State, to grant the right to extend the location of the railroad company's tracks upon the restrictions or conditions already mentioned. It may also be assumed, but only for the purpose of the argument, that the restrictions or conditions contained in the orders or decrees of the board of aldermen, upon their acceptance by the company, became contracts between the city and the company.

The question then arising is, whether the legislature, in the exercise of its general legislative power, could abrogate the provisions of the contract between the city and the railroad company with the assent of the latter, and provide another and a different method for the paving and repairing of the streets through which the tracks of the railroad company were laid under the permit of their extended location. We have no doubt that the legislature of the Commonwealth had that power. A municipal corporation is simply a political subdivision of the State, and exists by virtue of the exercise of the power of the State through its legislative department. The

legislature could at any time terminate the existence of the corporation itself, and provide other and different means for the government of the district comprised within the limits of the former city. The city is the creature of the State. *East Hartford* v. *Hartford Bridge Co.*, 10 How. 511, 533, 534.

As is stated in *United States* v. *Railroad Company*, 17 Wall. 322, 329, a municipal corporation is not only a part of the State but is a portion of its governmental power. "It is one of its creatures, made for a specific purpose, to exercise within a limited sphere the powers of the State. The State may withdraw these local powers of government at pleasure, and may, through its legislature or other appointed channels, govern the local territory as it governs the State at large. It may enlarge or contract its powers or destroy its existence. As a portion of the State in the exercise of a limited portion of the powers of the State, its revenues, like those of the State, are not subject to taxation."

In *New Orleans* v. *Clark*, 95 U. S. 644, 654, it was stated by Mr. Justice Field, in delivering the opinion of the court, that:

"A city is only a political subdivision of the State, made for the convenient administration of the government. It is an instrumentality, with powers more or less enlarged, according to the requirements of the public, and which may be increased or repealed at the will of the legislature. In directing, therefore, a particular tax by such corporation, and the appropriation of the proceeds to some special municipal purpose, the legislature only exercises a power through its subordinate agent, which it could exercise directly; and it does this only in another way when it directs such corporation to assume and pay a particular claim not legally binding for want of some formality in its creation, but for which the corporation has received an equivalent."

In *Commissioners of Laramie County* v. *Commissioners of Albany County et al.*, 92 U. S. 307, it was held that public or municipal corporations were but parts of the machinery employed in carrying on the affairs of the State, and that the

charters under which such corporations are created may be changed, modified or repealed as the exigencies of the public service or the public welfare may demand; that such corporations were composed of all the inhabitants of the territory included in the political organization; and the attribute of individuality is conferred on the entire mass of such residents, and it may be modified or taken away at the mere will of the legislature, according to its own views of public convenience, and without any necessity for the consent of those composing the body politic.

It was said in that case that "public duties are required of counties as well as of towns, as a part of the machinery of the State; and, in order that they may be able to perform those duties, they are vested with certain corporate powers; but their functions are wholly of a public nature, and they are at all times as much subject to the will of the legislature as incorporated towns, as appears by the best text writers upon the subject and the great weight of judicial authority."

In *Commissioners &c.* v. *Lucas, Treasurer*, 93 U. S. 108, 114, the question of the validity of an act of the legislature was presented, and Mr. Justice Field, in delivering the opinion of the court, said:

"Were the transaction one between the State and a private individual, the invalidity of the act would not be a matter of serious doubt. Private property cannot be taken from individuals by the State, except for public purposes, and then only upon compensation or by way of taxation; and any enactments to that end would be regarded as an illegitimate and unwarranted exercise of legislative power. . . . But between the State and municipal corporations, such as cities, counties, and towns, the relation is different from that between the State and the individual. Municipal corporations are mere instrumentalities of the State, for the convenient administration of government; and their powers may be qualified, enlarged or withdrawn, at the pleasure of the legislature."

In *Mount Pleasant* v. *Beckwith*, 100 U. S. 514, it was held

that, where no constitutional restriction is imposed, the corporate existence and powers of counties, cities and towns are subject to the legislative control of the State creating them.

In *New Orleans* v. *New Orleans Water Works Company*, 142 U. S. 79, it was also held that a municipal corporation was the mere agent of the State in its governmental character, and was in no contract relations with its sovereign, at whose pleasure its charter may be amended, changed or revoked without the impairment of any constitutional obligation. It was also therein held that such a corporation, in respect to its private or proprietary rights and interests, might be entitled to constitutional protection. The Massachusetts courts take the same view of such a corporation. *Browne* v. *Turner*, 176 Massachusetts, 9.

Enough cases have been cited to show the nature of a municipal corporation as stated by this court. In general it may be conceded that it can own private property, not of a public or governmental nature, and that such property may be entitled, as is said, "to constitutional protection." Property which is held by these corporations upon conditions or terms contained in a grant and for a special use, may not be diverted by the legislature. This is asserted in *Commissioners &c.* v. *Lucas, Treasurer*, 93 U. S. 108, 115, and in *Mount Hope Cemetery* v. *Boston*, 158 Massachusetts, 509, the Supreme Court of Massachusetts held that cities might have a private ownership of property which could not be wholly controlled by the state government.

It seems, however, plain to us that the asserted right to demand the continuance of the obligation to pave and repair the streets, as contained in the orders or decrees of the board of aldermen granting to the defendant the right to extend the locations of its tracks on the conditions named, does not amount to property held by the corporation, which the legislature is unable to touch, either by way of limitation or extinguishment. If these restrictions or conditions are to be regarded as a contract, we think the legislature would have the same right to

terminate it, with the consent of the railroad company, that the city itself would have. These restrictions and conditions were of a public nature, imposed as a means of collecting from the railroad company part, or possibly the whole, of the expenses of paving or repaving the streets in which the tracks were laid, and that method of collection did not become an absolute property right in favor of the city, as against the right of the legislature to alter or abolish it, or substitute some other method with the consent of the company, even though as to the company itself there might be a contract not alterable except with its consent. If this contention of the city were held valid, it would very largely diminish the right of the legislature to deal with its creature in public matters, in a manner which the legislature might regard as for the public welfare. In *City of Springfield* v. *Springfield Street Railway*, 182 Massachusetts, 41, this question was before the Supreme Judicial Court of Massachusetts, and the contention of the city, to the same effect as the plaintiff in error contends in this case, was overruled. It was therein held that the city acted in behalf of the public in regard to these extensions of locations, and that the legislature had the right to modify or abrogate the conditions on which the locations in the streets and public ways had been granted, after such conditions had been originally imposed by it. The case at bar was decided at the same time as the *Springfield case* (182 Massachusetts, 49), and the proposition that the legislature had the power to free the company from obligations imposed upon it by the conditions in the grant of the extended locations was adhered to, and the *Springfield case* cited as authority for the same. We concur in that view.

There is no force in the contention that the city of Worcester has a proprietary right in the property of the defendant in error, reserved to it under the original statute incorporating the Worcester Horse Railroad Company. (Chap. 148, Mass. Laws of 1861.) These sections simply give the city of Worcester the right, during the continuance of the charter of the corporation and after the expiration of ten years from the opening of

any part of said road for use, to purchase all its franchises, property, rights, etc. That right is not affected by the legislation in question, even assuming (which we do not for a moment intimate) that the act of 1898 affected the right of the city to make the purchase under the sections above cited.

We see no reason to doubt the validity of the act of 1898, and the judgments of the Supreme Judicial Court and the Superior Court of Massachusetts are, respectively,

Affirmed.

FLANIGAN *v.* SIERRA COUNTY.

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

No. 121. Argued January 12, 1905.—Decided February 20, 1905.

Whether a statute of a State is or is not a revenue measure and how rights thereunder are affected by a repealing statute depends upon the construction of the statutes, and where no Federal question exists this court will lean to an agreement with the state court.

Under the California cases the county ordinance imposing licenses involved in this case was a revenue and not a police measure.

While the doctrine that powers derived wholly from a statute are extinguished by its repeal and no proceedings can be pursued under the repealed statute, although begun before the repeal, unless authorized under a special clause in the repealing act has been oftenest illustrated in regard to penal statutes, it has been applied by the California courts to the repeal of the power of counties to enact revenue ordinances and will therefore in such a case be applied by this court.

THE facts are stated in the opinion.

Mr. C. C. Cole, with whom *Mr. Joseph C. Campbell* and *Mr. Thomas H. Breeze* were on the brief, for petitioner:

The ordinance under which this action was commenced was repealed by the act of the legislature of the State of California of March 23, 1901, and hence the action is abated. *Garrison*

v. *New York*, 21 Wall. 196; *Louisiana* v. *New Orleans*, 109 U. S. 285; *Freeland* v. *Williams*, 131 U. S. 417; *United States* v. *Tynen*, 11 Wall. 88; *Norris* v. *Crocker*, 13 How. 429; *Maryland* v. *B. & O. R. R. Co.*, 3 How. 534.

The ordinance was obviously enacted solely for raising revenue. It was not a licensing ordinance. *Sonora* v. *Curtin*, 137 California, 583; Cooley on Taxation, 573; *Mayor* v. *Charlton*, 36 Georgia, 460. A license confers a privilege, and makes the doing of something legal, which, if done without it, would be illegal. *Insurance Co.* v. *Augusta*, 50 Georgia, 530; *Burch* v. *Savannah*, 42 Georgia, 596; *Chilvers* v. *People*, 11 Michigan, 43; *Robinson* v. *Mayor*, 1 Humph. 156; *Ould* v. *Richmond*, 23 Gratt. 464; *Reed* v. *Beall*, 42 Mississippi, 472.

The effect of the ordinance is not otherwise than if it had provided that all sheep owned by those engaged in this business, should be taxed ten cents a head; that upon the payment of the tax the owner should be entitled to a tax receipt evidencing such payment, and that if it were not paid, it should become a debt due the county to be collected by a civil suit. Calling the tax receipt a "license" and the tax a "license tax" does not confine the lawful authority to transact this business to those who have paid the tax and procured the "license" any more than an ordinary tax on property creates a right or authority to own property. A license is a police regulation controlling the exercise of a profession, business or occupation. *Cache County* v. *Jensen*, 61 Pac. Rep. 303; *Mayor* v. *Second Ave. R. R. Co.*, 32 N. Y. 261; *Mays* v. *Cincinnati*, 1 Ohio St. 268; *Am. Fertilizing Co.* v. *Board of Agriculture*, 43 Fed. Rep. 609; *Flanigan* v. *Plainfield*, 44 N. J. L. 118; Cooley on Taxation, 597; *Merced County* v. *Helm*, 102 California, 159, 163; *Kiowa County* v. *Dunn*, 40 Pac. Rep. 357. As to power of county to enact revenue and license ordinances, see Political Code, § 3366; California Statutes, 1900, passed March 23, 1901, c. 209, p. 635; *Ex parte Pfirrmann*, 134 California, 143; *Sonora* v. *Curtin*, 137 California, 583, and cases cited.

Irrespective of the decisions of the courts of other States and of their rulings on the effect of similar statutes, the de-

cisions of the Supreme Court of California in the construction of a statute of that State must be read into that statute and conclusively control the Federal courts in their determination of its object and effect. *Brown* v. *New Jersey*, 175 U. S. 172; *Noble* v. *Mitchell*, 164 U. S. 367; *Illinois Cent. R. Co.* v. *Illinois*, 163 U. S. 142; *N. Y., L. E. & W. R. Co.* v. *Pennsylvania*, 158 U. S. 431; *Leeper* v. *Texas*, 139 U. S. 462; *M., K. & T. Ry. Co.* v. *McCann*, 174 U. S. 580; *Cravens* v. *N. Y. Life Ins. Co.*, 178 U. S. 389; *Morley* v. *Lake Shore & M. S. Ry. Co.*, 146 U. S. 162; *Lapp* v. *Ritter*, 88 Fed. Rep. 108; *Southern Ry. Co.* v. *North Carolina Corp. Comm.*, 99 Fed. Rep. 102; *O'Brien* v. *Wheelock*, 95 Fed. Rep. 883, 905.

Mr. Frank R. Wehe, with whom *Mr. W. J. Redding* and *Mr. C. N. Post* were on the brief, for respondent in No. 121; *Mr. U. S. Webb* and *Mr. L. N. Peter* for respondent in No. 122,[1] involving a similar ordinance, submitted:

The ordinance was passed in the exercise of police power and for the purpose of regulation, and was not, therefore, repealed. When petitioner commenced to do business in the county he became indebted to respondent in the amount due for the license. The right to the sum due vested in the county; hence no repeal could affect it. All constitutional questions raised have been decided adversely to petitioner by the Supreme Court of the State of California. The ordinance was in the exercise of police power and was not repealed. California Const., Art. XI, § 11; County Government Act, § 25, subd. 25, Stat. 1897, p. 465; *In re Guerro*, 69 California, 90; *Ex parte Mount*, 66 California, 448; *Ex parte Mirande*, 73 California, 374; *El Dorado County* v. *Meiss*, 100 California, 270; *Inyo County* v. *Erro*, 119 California, 120; *Ex parte Ah Toy*, 57 California, 92; *Ex parte Pfirrmann*, 134 California, 147; *Ex parte Roach*, 104 California, 276; *Los Angeles County* v. *Eikenberry*, 131 California, 461; Cooley on Taxation, 599; 1 Tiede-

[1] *Wheeler* v. *Plumas County*, *post*, p. 562.

man State & Federal Control, 483. Ordinary expenses are raised by taxes but in licensed businesses such as sheep raising there are extra hazards involving extra governmental expenses which must be met by police regulation. *St. Paul* v. *Coulter*, 12 Minnesota, 16; *Postal Tel. Cable Co.* v. *Charleston*, 153 U. S. 691; *Western Union Tel. Co.* v. *New Hope*, 187 U. S. 419; *Atl. & Pac. Tel. Co.* v. *Philadelphia*, 190 U. S. 160; *Philadelphia* v. *Atl. & Pac. Tel. Co.*, 89 Fed. Rep. 460; *Chilvers* v. *People*, 11 Michigan, 43; *Fayetteville* v. *Carter*, 52 Arkansas, 301; *Lumber Co.* v. *Arkadelphia*, 56 Arkansas, 370; *Ash* v. *People*, 11 Michigan, 347; *Littlefield* v. *State*, 42 Nebraska, 223; *Jacksonville* v. *Ledwith*, 26 Florida, 163; *Tomilson* v. *Indianapolis*, 114 Indiana, 142; *White* v. *Redmond*, 43 Minnesota, 250; *Marmet* v. *State*, 45 Ohio St. 63; *Ferry Company* v. *East St. Louis*, 107 U. S. 365. Petitioner refused to try the question of the reasonableness of the fee. He declined to answer and make the issue, and, in the absence of a trial, it must appear from the face of the ordinance that the fee is so excessive that the court can infer as matter of law that the purpose of the ordinance was to raise revenue and not to reimburse the county for the cost of regulation of the business licensed. *Glenn* v. *Mayor*, 5 Hill & J. 424; *Merced County* v. *Fleming*, 111 California, 46, 51; *Brooklyn* v. *Breslin*, 57 N. Y. 591, 596; *Price* v. *People*, 193 Illinois, 114; *Grand Rapids* v. *Brandy*, 105 Michigan, 671; *Atkins* v. *Phillips*, 26 Florida, 281; *Uttumwa* v. *Zekind*, 95 Iowa, 622; *Burlington* v. *Unterkircher*, 99 Iowa, 401; *Vansant* v. *Harlem Stage Co.*, 59 Maryland, 335; *People* v. *Russell*, 49 Michigan, 633.

The legislature of California has expressly authorized the county to license and fix the rate of license tax.

As to reasonableness of fee, see *Duluth* v. *Krupp*, 46 Minnesota, 435; *Sifert* v. *Johnson*, 65 Pac. Rep. 710; 2 Tiedeman, State & Federal Control, 838; *Lawton* v. *Steele*, 152 U. S. 135; Sutherland, § 335.

The moment the license was prescribed by the county the transaction of the business was forbidden unless the license

was taken out, hence the issuance of the license permits the person to transact the business. *Ex parte Christensen*, 85 California, 210.

The constitutional questions involved have been decided against the petitioner by the Supreme Court of California. A license fee is not a tax. *Santa Barbara* v. *Stearns*, 51 California, 499; *State* v. *Cassidy*, 22 Minnesota, 318; *Ex parte Robinson*, 12 Missouri, 263.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This action was brought by respondent against petitioner in the Superior Court of the County of Sierra, State of California, and removed on his motion to the United States Circuit Court.

The action was brought to recover the amount of license ordained under an ordinance passed May 31, 1900, by the supervisors of the respondent county, under what is known as "The County Government Act." California Stat. 1897, c. CCLXXVII. The act gave power to the boards of supervisors of counties as follows:

"To license for regulation and revenue, all and every kind of business not prohibited by law, and transacted and carried on in such county, and all shows, exhibitions, and lawful games carried on therein, to fix the rates of license tax upon the same, and to provide for the collection of the same, by suit or otherwise." Sec. 25, subd. 25.

In pursuance of the power conferred the ordinance in controversy was enacted, section 1 of which is as follows:

"Each and every person, copartnership, firm or corporation engaged in the business of raising, grazing, herding or pasturing sheep in the county of Sierra, State of California, must annually procure a license therefor from the license collector, and must pay therefor the sum of ten (10) cents for each sheep or lamb owned by, in the possession of, or under the control of such person, copartnership, firm or corporation, and used in such business in said county."

Application for a license is required to be made by affidavit, stating the number of sheep owned by and in possession of the applicant. "The license tax," it is provided, "shall be deemed a debt due to the county," which the district attorney of the county is directed to sue for; and a judgment is authorized. In case of recovery by the county, $50 damages and costs must be added to the judgment. All money collected for license, less a fee of ten per cent for collection, "shall be paid over to the county treasurer, as other moneys are, and be placed to the credit of the general funds of the county." Years within the meaning of the ordinance shall commence on the first day of January and end on the thirty-first day of December.

The petitioner between the first of May and the twenty-fifth of June, 1900, engaged in the business described in the ordinance, and had in his possession and under his control 25,000 sheep. He failed to apply for a license, and became, it is alleged, indebted to the county for the sum of $2,500, and became further indebted to the sum of $50 by way of damages for his neglect. Payment of both sums was demanded.

Petitioner demurred to the complaint, which, being overruled, and he having declined to answer, judgment was taken against him. It was affirmed by the Circuit Court of Appeals. 58 C. C. A. 340.

The ordinance was passed on the thirty-first day of May, 1900, and suit was brought on the twenty-fifth day of June of that year. On March 23, 1901, by an amendment to the Political Code of the State of California, section 3366, Stat. Cal. 1900, 1901, p. 635, the authority of the board of supervisors to license for revenue was repealed. The repealing provision is as follows:

"Boards of supervisors of the counties of the State, and the legislative bodies of the incorporated cities and towns therein, shall, in the exercise of their police powers, and for the purpose of regulation, as herein provided, and not otherwise, have power to license all and every kind of business not prohibited by law, and transacted and carried on within the limits of their

respective jurisdictions, and all shows, exhibitions and lawful games carried on therein, to fix the rates of license tax upon the same, and to provide for the collection of the same by suit or otherwise."

It is contended that the ordinance imposing the license was a revenue measure, not a police regulation, and that the law under which it was enacted, having been repealed, the suit abated. And, it is also contended, that there was no power to pass the ordinance. The latter contention is certainly untenable. *Ex parte Mirande*, 73 California, 365. The former requires some discussion. There are two parts to it—the character of the ordinance, as being for revenue or regulation, and the effect of the repeal of the ordinance. Under the authority of the California cases, it must be regarded as a revenue measure. 72 California, 387; 73 California, 365; 119 California, 119; *Town of Santa Monica* v. *Guidinger*, 137 California, 658; *City of Sonora* v. *Curtin*, 137 California, 583.

In *Merced County* v. *Helm*, 102 California, 159, the court said, distinguishing between the taxing power and the police power, that the latter "is exercised in the enforcement of a penalty prescribed for a non-compliance with the law, or for the doing of some prohibited act." It was provided by the ordinance passed on that the license should be a "debt," payable in advance and to be collected, in case of non-payment by suit. The absence of regulatory provisions has also been held to be an element in determining the character of an ordinance. *Town of Santa Monica* v. *Guidinger*, 70 Pac. Rep. 732. The ordinance in controversy in the case at bar was, at least, assumed by the Circuit Court of Appeals to be a revenue measure. This being its character, what was the effect of its repeal? It withdraws the power of collecting the tax, petitioner contends. The Court of Appeals did not take this view. The court regarded the right of the county as vesting at the date of the imposition of the license, and that the liability of petitioner was so far contractual as to be unaffected by the repeal of the statute giving power to the county to enact the

ordinance. We are unable to assent to this view. It is disputable under the authorities, and it is opposed to the decisions of the Supreme Court of the State of California.

The general rule is that powers derived wholly from a statute are extinguished by its repeal. Sutherland on Statutory Construction, § 165. And it follows that no proceedings can be pursued under the repealed statute, though begun before the repeal, unless such proceedings be authorized under a special clause in the repealing act. 9 Bacon's Abridgement, 226. This doctrine is oftenest illustrated in the repeal of penal provisions of statutes. It has, however, been applied by the Supreme Court of the State of California to the repeal of the power of counties to enact ordinances for revenue.

Town of Santa Monica v. *Guidinger*, 137 California, 658, was an action for the recovery of $50 for license imposed under an ordinance of the town "for the licensing of business carried on in the town . . . for purposes of regulation and revenue." The defendant was charged with two license taxes for $25 each for the year following the date of the ordinance, that being the annual date established by the ordinance, "for each person acting as agent or solicitor for any laundry whose plant or works are located without the corporate limits of the town." It was held that the license tax was repealed, and the right of action therefore extinguished, by section 3366 of the Political Code, added thereto by the act of March 23, 1901. This is the same section relied upon in the case at bar. The court said it was clear that the license tax in question was imposed for the purpose of raising revenue, and that the case was therefore substantially similar to that of *City of Sonora* v. *Curtin*, 137 California, 583. The ordinance involved in the latter case contained penal provisions, but they manifestly did not determine the decision. The court observed:

"The right is given by the ordinance to bring a civil suit to recover the amount so made a license tax. This civil remedy was created by the ordinance, and the remedy is repealed by the repeal of the ordinance as to revenue.

"In speaking of the rule as to enforcements of rights under repealed statutes, Endlich on the Interpretation of Statutes [sec. 480], says: 'The same rule applies to rights and remedies founded solely upon statute, and to suits pending to enforce such remedies. If at the time the statute is repealed, the remedy has not been perfected or the right has not become vested, but still remains executory, they are gone.' "

It is clear that the decision was not based alone on the penal character of the ordinance but on the broader principle that the power to enact it having been taken away the power to enforce it was also taken away. The cases cited by the court illustrate this. Among others, *Napa State Hospital* v. *Flaherty*, 134 California, 315, was cited. In that case the right given by a statute of the State to maintain an action against the father of an insane adult son was held to be taken away by the repeal of the statute conferring the right.

But if the ordinance passed on in *City of Sonora* v. *Curtin* was penal, the ordinance involved in the case at bar may be so characterized within the limits of the principle we are now discussing, as applied by the Supreme Court of the State of California. What it might be under broader considerations see *Huntington* v. *Attrill*, 146 U. S. 657.

That there is a conflict between the Supreme Court of the State and the Circuit Court of Appeals respondent does not deny. Counsel, however, say the conflict "does not arise out of a construction of a statute of the State," but (we quote the language of counsel) "as to the effect of the new statute, construed by each court to be a repeal of a prior statute, upon the rights of the litigant granted under the prior statute, the Circuit Court of Appeals first assuming, but not deciding, that the ordinance *may* have been a revenue measure, and the Supreme Court of California deciding that in its cases the ordinance *was* a revenue measure. This question did not involve the construction of the statute; it was merely the determination of a question that depended upon the principle of general law and not upon a positive statute of the State." The counsel further

say: "In such cases the courts of the United States are not required to follow the decision of state courts." The distinction made by counsel we cannot adopt. Whether a statute of a State is or is not a revenue measure certainly depends upon the construction of that statute. Besides, if in any case we should lean to an agreement with the state court, this is such a case. There is no Federal right involved. The question is one strictly of the state law; and the power of one of the municipalities of the State under that law. If we should yield to the contention of counsel we should give greater power to one of the municipalities of the State than the law of the State, as construed by the Supreme Court of the State, would give it. We should enforce against petitioner a tax which the Supreme Court of the State, construing a state law, would not enforce. The result of the contention indicates its error.

Judgment reversed and cause remanded for further proceedings in conformity with this opinion.

WHEELER *v.* PLUMAS COUNTY.

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

No. 122. Submitted January 12, 1905.—Decided February 20, 1905.

Decided on authority of *Flanigan* v. *Sierra County*, *ante*, p. 553.

THE facts are stated in the opinion.

Mr. C. C. Cole, *Mr. Joseph C. Campbell* and *Mr. Thomas H. Breeze* for petitioners.[1]

Mr. U. S. Webb and *Mr. L. N. Peter* for respondent.[1]

[1] Submitted simultaneously with *Flanigan* v. *Sierra County*. For abstract of arguments see *ante*, p. 553.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This case was submitted with *Flanigan* v. *Sierra County*. It is also an action for the recovery of a sum of $2,100, alleged to be due for license tax, and $50 damages. The taxes were imposed under an ordinance of the county of Plumas, substantially similar to the ordinance passed on in *Flanigan* v. *Sierra County*. The action was brought in the Superior Court of Plumas County and removed, upon the petition of the petitioners herein, to the Circuit Court for the Northern District of California. In that court, petitioners demurred to the complaint, which, being overruled, and they declining to answer, judgment was taken against them by default. It was affirmed by the Circuit Court of Appeals.

The questions are identical with those passed on in *Flanigan* v. *Sierra County*, and on the authority of that case the

Judgment is reversed and cause remanded for further proceedings.

McCAFFREY *v.* MANOGUE.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 131. Argued January 17, 18, 1905.—Decided February 20, 1905.

The policy of the law in favor of the heir yields to the intention of the testator if clearly expressed or manifested. The rule of law that a devise of lands without words of limitation or description gives a life estate only, does not apply, and devises will be held to be of the fee, where it is plain that the testator's intention was to dispose of his whole estate equally between his heirs, and there is no residuary clause indicating that he intended passing less than all of his estate, and all of his heirs at law are devisees under the will.

THE question involved in this case is the construction of the will of Hugh McCaffrey, deceased. It was duly admitted to probate and recorded in the Supreme Court of the District. It is as follows:

"WASHINGTON, DISTRICT OF COLUMBIA,
"*April Thirtieth*, 1896.

"In the name of God, being now in good health and sound in mind and body I hereby certify and declare this to be my last will and testament, hereby annulling and revoking any and all wills previously made.

"I give and bequeath to my daughter, Mary A. Quigley, house number 301 at southwest corner of 11th and C streets southeast, being in lot number 5, in square 970, with the store and dwelling, stock and fixtures, and lot on which it stands, also houses numbers 13 and 15 6th street southeast with lots on which they stand, being parts of lots 19 and 20 in square 841, also any money in bank to my account at the time of my death, also any money due to me, also any building association stock. She is to pay funeral expencies and any other legal debts I may owe, also to care for my lot in Mount Olivet cemetrey.

"I give and bequeath to my son, James B. McCaffrey, house number six hundred and two (602) East Capitol street and lot on which it stands, being in lot number ten (10) in square number eight hundred and sixty-eight (868).

"To my son, William H. McCaffrey, I give and bequeath house 604 East Capitol street, being in lot number ten (10) in square number eight hundred and sixty-eight (868) and lot on which it stands.

"To my daughter, Lizzie Manogue, I give and bequeath house number fourteen hundred and twenty-three (1423) Corcoran street, N. W., and lot on which it stands, being lot number fifty-four (54) in square number two hundred and eight (208).

"2. To my son, Francis T. McCaffrey, I give and bequeath house five hundred and nineteen (519) East Capitol street, and

lot on which it stands, being part of lot number (20) in square eight hundred and forty-one (841), also my horse and buggy.

"And to my grandson, Frank Foley, I give and bequeath house number one hundred and twenty-one (121) Eleventh street, S. E., being in lot number fourteen (14), square number nine hundred and sixty-eight (968), and lot on which it stands.

"To my grandson Joseph Quigley, I give and bequeath my watch and chain.

"I hereby name and appoint as executors of this my last will and testament, John E. Herrell and Patrick Maloney.

"All the real estate herein described is located in the city of Washington, District of Columbia.

"HUGH McCAFFREY. [SEAL.]"

The devisees in the will were the only heirs of the testator.

On the tenth of July, 1897, Mary A. Quigley, died leaving surviving four children, the appellants Catherine L., Margaret, Mary and Joseph Quigley. Edward Quigley, her husband, also an appellant, survived her. She left a will, which was duly admitted to record, by which she devised all her estate to Catherine L. and Edward Quigley in trust for her children. Francis T. McCaffrey, son of Hugh, and one of the devisees in the latter's will, died October 20, 1898, leaving as heirs at law his brothers and sisters, the children of his deceased sister, Mary A. Quigley, and his nephew, Frank Foley. He left a will, by which he devised and bequeathed all of the property to his sister, Lizzie C. Manogue, and his brothers, William A. and James B. McCaffrey, "absolutely and in fee simple, according to the nature of the property, as tenants in common, but not as joint tenants." At the time of his death he was seized and possessed of the real estate devised to him by his father.

James B. McCaffrey has sold and conveyed the lot devised to him to the respondent George W. Manogue. Upon an attempt to sell the property devised by Francis T. McCaffrey a doubt was raised as to the extent of the interest devised to him

and the other devisees by the will of H. McCaffrey, whether an estate for life or in fee simple. This suit was brought "to have it determined what estate each of the said devisees took thereby, and to have their title quieted as against any person or persons who may claim adversely to the same as heirs of said Hugh McCaffrey, or under such heirs."

It was decreed by the trial court that only life estates were devised by the will, and the decree was affirmed by the Court of Appeals. 22 App. D. C. 385.

Mr. Arthur A. Birney, with whom *Mr. O. B. Hallam* and *Mr. Henry F. Woodard* were on the brief, for appellants:

In *McCaffrey* v. *Little*, 20 App. D. C. 116, the main question herein was before the court but not decided. Mrs. Quigley took a fee simple. *Collier's Case*, 6 Coke, 16; *King* v. *Ackerman*, 2 Black, 408; *Doe* v. *Holmes*, 8 Dunf. & East, 1; Sharswood's Blackstone, citing *Goodlittle* v. *Maddern*, 7 East. 500; *Doe* v. *Clarke*, 8 New Rep. 349; *Roe* v. *Dan*, 3 Man. & Sel. 522; *Baddeley* v. *Leapingwell*, Wilm. Notes, 235. The Court of Appeals held that because the proofs taken by appellees showed that out of the personal estate bequeathed to Mrs. Quigley "a large surplus must necessarily remain to her after the discharge of all possible demands and expenses," the charge should be construed as upon the personal estate and not the person. But the court had no right to look beyond the face of the will in determining its construction, and should have rejected the testimony as wholly incompetent to diminish the estate which the *fact of the personal charge* defined as created in Mrs. Quigley by the terms of the devise. The court cited no authority for its reception of this evidence and ignored authoritative decisions in doing so. *King* v. *Ackerman*, 2 Black, 408; *Barber* v. *Pittsburg &c. Railway*, 166 U. S. 109; *Allen* v. *Allen*, 18 How. 385; *West* v. *Fitz*, 109 Illinois, 438; Powell on Devises, Jarman, § 379; 2 Jarman on Wills.

If the limited construction of the several devises to life estates only is declared, it must result that the testator,

Hugh McCaffrey, died intestate as to the remainder after the expiration of the life estates, for there is no residuary devise, or other language to dispose of the remainders. It is unreasonable to suppose that this was the testator's intention. *Kennedy* v. *Alexander*, 21 App. D. C. 424; *Hardenburgh* v. *Ray*, 151 U. S. 112; *Abbott* v. *Essex Co.*, 18 How. 202. The other devisees took fee simples also.

Where from the fact of such condition in one of several devises, it is manifest the testator intended to pass a fee in such devise, the fact that in the others he has used similar terms (although without attaching conditions), will, in the absence of words of contrary import, establish a like intent in those other devises, and the beneficiaries will take in fee. Cases cited *supra* and *Cook* v. *Holmes*, 11 Massachusetts, 529; *Butler* v. *Butler*, 2 Mackey, 96, 104; *White* v. *Creushaw*, 5 Mackey, 113.

Mr. Edwin Forrest and *Mr. A. A. Hoehling, Jr.*, for appellees:

A devise without words of limitation or inheritance passes only a life estate. The authorities sustaining it are uniform in every jurisdiction, and the same rule of decision obtains in the District of Columbia, with the exception only of cases coming within the provisions of the Code, of which, however, the case at bar is not one. 2 Jarman on Wills, 267; 2 Redfield on Wills, 321; *Farrar* v. *Ayres*, 5 Pick. 404; *McAleer* v. *Schneider*, 2 App. D. C. 461; *McCaffrey* v. *Little*, 20 App. D. C. 116; *Wright* v. *Denn*, 10 Wheat. 204, 236. And this is so notwithstanding the testator in the will may have declared an intention to dispose of his whole estate, although here there is absolutely no expression by testator of any intention to dispose by will of his entire estate in the property, nor does he attempt to dispose by will of his entire property.

The Quigley devise cannot be enlarged by legal implication to a fee. The directions to her were not a charge upon her devise. *Buggens* v. *Yeates*, 8 Vin. Abr. 72; 1 Jarman on Wills, 387; *Wright* v. *Denn*, 10 Wheat. 204, 236; *Jackson* v. *Harris*,

8 Johnson, 142; *Burlingham* v. *Belding*, 21 Wend. 463; *Turnbake* v. *Parker*, 2 MacA. 444; *Moor* v. *Mellor*, 5 Durnf. & East. 284; *S. C.*, 1 Bos. & Pul. 558; *S. C.*, 2 Bos. & Pul. 247, 253.

Even if the Quigley devise is so enlarged the other devises in the will are not aided thereby.

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

It will be observed that the devises are expressed in exactly the same way. To Mary A. Quigley, however, there are given several pieces of real estate, the money of the testator in bank and his building association stock. She is charged with the payment of the testator's funeral expenses and debts; also with the care of his cemetery lot. Nevertheless, neither of the lower courts distinguished between the devisees—to all was applied the rule of law that a devise of land without words of limitation or description gives a life estate only. The Court of Appeals held that the charge or burden upon Mary A. Quigley to pay the funeral expenses and debts of the testator was offset by the gift to her of personal property. It is insisted that the ruling is contrary to the decision in *King* v. *Ackerman*, 2 Black, 408. It is there said: "The rule of law which gives a fee, where the devisee is charged with a sum of money, is a technical dominant rule, and intended to defeat the effect" of the artificial rule established in favor of the heir at law, that an indefinite devise of land passes nothing but a life estate. It was, however, apparent to the Court of Appeals that, to follow *King* v. *Ackerman*, would not execute the intention of the testator by opposing one technical rule by another, but would discriminate between his heirs and destroy the equality between them which it was the purpose of the will to create. To effect this equality the court selected, not the "dominant rule," whose virtue this court pointed out, but the other, regarding it the most commanding. It is altogether a strange tangle of technicalities. Apply either of them, or both

of them, and we defeat the intention of the testator. Are we reduced to this dilemma? We think not; nor need we dispute the full strength of the rule in favor of the heir at law. It is not an unyielding declaration of law. It cannot be applied when the intention of the testator is made plain. It cannot be applied when the purpose of the testator, as seen in the will, cannot be carried out by a devise of a less estate than the fee. *Bell County* v. *Alexander*, 22 Texas, 350. The policy of the law in favor of the heir yields, we repeat, to the intention of a testator if clearly expressed or manifested. That policy, the reason for it and the elements of it, is expressed strongly by Mr. Justice Story in *Wright* v. *Denn ex dem. Page*, 10 Wheat. 204, 227, 228:

"Where there are no words of limitation to a devise, the general rule of law is, that the devisee takes an estate for life only, unless, from the language there used, or from other parts of the will, there is a plain intention to give a larger estate, we say, a plain intention, because, if it be doubtful or conjectural, upon the terms of the will, or if full legal effect can be given to the language, without such an estate, the general rule prevails. It is not sufficient, that the court may entertain a private belief that the testator intended a fee; it must see that he has expressed that intention, with reasonable certainty, on the face of his will. For the law will not suffer the heir to be disinherited upon conjecture. He is favored by its policy; and though the testator may disinherit him, yet the law will execute that intention only when it is put *in a clear and unambiguous shape*." (Italics ours.)

We think the intention of McCaffrey is "put in a clear and unambiguous shape." He intended to dispose of his whole estate. It is true there is no introductory clause expressing such intention, but there is no residuary clause indicating that he intended to pass less than all of his estate. And all of his heirs at law were his devisees. In other words, the very heirs for whom the rule is invoked are those among whom he distributed his property, and surely he intended a

complete distribution—to vest in each the largest interest he could give, not assigning life estates with residuary fees to the very persons to whom such life estates were devised. In other words, making each heir the successor of the other and of himself. It was evident to the Court of Appeals—it is evident to us—that he intended to make his heirs equal. Of this purpose the charge upon his daughter, Mary A. Quigley, is dominantly significant, not only in effect, but in its expression. She is given a greater quantity of real estate than the other devisees. She is given personal property besides, but, declared the testator, "she is to pay funeral expenses and other legal debts I may owe, also to care for my lot in Mount Olivet Cemetery." That charge was not intended to enlarge the quantity of interest in the real estate devised in the sense contended for, but to make an equality between her and the other heirs and devisees, and, we repeat, that was his especial purpose. In other words, he gave her more property, not a larger interest in it. The devise to his grandson, Frank Foley, shows how carefully the testator regarded his heirs. Surely, as he regarded that grandchild as inheriting the rights which his mother might have inherited, he did not intend a disposition of his property which precluded his other grandchildren of inheriting through their parents. And this will be the result if the appellees are right. No devisee possesses an estate which can be devised to or inherited by his or her children.

Against the effect of the heirs at law of the testator being also his devisees, it may be said that it has been held that, though a testator has given a nominal legacy to his heir or declared an intention to wholly disinherit him, the inflexibility of the rule in favor of the heir has been enforced. *Frogmorton* v. *Wright*, 2 W. Bl. 889; *Roe d. Callow* v. *Bolton*, 2 W. Bl. 1045; *Right* v. *Sidebotham*, 2 Douglas, 730; *Roe d. Peter* v. *Daw*, 3 M. & Sel. 518.

In *Right* v. *Sidebotham*, Lord Mansfield felt himself constrained to enforce the rule, but he observed in protest: "I

verily believe, that, in almost every case where by law a general devise of land is reduced to an estate for life, the intent of the testator is thwarted; for ordinary people do not distinguish between real and personal property. The rule of law, however, is established and certain, that express words of limitation, or words tantamount, are necessary to pass an estate of inheritance." And he hence concluded that words tending to disinherit the heir at law, unless the estate is given to some one else, were not sufficient to prevent the heir from taking.

Lord Ellenborough in *Roe* v. *Daw* followed the rule, and declared also that he thereby probably defeated the intention of the testator. It is a strange conclusion from the facts and needs the sanction of those great names to rescue it from even stronger characterization. Lord Mansfield spoke in 1781, Lord Ellenborough in 1815. We cannot believe, if called upon to interpret a will made in 1896, when the rights of heirs are not so insistent and the rule in their favor lingers, where it lingers at all, almost an anachronism; when ownership of real property is usually in fee, and when men's thoughts and speech and dealings are with the fee, they would hold that the purpose of a testator to disinherit his heirs could be translated into a remainder in fee after a devise of a life estate to another.

But, perhaps, even the severe technicality of those cases need not be questioned. In the construction of wills we are not required to adhere rigidly to precedents. We said in *Abbott et ux.* v. *Essex Co.*, 18 How. 202, 213:

"If wills were always drawn by counsel learned in the law, it would be highly proper that courts should rigidly adhere to precedents, because every such instrument might justly be presumed to have been drawn with reference to them. But in a country where, from necessity or choice, every man acts as his own scrivener, his will is subject to be perverted by the application of rules of construction of which he was wholly ignorant."

To like effect is *Cook et al.* v. *Holmes et ux.*, 11 Massachusetts, 528, where the will passed on contained the following devise:

"*Item.* To his grandson Gregory C., only child of his son Daniel C., deceased, a certain piece of land in Watertown, containing about six acres." The will contained devises to other sons of pieces of real estate, charging them with payment of certain legacies. The will concluded as follows: "The above-described legacies, together with what I have heretofore done for my children and grandchildren, make them nearly equal, and are their full portions of my estate."

The will, therefore, is similar to the will in the case at bar. Equality between the devisees is as much the purpose of one as the other, though it is expressed in one and deduced as an implication in the other. Chief Justice Parker, in delivering the opinion of the court, said: "The quality of the estate which Gregory C. took by the devise must be determined by the words of the will, taken together, and receiving a liberal construction, to effectuate the intention of the testator, as manifested in the will."

Further: "The words of the particular devise to Gregory, considered by themselves, certainly give no inheritance." And stating the rule of law to be, as contrasted with the popular understanding, "that such a devise, standing alone, without any aid in the construction from other parts of the will, would amount only to an estate for life in the devisee," added:

"But it is too well established and known to require argument or authority now to support the position, that devises and legacies in a will may receive a character, by construction and comparison with other legacies and devises in the same will, different from the literal and direct effect of the words made use of in such devise; [Cases were cited in note] and this because the sole duty of the court, in giving a construction, is to ascertain the real intent and meaning of the testator; which can better be gathered by adverting to the whole scope of the provisions made by him for the objects of his bounty, than by confining their attention to one isolated paragraph, probably drawn up without a knowledge of technical words, or without recollecting the advantage of using them."

The devise to Gregory C. was held to be of the fee.

From these views it follows that the decree of the Court of Appeals must be and it is reversed, and the case is remanded to that court with directions to reverse the decree of the Supreme Court, and remand the case to that court with directions to enter a decree in accordance with this opinion.

MR. JUSTICE PECKHAM dissents.

UNITED STATES *v.* MONTANA LUMBER AND MANUFACTURING COMPANY.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 125. Argued January 13, 1905.—Decided February 20, 1905.

While the grant to the Northern Pacific Railroad Company under the act of July 2, 1864, was *in præsenti*, and took effect upon the sections granted when the road was definitely located, by relation as to the date of the grant, the survey of the land and the identification of the sections—whether odd or even—is reserved to the Government, and the equitable title of the railroad company and its assigns becomes a legal title only upon the identification of the granted sections. Until the identification of the sections by a government survey the United States retains a special interest in the timber growing in the township sufficient to recover the value of timber cut and removed therefrom.

In a suit brought by the United States for that purpose private surveys made by the railroad company cannot be introduced as evidence to show that the land from which the timber was cut were odd sections within the grant and included in a conveyance from the railroad company to the defendants.

ACTION by the United States against the Montana Lumber Company and the other defendants for the recovery of $15,000, for the value of 2,000,000 feet of lumber which had been cut by the lumber company on unsurveyed lands within the District of Montana, and converted by the defendants to their own

use. It is alleged that the land from which the lumber was cut when surveyed will be in township 26 N., of range 34 W., of the Montana meridian. The railway company answered separately denying the allegations of the complaint. The other defendants also denied the allegations of the complaint. Further answering, they admitted the cutting of the lumber, but alleged it was cut from land which, when surveyed, would be section 5 of said township, and that said section was within the limits of the grant made by Congress to the Northern Pacific Railroad Company, and that the lumber company was at the time of the cutting the owner of the lands by conveyances from the railway company.

The case was tried to a jury. A nonsuit was granted as to the railway company. Under instructions of the court a verdict was returned for the other defendants.

On the trial of the case the lumber company was permitted to introduce in evidence, over the objection of the plaintiff, a private survey of a portion of the township made by one John J. Ashley, a civil engineer and surveyor, in the year 1886, for the Northern Pacific Railway Company, for the purpose of ascertaining the location of the railroad sections contained in said township, in connection with other evidence that the timber sued for was taken from what Ashley had designated as section 5.

In rebuttal of this evidence the plaintiff offered to prove by George F. Rigby, a surveyor and engineer, that he had made a survey of the same lands, and that the Ashley survey was incorrect, and that section 5 as located by Ashley had been placed three-fourths of a mile too far east. The court ruled out the testimony. From the judgment entered upon the verdict for the defendants the case was taken by writ of error to the Circuit Court of Appeals. Whereupon the latter court stated the facts substantially as above, and recited that there were two other cases pending involving the same questions, and that the court was divided in opinion, and certified to this court the following questions:

"First. Did the District Court for the District of Montana err in admitting in evidence the proof of the survey made by Ashley and the proof tending to show that the timber cut by the Montana Lumber and Manufacturing Company had been cut on what will be, when surveyed by the United States, section 5 of township 26 north, of range 34 west, Montana meridian?

"Second. Did the court err in excluding the evidence offered, on behalf of the plaintiff in error, tending to show that the Ashley survey was erroneous?

"Third. Did the court err in instructing the jury to return a verdict for the defendants in error on the ground that the United States had failed to prove its ownership of the land from which the timber was cut?"

Mr. Marsden C. Burch, Special Assistant to the Attorney General, with whom *The Solicitor General* was on the brief, for the United States:

A sovereign makes its own surveys and fixes the boundaries of its grants. The Ashley survey, made under the direction of the railway company, was incompetent, and the fact that Ashley testified that it was made after the method of Government surveys did not relieve it of its vice.

A grantee cannot establish the boundaries of his grant by his own survey, nor can a court of justice do so. *Cooper* v. *Roberts*, 18 How. 175; *Cragin* v. *Powell*, 128 U. S. 691; *Robinson* v. *Forest*, 29 California, 325; *Maguire* v. *Tyler*, 8 Wall. 660, 661; *United States* v. *McLaughlin*, 127 U. S. 428; *Grogan* v. *Knight*, 27 California, 519; *Middleton* v. *Low*, 30 California, 605; *Blake* v. *Doherty*, 5 Wheat. 358; *United States* v. *Hanson*, 16 Pet. 194; *Les Bois* v. *Bramell*, 4 How. 449; *Mackey* v. *Dillon*, 4 How. 448; *Glenn* v. *United States*, 13 How. 256; *Smith* v. *United States*, 10 Pet. 326.

The court erred in excluding the evidence offered by the Government tending to show that the Ashley survey was erroneous and also erred in instructing the jury to return a

verdict for defendants on the ground that the Government had failed to prove its ownership of the land from which the timber was cut.

It is true while some authorities hold that the grant to the Northern Pacific Railroad Company was a grant *in præsenti*, it is also true that no title can pass to any particular land until the regular official survey has been made, for until then there is no identification of the land granted. Therefore the Government, by its proof of the fact that township 26 was Government land, sustained the allegations of its complaint, and the defendants were therefore forced to disprove the Government's case if they could. This they sought to do by the same evidence which they were to offer in support of their special plea. If, then, such evidence was incompetent, it neither disproved the Government's case nor proved their special plea.

Outside of the thirteen original States of the Union we have been unable to find that any court has ever decided, or that any counsel has ever made the claim, that it was necessary that the United States, being the party plaintiff, should prove the title to its land. As in England primarily all lands were property of the Crown, so in the United States all lands outside of the said original States are presumed to belong to the United States, and any party claiming a title adverse to the Government must prove his way from the Government by a regular chain to himself. *Northern Pacific R. R. Co.* v. *Hussey*, 61 Fed. Rep. 231; *Deseret Salt Co.* v. *Tarpey*, 142 U. S. 241; *United States* v. *Loughrey*, 172 U. S. 206.

There was no brief or appearance for defendant in error.

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

In the view we take of the case the answer to the second question becomes unnecessary. The answer to the first and third depends upon the effect of the grant to the Northern Pacific Railroad Company by the act of July 2, 1864.

The third section of that act contains the usual granting words: "That there be, and hereby is, granted to the 'Northern Pacific Railroad Company,' its successors and assigns," every alternate section of public land, not mineral, designated by odd numbers, on each side of the line of the railroad when definitely fixed.

It has been decided many times that such grants are *in præsenti*, and take effect upon the sections of the land when the road is definitely located, by relation as to the date of the grant. But the survey of the land is reserved to the Government (section 6); in other words, the identification of the sections—whether odd or even—is reserved to the Government; and by the act of July 15, 1870, making appropriations for the sundry civil expenses of the Government for the year ending June 30, 1871, it was provided, in regard to the grant to the Northern Pacific Railroad Company, that the cost of surveying must be paid by the company, and no conveyance should be made of the lands until such cost be paid. On account of that provision it was held in *Northern Pacific Railroad Company* v. *Traill County*, 115 U. S. 600, that the land of a railroad company was not subject to taxation. It was said, "to secure the payment of those expenses, it (the Government) decided to retain the legal title in its own hands until they were paid." See also *New Orleans Pacific Railway Co.* v. *United States*, 124 U. S. 124. The equitable title becomes a legal title only upon the identification of the granted sections. *Deseret Salt Co.* v. *Tarpey*, 142 U. S. 241. As expressed in *Leavenworth &c. Railroad Co.* v. *United States*, 92 U. S. 733, 741, "They" (the words "there be and is hereby granted") "vest a present title, . . . though a survey of the lands and a location of the road are necessary to give precision to it, and attach it to any particular tract." The right of survey is in the United States. It was error, therefore, in the trial court to admit the survey made by Ashley. It was also error to instruct the jury to return a verdict for the defendants. Until the identification of the even and odd-numbered sections the

United States retained a special property, at least, in the timber growing in the township; and this was sufficient to enable it to recover the value of the timber cut and removed by the defendants. A contrary conclusion would impair the Government's right of survey and force it into controversies over surveys made by the railroad or its grantees. It would enable the railroad company or its grantees to despoil the lands of their timber and leave them denuded, and, may be worthless, to the Government. Indeed it would reverse the statutory grant of powers and transfer the location of the sections from the Government to the railroad company. The extent and the effect of the power of the Government to make its own surveys is expressed and illustrated in the following cases: *Maguire* v. *Tyler*, 8 Wall. 650; *Cragin* v. *Powell*, 128 U. S. 691; *United States* v. *McLaughlin*, 127 U. S. 428; *Blake* v. *Doherty*, 5 Wheat. 358; *Central Pacific Railroad Co.* v. *Nevada*, 162 U. S. 512; *United States* v. *Hanson*, 16 Pet. 196; *Les Bois* v. *Bramell*, 4 How. 449; *Mackey* v. *Dillon*, 4 How. 421; *Glenn* v. *United States*, 13 How. 250; *Smith* v. *United States*, 10 Pet. 326.

There is nothing in *Northern Pacific Railroad Company* v. *Hussey*, 61 Fed. Rep. 231, which militates with these views. In that case relief was granted by injunction against a trespasser upon unsurveyed land at the suit of the railway company, its contingent interest being held sufficient for that purpose. The paramount control and property in the United States was not in question.

We, therefore, answer the first and the third question certified by the Circuit Court of Appeals in the affirmative.

Mr. Justice Brewer concurs in the result.

DOCTOR v. HARRINGTON.

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

No. 477. Submitted January 25, 1905.—Decided February 20, 1905.

The presumption of law that stockholders are deemed to be citizens of the State of the corporation's domicil must give way to the actual fact proved that complainant is a citizen of a different State from the corporation, and in such a case the stockholder, if other conditions of jurisdiction exist can bring his suit against the corporation in the Circuit Court of the United States.

The ninety-fourth rule in equity contemplates and provides for a suit brought by a stockholder against the corporation and other parties on rights which may be properly asserted by the corporation, and when such a suit is between citizens of different States and is not collusive, but the corporation is controlled by interests antagonistic to complainant, it involves a controversy which is cognizable in a Circuit Court of the United States, and the defendant corporation is not to be classed on the same side of the controversy as complainant for the purpose of determining the diversity of citizenship on which the jurisdiction of the Circuit Court must rest.

THE bill in this case was dismissed by the Circuit Court on the ground that it had no jurisdiction upon the fact alleged, and certified to this court the question of jurisdiction. The following is the question certified:

"Whether or not the complainants' bill of complaint showed that there was such diversity of citizenship between the parties complainant and parties defendant in this cause as would be sufficient under the provisions of the United States Revised Statutes to confer jurisdiction upon the United States Circuit Court for the Southern District of New York, of this cause."

The court further certified that it entered a decree dismissing the bill, "holding that it appeared from the said bill of complaint that there was no such diversity of citizenship between the parties complainant and defendant as would confer

jurisdiction upon the United States Circuit Court for the Southern District of New York in the cause within the meaning of the United States Revised Statutes, and that in arranging the parties to this cause relatively to the controversy the Sol Sayles Company must be grouped on the side of the complainants, with the result that citizens of the same State would thus be parties on both sides of the litigation, and thus deprive this court of jurisdiction."

The bill is very voluminous, and, as it is agreed by appellees that the statement of appellants substantially states its allegation, we quote from appellants' brief as follows:

"This action was brought by the appellants, as stockholders of the Sol Sayles Company, a corporation organized under the laws of the State of New York, for the purpose of vacating and setting aside a judgment obtained by the appellees Harrington against the Sol Sayles Company in the Supreme Court of the State of New York, on October 28, 1902, and the levy and sale under an execution issued thereunder, and of requiring the appellees Harrington to deliver to the Sol Sayles Company certain shares of stock in the Sayles, Zahn Company, and certain bonds, belonging to the Sol Sayles Company, which had been sold under such execution, and for other equitable relief.

"In substance, the complainants allege in their bill of complaint that they are citizens of Morris County, New Jersey; that the defendants Harrington are citizens of the State of New York, and that the defendants Sol Sayles Company and Sayles, Zahn Company are likewise citizens of said State, both being incorporated under the laws of that State; that the Sol Sayles Company was organized with a capital stock of $100,000, divided into 1,000 shares of the par value of $100 per share, of which the complainants owned 500 shares and the defendants Harrington 500 shares; that by an arrangement made between the owners of the stock, the voting power on a majority thereof was given to the defendant John J. Harrington, who directed the management of the affairs of the corporation, dictated its

policy, and selected its directors; that on January 26, 1898, the defendant John J. Harrington caused the defendant Sayles, Zahn Company to be organized, for the purpose of taking over the business of the defendant Sol Sayles Company and of one Henry Zahn, and thereupon the property of the Sol Sayles Company and of Zahn was transferred to the Sayles, Zahn Company, which likewise was controlled by the defendant John J. Harrington; that the Sol Sayles Company received, in consideration of the transfer of its property, $50,000 of the capital stock of the Sayles, Zahn Company, and subsequently subscribed for $50,000 additional stock.

"It is further alleged that about February 1, 1899, the defendants Harrington, for the purpose of cheating and defrauding the Sol Sayles Company, and the complainants, of their interest in the assets of the Sayles, Zahn Company, fraudulently caused the Sol Sayles Company to execute and deliver to them, without any consideration whatsoever, its promissory notes, aggregating $23,700, which were utterly fictitious, and thereafter, and on October 3, 1902, the defendants Harrington, in furtherance of their fraudulent scheme, caused an action to be instituted and a judgment to be recovered against the Sol Sayles Company, for the amount of the said promissory notes and interest which was alleged to have accrued thereon, the Sol Sayles Company being in utter ignorance of the nature of the action and omitting to interpose any defense thereto.

"This scheme resulted in the recovery of a judgment against the defendant Sol Sayles Company on October 28, 1902, for $27,357.28, in favor of the defendants Harrington, who thereupon caused an execution to be issued to the sheriff of the county of New York, against the property and assets of the Sol Sayles Company, under which execution the said sheriff levied on the shares of stock in the Sayles, Zahn Company, and also two bonds of the New Jersey Steamboat Company, which belonged to the Sol Sayles Company, and sold all of the right, title and interest of the Sol Sayles Company in the said certificates of stock and in the said bonds, the said defendants

Harrington causing them to be purchased for their own benefit; said shares of stock being then, as the defendants Harrington well knew, and have ever since continued to be, worth upwards of $200,000.

"It further alleged that the complainants caused a demand to be made upon the defendants Harrington, that they transfer the said shares of stock and the said bonds to the Sol Sayles Company, but that they have refused to do so, and have insisted that these shares of stock and bonds are their personal and individual property, and that neither the Sol Sayles Company nor their complainants have any right, title or interest in either the said shares of stock or the said bonds, or any part thereof.

"The twentieth paragraph of the bill of complaint is as follows:

" 'The complainants were and each of them was a shareholder of the defendant Sol Sayles Company at the time of the transactions herein complained of. This suit is not a collusive one to confer upon a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. The complainants are unable to secure any corporate action on the part of the defendant Sol Sayles Company to redress the wrongs hereinbefore set forth, nor are they able to obtain any redress at the hands of the stockholders of the said defendant Sol Sayles Company. The board of directors of said corporation is under the absolute control and domination of the defendant John J. Harrington, and the said Harrington, by reason of having possession of a majority of the capital stock of the said corporation, likewise controls the action of the stockholders. Although requested for information with regard to the facts hereinbefore set forth, he has refused to give any information with regard thereto, and has declined to redress the wrongs of which complaint is herein made, or to give to the complainants any opportunity to lay before the board of directors or the stockholders of the defendant Sol Sayles Company the facts herein set forth.' "

Mr. Charles A. Hess for appellants:

There is diversity of citizenship between complainants and defendants, the former being citizens of New Jersey and the latter of New York.

Appellees' contention that appellants are estopped or debarred from asserting the actual facts as to diversity of citizenship because stockholders are presumed to be citizens of the same State as the corporation, may on its face be good reasoning, but it is based entirely on a legal fiction, which has been indulged for the purpose of enabling the Federal courts to exercise jurisdiction over corporations. Legal fictions, however, are not always carried out to their logical conclusion, and this court has entertained jurisdiction in numerous instances, where precisely the same state of facts existed as in the present case. Among the more important precedents are the following: *Dodge* v. *Woolsey*, 18 How. 331; *Hawes* v. *Oakland*, 104 U. S. 450; *Quincy* v. *Steel*, 120 U. S. 241; *Pollock* v. *Farmers' L. & T. Co.*, 157 U. S. 429; *Cotting* v. *Kansas City Stock Yard Co.*, 183 U. S. 79; *Utah-Nevada Co.* v. *DeLamar*, 133 Fed. Rep. 113.

Even though complainants are seeking to maintain this action in the right of the Sol Sayles Company, in view of the trend of authority that fact is not entitled to weight as against the circumstances that such company is in fact a defendant. *De Neufville* v. *N. Y. & Northern Ry. Co.*, 81 Fed. Rep. 10, 13.

Mr. Philip J. Britt and *Mr. John J. Adams* for appellees:

There is no such diversity of citizenship between the complainants and defendants as is required under the Federal statutes. Complainants sue, not in their own right, but as stockholders of the Sol Sayles Company, and are, therefore, to be conclusively presumed, for purposes of jurisdiction, to be citizens of New York. See also rule 94 in equity.

The action is brought in the right of the corporation. *Davenport* v. *Dows*, 18 Wall. 626; *Dewing* v. *Perdicaris*, 96 U. S. 197; *Porter* v. *Sabin*, 149 U. S. 473; *Dickerman* v. *Northern*

Trust Co., 176 U. S. 188; *Alexander* v. *Donohoe*, 143 N. Y. 203; *Flynn* v. *Brooklyn City R. R. Co.*, 158 N. Y. 493. As to different classes of stockholders' actions and where the damages belong to the corporation and not to individual stockholders see *Niles* v. *N. Y. C. & H. R. R. Co.*, 176 N. Y. 119; *Smith* v. *Hurd*, 12 Metc. 371; *Allen* v. *Curtis*, 26 Connecticut, 456. As to the status of corporations as citizens and the stockholders being of the same State as that under whose laws the corporation is organized see *Bank of U. S.* v. *Deveaux*, 5 Cranch, 61; *Hope Ins. Co.* v. *Boardman*, 5 Cranch, 57; *Sullivan* v. *Fulton Steamboat Co.*, 6 Wheat. 540; *Breithaupt* v. *Bank of Georgia*, 1 Pet. 238; *Commercial Bank* v. *Slocomb*, 14 Pet. 60; *Louisville &c. R. R. Co.* v. *Letson*, 2 How. 497, 558; *Marshall* v. *B. & O. R. R. Co.*, 16 Ohio St. 314, 328; *Drawbridge Co.* v. *Shepherd*, 20 How. 227, 233; *Ohio & Miss. R. R.* v. *Wheeler*, 1 Black, 286, 296; *Muller* v. *Dows*, 94 U. S. 444; *Steamship Co.* v. *Tugman*, 106 U. S. 118, 121; *Memphis & Charleston R. R.* v. *Alabama*, 107 U. S. 581; *Shaw* v. *Quincy Mining Co.*, 145 U. S. 444, 451; *St. Louis & San Francisco Railway Co.* v. *James*, 161 U. S. 545; *Barrow S. S. Co.* v. *Kane*, 170 U. S. 100; *Southern Ry. Co.* v. *Allison*, 190 U. S. 326; *Great Southern Fire Proof Hotel Co.* v. *Jones*, 177 U. S. 456; *Taylor* v. *Illinois Central Ry. Co.*, 89 Fed. Rep. 119; *Thomas* v. *Board of Trustees*, 195 U. S. 207; cases cited by appellants and *Hanchett* v. *Blair*, 100 Fed. Rep. 817, are not in point, and as to rule 94 in equity see *Davis & Farnum Mfg. Co.* v. *Los Angeles*, 189 U. S. 220.

The complainants are suing solely for the benefit of the Sol Sayles Company and that corporation, although in form a defendant, is, in legal effect, on the same side of the controversy as the complainants. *Arapahoe County* v. *Railway Co.*, 4 Dillon, 277; *Walden* v. *Skinner*, 101 U. S. 589; and see also as to where defendants may be on same side as complainants, *Covert* v. *Waldron*, 33 Fed. Rep. 311; *The Removal Cases*, 100 U. S. 457; *Pacific Railroad* v. *Ketchum*, 101 U. S. 289; *Harter* v. *Kernochan*, 103 U. S. 562; *Evers* v. *Watson*, 156 U. S. 532;

Brown v. *Truesdale*, 138 U. S. 389, 395; *Merchants Cotton Press Co.* v. *N. A. Ins. Co.*, 151 U. S. 385; *Wilson* v. *Oswego Agency*, 151 U. S. 63; *Cilly* v. *Patton*, 62 Fed. Rep. 498; *Board of Trustees* v. *Blair*, 70 Fed. Rep. 414; *Consol. Water Co.* v. *Babcock*, 76 Fed. Rep. 642; *Shipp* v. *Williams*, 62 Fed. Rep. 4; *Gardner* v. *Brown*, 21 Wall. 36; *Pittsburg, C. & St. L. Ry. Co.* v. *B. & O. R. R. Co.*, 61 Fed. Rep. 705; *Boston Safe Dep. & Tr. Co.* v. *Racine*, 97 Fed. Rep. 817; *Old Colony Trust Co.* v. *Altanta Ry. Co.*, 100 Fed. Rep. 798; 1 Foster's Federal Practice, 64.

The lack of jurisdiction of the court can be raised at any stage of the litigation, and even though the appellees had not raised the question, the court could, of its own motion, have dismissed the cause for want of jurisdiction. *Grace* v. *Am. Cen. Ins. Co.*, 109 U. S. 278, 283; *Mexican Cen. R. R. Co.* v. *Pinkney*, 149 U. S. 194; *Thomas* v. *Board of Trustees*, 195 U. S. 207.

Mr. George H. Yeaman by leave of the court filed a brief as *amicus curiæ* contending that diversity of citizenship did not exist and that the Circuit Court had no jurisdiction of the case.

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

To sustain the action of the Circuit Court in dismissing the bill the argument is as follows: (1) By a conclusive presumption of law the stockholders of a corporation are deemed to be citizens of the State of the corporation's domicile. (2) Granting that the complainants are citizens of New Jersey, yet as they are suing for the Sol Sayles Company, a New York corporation, that corporation, although in form a defendant, is in legal effect on the same side of the controversy as the complainants, and since it is a citizen of the same State as the other defendants, the Circuit Court had no jurisdiction, as the suit

does not involve a controversy between citizens of different States.

1. This is based on the assumption adopted by this court, that stockholders of a corporation are citizens of the State which created the corporation—an assumption physically possible but hardly true in a single instance; and appellants here contend that it should be classed with the fictions of the law and subject to one of their fundamental maxims, and cannot be carried beyond the reasons which caused its adoption necessarily requisite. It is, however, more of a presumption than a fiction, but whether we regard it as either it cannot be pushed to the end contended for by appellees.

The reason of the presumption (we will so denominate it) was to establish the citizenship of the legal entity for the purpose of jurisdiction in the Federal courts. Before its adoption difficulties had been encountered on account of the conditions under which jurisdiction was given to those courts. A corporation is constituted, it is true, of all its stockholders, but it has a legal existence separate from them—rights and obligations separate from them; and may have obligations to them. It can sue and be sued. At first this could be done in the Circuit Court of the United States only when the corporation was composed of citizens of the State which created it. *Bank of United States* v. *Deveaux*, 5 Cranch, 61; *Hope Insurance Company* v. *Boardman*, 5 Cranch, 57. But the limitation came to be seen as almost a denial of jurisdiction to or against corporations in the Federal courts, and in *Louisville &c. Railroad Company* v. *Letson*, 2 How. 497, prior cases were reviewed; and this doctrine laid down:

"That a corporation created by and doing business in a particular State, is to be deemed to all intents and purposes as a person, although an artificial person, . . . capable of being treated as a citizen of that State, as much as a natural person." And "when the corporation exercises its powers in the State which chartered it, that is its residence, and such an averment is sufficient to give the Circuit Courts jurisdiction."

The presumption that the citizenship of the corporators should be that of the domicil of the corporation was not then formulated. That came afterwards, and overcame the difficulty and objection that the legal creation, the corporation, could not be a citizen within the meaning of the Constitution. *Marshal* v. *B. & O. Railroad Company,* 16 How. 314. This, then, was its purpose, and to stretch beyond this is to stretch it to wrong. It is one thing to give to a corporation a status, and another thing to take from a citizen the right given him by the Constitution of the United States. Disregarding the purpose of the presumption, it is easy to represent it, as counsel does, as illogical if not extended to every stockholder; but as easy it would be to show its falseness if so applied. But such charges and countercharges are aside from the question. To the fact and place of incorporation the law attaches its presumption for a special purpose. Perhaps, as intimated in *St. Louis & San Francisco Ry.* v. *James,* 161 U. S. 545, 563, this "went to the very verge of judicial power." Against the further step urged by appellees we encounter the Constitution of the United States.

2. The ninety-fourth rule in equity contemplates that there may be, and provides for, a suit brought by a stockholder in a corporation founded on rights which may properly be asserted by the corporation. And the decisions of this court establish that such a suit, when between citizens of different States, involves a controversy cognizable in a Circuit Court of the United States. The ultimate interest of the corporation made defendant may be the same as that of the stockholder made plaintiff, but the corporation may be under a control antagonistic to him, and made to act in a way detrimental to his rights. In other words, his interests, and the interests of the corporation, may be made subservient to some illegal purpose. If a controversy hence arise, and the other conditions of jurisdiction exist, it can be litigated in a Federal court.

In *Detroit* v. *Dean,* 106 U. S. 537, Dean, who was a citizen

of New York and a stockholder in the Mutual Gas Light Company, a Michigan corporation, in order to protect its right and property against the threatened action of a third party brought suit against the latter and the corporation in the Circuit Court of the United States for the Eastern District of Michigan. This court ordered the bill dismissed, not because Dean and the corporation had identical interests, but because the refusal of the directors of the corporation to sue was collusive. The right of a stockholder to sue a corporation for the protection of his rights was recognized, the condition only being the refusal of the directors to act, which refusal, it is said, must be real, not feigned. *Hawes* v. *Oakland*, 104 U. S. 450, was cited, where a like right was decided to exist. See also *Dodge* v. *Woolsey*, 18 How. 331; *Davenport* v. *Dows*, 18 Wall. 626; *Memphis* v. *Dean*, 8 Wall. 64; *Greenwood* v. *Freight Company*, 105 U. S. 13; *Quincy* v. *Steel*, 120 U. S. 241. It was said in *Dodge* v. *Woolsey*, that the refusal of the directors to sue caused them and Woolsey, who was a stockholder in a corporation of which they were directors, "to occupy antagonistic grounds in respect to the controversy, which their refusal to sue forced him to take in defense of his rights." *Dodge* v. *Woolsey* was modified by *Hawes* v. *Oakland*, as to what circumstances would justify a suit by a stockholder if the directors refuse to sue. See also *Quincy* v. *Steel*, *supra*.

The case at bar is brought within the doctrine of those cases by the allegations of the bill. The defendant corporations are alleged to be under the control of John J. and Dennis A. Harrington, and that complainants are unable to secure any corporate action on the part of the defendant, the Sol Sayles Company, to redress the wrongs complained of. It is also alleged that the Harringtons control the action of the stockholders, and have declined to redress the wrongs complained of or give complainants any opportunity to lay before the board of directors or the stockholders of the Sol Sayles Company the facts alleged. It is also alleged the suit is not collusive. It is manifest that if the matter alleged be true, com-

plainants will suffer irremediable loss if not permitted to sue, and as they had a cause of action they rightly brought it in the Circuit Court of the United States.

Decree reversed.

THE GERMANIC.

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

No. 128. Argued January 13, 16, 1905—Decided February 20, 1905.

A foreign vessel from Liverpool arrived at its destination, New York, and made fast to the wharf. Owing to unusual gales and weather she was heavily weighted with snow and ice and made top heavy. While the cargo was being unloaded she suddenly rolled over and sank, damaging the cargo remaining in her, some of which had been shipped from points east of Liverpool on bills of lading to Liverpool, thence to be forwarded to New York, and containing certain exemptions of the carrier from liability. The owners and insurers of cargo libelled the vessel; it was found by the District Court and the Circuit Court of Appeals that the damage was due to negligence in unloading cargo and ruled that the negligence fell within section one of the Harter Act and not within section three of the same as negligence in the navigation or management of the vessel. *Held*, that:

This court will not go behind the findings of the two courts as to negligence and that the rule was correct.

When a case may fall under section one and section three of the Harter Act the question which section is to govern must be determined by the primary nature and object of the acts which cause the loss.

Semble. The standard of conduct is external and not merely co-extensive with the judgment of the individual.

The Harter Act will be applied to foreign vessels in suits brought in the United States, and where claimants set up and rely upon the act they must take the burden with the benefits and cannot claim a greater limitation of liability under provisions of bills of lading.

THE facts are stated in the opinion.

Mr. Everett P. Wheeler for petitioner:

The Harter Act exempts the ship from liability. She was seaworthy when she left Liverpool and the cargo was in good order when she arrived in New York. Even if the captain was negligent his treatment of the ship and cargo was part of her management under the act. For history of the act see 24 Cong. Rec. 147, 171, 1180.

The exemption under the act continues until the cargo is delivered from the ship. *The Glenochil*, Prob. (1896) 10; *The Silvia*, 171 U. S. 462; *Knott* v. *Botany Mills*, 179 U. S. 69; *The Wildcroft*, 130 Fed. Rep. 521, affirming 124 Fed. Rep. 631; *The Rotherfield*, 8 Revue Int. du Droit Mar. 103. The object of the Harter Act is to regulate the relation between carriers and shippers. *The Delaware*, 161 U. S. 459; *The Viola*, 59 Fed. Rep. 632; *The Berkshire*, 59 Fed. Rep. 1007.

Both of the courts below held that the steamer was liable because a condition of instability brought about by improper unloading, care and custody of the cargo is not a fault in the management of the vessel. This was error. Cases cited *supra; Knott* v. *Botany Mills*, 76 Fed. Rep. 582; *The Mississippi*, 113 Fed. Rep. 985; *S. C.*, 120 Fed. Rep. 1020; *The Canon Park*, 15 Prob. Div. 203; *The Southgate*, Prob. (1893) 329, 337, all really support petitioner's contention.

Management of the vessel includes management of any part of the vessel. *Rowson* v. *Atlantic Transport Co.*, (1903) 1 K. B. Div. 114; *S. C.*, 9 Maritime Law Cas. U. S. 347; K. B., (1903) Div. 666; 19 Times L. R. 668; *The Rodney*, Prob. Div. (1900) 112, 117.

The doctrine of the opinions of the courts below are opposed to *The Sandfield*, 79 Fed. Rep. 371; *S. C.*, 92 Fed. Rep. 663; *Am. Sug. Rfg. Co.* v. *Rickinson*, 124 Fed. Rep. 188; *The Mexican Prince*, 82 Fed. Rep. 484; *S. C.*, 91 Fed. Fep. 1003. The loading and discharge of cargo and the coaling were under the captain's direction. He always has the control. The distinction is unimportant. *Int. Nav. Co.* v. *Farr & Bailey*

Co., 181 U. S. 218, 226; as to history of Harter Act see *The Delaware*, 161 U. S. 459.

To limit § 3 to management in reference to delivery of the cargo and not to handling of coal would be to interpolate language not contained in the act. The act was drawn with reference to business usage and general words must be given their general construction. *Demarest* v. *Wynkoof*, 3 Johns. Ch. 142; *United States* v. *Coombs*, 12 Pet. 72; *Chamberlain* v. *Transportation Co.*, 44 N. Y. 305; *So. Life Ins. Co.* v. *Packer*, 17 N. Y. 51. The Harter Act applies alike to foreign and domestic vessels. *The Chattahoochee*, 173 U. S. 540; *The Silvia*, 171 U. S. 642; *The Manitoba*, 104 Fed. Rep. 145, can be distinguished.

The bills of lading exempted the carrier for loss which would cover the damages in this case. *The Etona*, 64 Fed. Rep. 880; *S. C.*, 71 Fed. Rep. 895. The finding that the unloading was negligent is not tenable. The only mistake of the captain was in failing to see an extraordinary result of an unusual storm.

Negligence is an omission to judge or the neglect of some means reasonably adapted to guard against a danger which is reasonably to be expected. *The Adriatic*, 17 Blatch. 176; *S. C.*, 107 U. S. 512; *Int. Nav. Co.* v. *Farr & Bailey Co.*, 98 Fed. Rep. 636; *S. C.*, 181 U. S. 218, 227; *Brown* v. *French*, 104 Pa. St. 604, 608; *The Tom Lysle*, 48 Fed. Rep. 690; *Mason* v. *Ervine*, 27 Fed. Rep. 459; *Wilson* v. *Pilots*, 57 Fed. Rep. 227; *Williams* v. *Le Bar*, 141 Pa. St. 149; *The Luckenbach*, 109 Fed. Rep. 487; *Lawrence* v. *Minturn*, 17 How. 100; *Boyd* v. *Moser*, 7 Wall. 316; *Steam Trans. Co.* v. *Bank*, 6 How. 344.

It is only because an exemption from liability for negligence is against the policy of the law that libellants have any case at all. *R. R. Company* v. *Lockwood*, 17 Wall. 357, 362; *Crossman* v. *Burrill*, 179 U. S. 100. The captain's conduct should not be viewed in the light of subsequent events. *The Newfoundland*, 176 U. S. 97; *The Styria*, 186 U. S. 1, 9; *McClain*

v. *Brooklyn City R. R. Co.*, 116 N. Y. 459, 470; *The Maria Luigi*, 28 Fed. Rep. 244; *The Columbia R. R. Co.* v. *Hawthorne*, 144 U. S. 202, 208; *Hart* v. *Railroad Co.*, 21 Law Times (N. S.), 261.

No one is guilty of negligence by reason of failing to take precautions which no other man would be likely to take under the same circumstances. 1 Shearman & Redfield on Negligence, 4th ed., § 11; Wharton on Neg. § 46; *Nitro-Glycerine Cases*, 15 Wall. 524, 537; *The Timor*, 67 Fed. Rep. 356; Carver on Carriage by Sea, 3d ed., § 181.

The sinking of the Germanic was not only unexpected but it was unlike anything that ever occurred before in the history of the port. *Hibernia Ins Co.* v. *Trans. Co.*, 120 U. S. 166; *Stover* v. *Erie R. R.*, 95 Fed. Rep. 495. The captain was trying to have the steamer ready to sail. It is the duty of carriers to keep their contracts. *The Helios*, 115 Fed. Rep. 705; *S. C.*, 108 Fed. Rep. 279.

As to the effect of the insurance claims in the bill of lading providing that the shipowner is not liable for any loss capable of being covered by insurance and to his right of subrogation to insurance see *Rintoul* v. *N. Y. Cent. R. R. Co.*, 17 Fed. Rep. 905; *S. C.*, 20 Fed. Rep. 313; *Phœnix Ins. Co.* v. *Erie R. R. Co.*, 117 U. S. 312, 325; *Inman* v. *So. Car. Ry. Co.*, 129 U. S. 128; *The Egypt*, 25 Fed. Rep. 320.

Mr. Walter F. Taylor, with whom *Mr. Edmund Baylies* was on the brief, for respondent Aiken, and *Mr. Wilhelmus Mynderse* for certain insurance companies, respondents:

The disaster was the result of gross negligence, and as that fact was established in the lower courts it is not an open question in this court. *Compania De Navigacion La Flecha* v. *Brauer*, 168 U. S. 104; *Morewood* v. *Enequist*, 23 How. 491; *The Richmond*, 103 U. S. 540; *The Conqueror*, 166 U. S. 110, 135; *The Carib Prince*, 170 U. S. 655; *The Iroquois*, 194 U. S. 240, 247; *Int. Nav. Co.* v. *Farr & Bailey Co.*, 181 U. S. 218.

The Harter Act is not a defense, as the damage arose from causes specified in the first section of the act, *Knott* v. *Botany Mills*, 179 U. S. 69; *S. C.*, 76 Fed. Rep. 583, and not from faults or errors of navigation of the vessel within the third section of the act.

In most of the cases where the Harter Act has been held to exempt the owner from liability the negligence has not resulted in any injury to the vessel or affected her safety. In many of them, the negligence has involved peril to the cargo only, and has consisted solely in the use of the appliances of the ship, without due regard to the possible effect upon the safety of the cargo. *The Sylvia*, 171 U. S. 642; *The Wildcroft*, 130 Fed. Rep. 521; *The Rodney* (1900), Prob. Div. 112; *The Mexican Prince*, 82 Fed. Rep. 484; *The Sandfield*, 82 Fed. Rep. 663; *Rowson* v. *Atlantic Transport Company* (1903), K. B. Div. 666. These cases establish that the character of a fault, as a fault in the management of the ship, or as one for which the owner is responsible, is not to be determined by the fact that it affects the ship, or the nature or degree of the effect produced, but by reference to the nature of the operation which is negligently performed. *The Glenochil*, 1896, Prob. Div. 10, can be distinguished.

As to where the damage is attributed to unseaworthiness and not to a fault in her management see *The Oneida*, 128 Fed. Rep. 687; *The Elphicke*, 117 Fed. Rep. 272; *S. C.*, 122 Fed. Rep. 439. The tendency is to limit rather than extend the exemptions under the act. *The Delaware*, 161 U. S. 459; *The Irrawaddy*, 171 U. S. 187; *The Chattahoochee*, 173 U. S. 540; *The Carib Prince*, 170 U. S. 655. The disaster was not due to perils of the sea or the act of God. The insurance clauses of the bills of lading do not relieve the owners.

The provision that the shipowner shall not be liable for any loss capable of being covered by insurance is invalid. It is a direct violation of those provisions of the Harter Act which forbid any clauses relieving the shipowner from the general responsibility imposed upon him by law.

Even before the Harter Act this clause was condemned as invalid, because it was unreasonable in the eye of the law, in that it practically compelled a shipper to take insurance. *The Hadji*, 16 Fed. Rep. 861; *S. C.*, 20 Fed. Rep. 875; *The Egypt*, 25 Fed. Rep. 320.

The clause giving to the carrier the benefit of the shipper's insurance rests upon different principles but it did not form a part of the contract of carriage between Liverpool and New York. *Phœnix Ins. Co.* v. *Erie Trans. Co.*, 117 U. S. 312; *Liverpool & G. W. S. S. Co.* v. *Phœnix Ins. Co.*, 129 U. S. 397, 463.

Mr. Justice Holmes delivered the opinion of the court.

This writ of certiorari brings up the record of two cases which were tried together upon libels filed by cargo owners and underwriters to recover for water damage done to goods on board the steamship Germanic. 107 Fed. Rep. 294; 124 Fed. Rep. 1. The steamer reached her pier in New York at about noon, Saturday, February 11, 1899. She was heavily coated with ice, estimated by the courts below at not less than 213 tons, and this weight was increased by a heavy fall of snow after her arrival. She was thirty-six hours late, and in order to sail at her regular time on the following Wednesday, began to discharge cargo from all of her five hatches at once. At the same time she was taking in coal from coal barges on both sides, to that end being breasted off from the dock twenty-five or thirty feet on her port side. At about 4 p. m. on Monday, February 13, she had discharged about 1,370 out of her 1,650 tons of cargo, including all but about 155 tons in the lower hold, the other 125 tons being on the orlop and steerage decks. She then had a starboard list of about 8°. At that moment she suddenly rolled over from starboard to port and kept a port list of 9° or more. As she rolled over the open cover of an aft coal port, about 33 inches by 22, was knocked off, leaving the bottom of the coal port about a foot above the water line.

Thereupon the master, who previously had given no attention to the discharge of cargo and loading of coal, ordered that coaling should be stopped on the port side but continued on the starboard, that no more cargo should be taken from the lower hold, and that some sugar in bags should be shifted to the starboard side.

When ten tons of sugar had been shifted, at 4.45 P. M., the steamer rolled back to starboard with a list of eight degrees as before. Coaling was resumed on the port side but at 6 was stopped on the starboard side. Between 6 and 9 P. M. all her side pockets were filled with coal up to the main deck, except one on the starboard, which lacked about thirty tons of being full. Some twenty or twenty-five tons were run into her cross bunkers in the lower part of the ship, which previously were about half full. About fifty tons of goods were discharged from the orlop and steerage docks, and about sixty tons of bacon were put on board and distributed evenly in the bottom of the hold. From 4.45 to 9 the starboard list was increasing constantly. At a little after 9 the steamer suddenly rolled over again to port, carrying the lower part of the open coal port below the water line. The pumps could not control the inflowing water and the ship sank before relief could be got. The damage to the goods was caused in this way.

The petitioner argues that the danger could not have been foreseen and that there was no negligence, attributing the loss to an unusual gale and special circumstances. But the District Court and the Circuit Court of Appeals agree that the loss was due to hurried and imprudent unloading, which brought the center of gravity of the ship five or six inches above the metacenter. As usual we accept their finding. *The Iroquois*, 194 U. S. 240, 247; *The Carib Prince*, 170 U. S. 655, 658. We see no sufficient reason to doubt that it was correct. With reference to a part of the argument we think it proper to say a word. It is quite true that negligence must be determined upon the facts as they appeared at the time and not by a judgment from actual consequences which then were not

to be apprehended by a prudent and competent man. This principle nowhere has been more fully recognized than by this court. *Lawrence* v. *Minturn*, 17 How. 100, 110; *The Star of Hope*, 9 Wall. 203. But it is a mistake to say, as the petitioner does, that if the man on the spot, even an expert, does what his judgment approves, he cannot be found negligent. The standard of conduct, whether left to the jury or laid down by the court, is an external standard, and takes no account of the personal equation of the man concerned. The notion that it "should be coextensive with the judgment of each individual," was exploded, if it needed exploding, by Chief Justice Tindal, in *Vaughan* v. *Menlove*, 3 Bing. N. C. 468, 475. And since then, at least, there should have been no doubt about the law. *Commonwealth* v. *Pierce*, 138 Massachusetts, 165, 176. Pollock, Torts, 7th ed., 432.

The foregoing statement, abridged from that of the District Court, which was accepted by the Circuit Court of Appeals, is sufficient to present the question which we have to discuss, if we add the finding of the latter court that after the Germanic was made fast she was given in charge of the shore agents of the owners and that they alone assumed direction of the discharging and loading of cargo and prepared her for the return voyage. The question is whether the damage to the cargo was "damage or loss resulting from faults or errors in navigation or in the management of said vessel," as was set up in the answers, in which case the owner was exempted from liability by § 3 of the Harter Act, or whether it was "loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery" of merchandise under § 1 of the same, in which case he could not stipulate to be exempt. The second section also recognizes and affirms the "obligations" "to carefully handle and stow her cargo, and to care for and properly deliver the same." Act of February 13, 1893, c. 105, 27 Stat. 445.

The petitioner contends that any dealing with the ship or cargo which affects the fitness of the ship to carry her cargo is

"management of the vessel," within the meaning of § 3. To support this contention the case of *The Glenochil* [1896], Prob. 10, is cited. There, after the arrival of the vessel in port and while she was unloading, the engineer, in order to stiffen the ship, let water into a ballast tank, and did it so negligently that the water got to and injured the cargo. The damage was held to result from fault in the management of the vessel within § 3, and the shipowner was held exempt. See *The Silvia*, 171 U. S. 462. We see no reason to criticise this decision, and therefore lay on one side at once the fact that the vessel had come to the end of her voyage and was in dock. We assume further that the captain retained authority over his ship, so that it was his power and perhaps his duty to intervene in any case that needed his control. On these assumptions the argument is that cargo has also a function as ballast, that if, for instance, the loss is caused by the improper shifting of pigs of lead, it does not matter whether they are called ballast or cargo, but in either case, so far as the change affects the fitness of the ship as a carrier, it is management of the vessel within the act. The thing done is the same and the name of the object cannot affect the result.

Nevertheless, in a practical sense, the ship was not under management at the time, but was the inert ground or floor of activities that looked not to her, but to getting the cargo ashore. And this consideration brings to light the limitation of the section, adopted by the court in *The Glenochil*, and sanctioned by this court in *Knott* v. *Botany Mills*, 179 U. S. 69, 73, 74, to faults "primarily connected with the navigation or the management of the vessel and not with the cargo." [1896] Prob. 15, 19. In the case supposed the name given to the pigs of lead is not important in itself, to be sure, but may indicate a difference in the purpose and character of the change of place. If the primary purpose is to affect the ballast of the ship, the change is management of the vessel, but if, as in view of the findings we must take to have been the case here, the primary purpose is to get the cargo ashore,

the fact that it also affects the trim of the vessel does not make it the less a fault of the class which the first section removes from the operation of the third. We think it plain that a case may occur which, in different aspects, falls within both sections, and if this be true, the question which section is to govern must be determined by the primary nature and object of the acts which cause the loss.

A distinction was hinted at in argument based on the fact that the damage was not to the cargo removed, but to that left behind in the ship. If the damage was attributable to negligence in unloading, it does not matter what part of the cargo is injured. The fact referred to does bring out, however, that the negligence in removing the cargo was negligence only because of its probable effect on the ship, and was negligence towards the remaining cargo, only through its effect on the ship. But, although this may be conceded, the criterion which we have given is undisturbed. That "in" which, as the statute puts it, the fault was shown was not management of the vessel, but unloading cargo; and, although it was fault only by reason of its secondary bearing, the primary object determines the class to which it belongs.

It is settled by repeated decisions that the Harter Act will be applied to foreign vessels in suits brought in the United States. *The Scotland*, 105 U. S. 24; *The Chattahoochee*, 173 U. S. 540. The claimant sets up the act and relies upon it. Under the cases it must take the burdens with the benefits, and no discussion of the terms of the bills of lading, if they might lead to a greater limitation of liability, is necessary. *Knott* v. *Botany Mills*, 179 U. S. 69; *The Kensington*, 183 U. S. 263, 269. Some of the bills of lading in evidence contain a clause to the further effect that the shipowners, if liable for a loss capable of being covered by insurance, shall have the benefit of any insurance on the goods. But these bills of lading were for transport to Liverpool, and while they provided for forwarding the goods at ship's expense to New York, the forwarding was to be on bills of lading issued by

the steamer sailing to that port, and subject to the stipulations, exceptions and conditions in those bills. We see no occasion to consider the questions which might be raised if the same stipulations were contained in the bills of lading to New York. See *Liverpool Steam Co.* v. *Phenix Insurance Co.*, 129 U. S. 397, 463; *Inman* v. *South Carolina Ry.*, 129 U. S. 128; *Phenix Insurance Co.* v. *Erie & Western Transportation Co.*, 117 U. S. 312.

Decree affirmed.

COULTER *v.* LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

No. 244. Argued November 29, 30, 1904.—Decided February 20, 1905.

A railroad company in Kentucky claimed as its only ground of Federal jurisdiction in an action in the Circuit Court of the United States against members of the state board of valuation and assessment that under the tax laws of the State it was deprived of equal protection of the laws contrary to the Fourteenth Amendment, because while the law of the State required all property to be taxed at its fair cash value there was a uniform and general undervaluation of other property but the company's property was taxed at its full value. There was conflicting testimony as to the valuations, most of the members of the board testifying that they tried in good faith to reach fair cash values. *Held*, that:

The court will not intervene merely on the ground of a mistake in judgment on the part of the officer to whom the duty of assessment was entrusted by the law.

It is not beyond the power of a State, so far as the Federal Constitution is concerned, to tax the franchise of a corporation at a different rate from the tangible property in the State.

Where the only constitutional ground on which the complainant can come into the Circuit Court obviously fails the court should be very cautious in interfering with the State's administration of its taxes upon other considerations which would not have given it jurisdiction.

THE facts are stated in the opinion.

Mr. Wm. O. Davis and *Mr. Henry L. Stone*, with whom *Mr. Napoleon B. Hays*, Attorney General of the State of Kentucky, was on the brief, for appellants:

The Circuit Court had no jurisdiction of this action.

The state board had made the final assessment of appellee's franchise, and the auditor had given appellee the statutory notice thereof, and it is not shown that appellants, being the auditor, treasurer, and secretary of state, constituting said board, had any further statutory power or authority to enforce the collection of the unpaid part of the state taxes on said assessment. Hence, appellee's suit was against the State without its consent, and in violation of the Eleventh Amendment. *Louisiana* v. *Jumel*, 107 U. S. 711; *Ex parte Ayres*, 123 U. S. 443; *Hans* v. *Louisiana*, 134 U. S. 1; *Coulter* v. *Weir*, 127 Fed. Rep. 897; *Fitts* v. *McGhee*, 172 U. S. 516; *Arbuckle* v. *Blackburn*, 113 Fed. Rep. 616.

The bill alleges that the amount in controversy in this action, without considering the local taxes, exceeds $2,000, but there is no allegation stating the amount or value of the local taxes due the counties, cities, towns, and taxing districts exceed the sum of $2,000. *Walter* v. *Northwestern Railroad Co.*, 147 U. S. 370; *Fishback* v. *Western Union Telegraph Co.*, 161 U. S. 96; *Coulter* v. *Fargo*, 127 Fed. Rep. 912.

There being no diverse citizenship between the parties, the bill does not show jurisdiction in the Circuit Court, on account of the alleged denial of the equal protection of the laws within the meaning of the Fourteenth Amendment. *Nash., Chatt. & St. L. Ry.* v. *Taylor*, 86 Fed. Rep. 168; *R. R. & Telephone Co.* v. *Board of Equalization*, 85 Fed. Rep. 302; *Taylor* v. *Louisville & Nashville R. R. Co.*, 88 Fed. Rep. 350; *Louisville Trust Co.* v. *Stone*, 107 Fed. Rep. 305; *Cummings* v. *Merchants National Bank*, 101 U. S. 153; *Albuquerque Bank* v. *Perea*, 147 U. S. 87.

The proof shows the assessment of appellee's franchise had become final before this action was instituted.

The bill as amended does not state facts sufficient to entitle complainant to any relief in equity.

The allegation in the amended bill that said assessors "uniformly" assessed such property below its value for the year 1902 is not sufficient to bring this case within the rule

announced in this class of cases by the Federal courts. Cases *supra* and *German National Bank* v. *Kimball*, 103 U. S. 732; *Pelton* v. *Commercial National Bank*, 101 U. S. 143; *New York ex rel.* v. *Barker*, 179 U. S. 279; *State ex rel.* v. *Western Union Telegraph Co.*, 165 Missouri, 504; *West. Un. Tel. Co.* v. *Missouri*, 187 U. S. 412; *Exchange National Bank* v. *Miller*, 19 Fed. Rep. 372.

The county assessors did not habitually and intentionally nor fraudulently assess the property of individuals and corporations, not required to report to the board of valuation and assessment, at less than its fair cash value; nor did the board of equalization intentionally or fraudulently equalize the assessments of such property subject to equalization on the basis of eighty per cent of its cash value for the year 1902.

If the allegations are sufficient to give jurisdiction to the Circuit Court, and to constitute a cause of action, then the proof falls short of what is required by the decisions of the Federal courts in this class of cases before an injunction will be granted interfering with the collection of the public revenues of a State. *Cin. So. Railway* v. *Guenther*, 19 Fed. Rep. 398; *Taylor* v. *Louisville & Nashville R. R. Co.*, 88 Fed. Rep. 373; *New York ex rel.* v. *Barker*, 179 U. S. 279.

If there was any actual discrimination between the assessments of property by the local assessing authorities as equalized and those of appellee's franchise, it was sporadic, and not designed or intentional.

The presumption is that the sworn assessing officers discharged their duties faithfully and as required by law, until the contrary is clearly shown by a preponderance of the competent and relevant evidence.

The franchise or intangible property of the complainant was not in fact assessed by the board of valuation and assessment at its full cash value, or at a sum in excess of eighty per cent of such value for 1902. To ascertain the value of the franchise or intangible property of a public service corporation two methods have been followed by the board of valua-

tion and assessment, and approved by the courts, to wit: the capitalization plan, whereby the total value of all the property of the corporation is fixed at a sum which at six per cent will produce the amount of the net income or earnings; the stock and bond plan, whereby the total value of all the property of the corporation is fixed at the market value of the shares of stock and bonds. *Henderson Bridge Co.* v. *Commonwealth*, 99 Kentucky, 641; *S. C.*, 166 U. S. 152; *Louisville Railway Co.* v. *Commonwealth*, 105 Kentucky, 722; *Adams Express Co.* v. *Kentucky*, 166 U. S. 180; *State Railroad Tax Cases*, 92 U. S. 575; *Commonwealth* v. *Covington & Cin. Bridge Co.*, 70 S. W. Rep. 849; *West. Un. Tel. Co.* v. *Taggart*, 163 U. S. 1.

Under either of these plans the value of the franchise or intangible property of the corporation may be ascertained by deducting from such total value the assessed value of its tangible property, the remainder being considered the value of its franchise or intangible property.

The share of Kentucky in the assessment of appellee's property was more than twenty-six per cent, the percentage adopted by the board of valuation and assessment, which erroneously included as a part of the lines of the road that appellee "operated, owned, leased or controlled" in that State and elsewhere 1,044.21 miles of road belonging to other companies, in which appellee merely owned one-half or a majority of the shares of stock. The road of another company in which appellee owns a majority of the stock is not "controlled" by the appellee within the meaning of the statute. *United States* v. *Northern Securities Co.*, 120 Fed. Rep. 721; *Pullman Palace Car Co.* v. *Mo. Pac. Railway Co.*, 115 U. S. 587; *Porter* v. *Pittsburg &c. Co.*, 120 U. S. 670; *Am. Preservers Co.* v. *Norris*, 43 Fed. Rep. 714; *Exchange Bank* v. *Macon &c. Co.*, 97 Georgia, 7; *Atchison &c. Ry.* v. *Cochran*, 43 Kansas, 234; *Louisville Gas Co.* v. *Kaufman*, 105 Kentucky, 131.

The complainant, by reason of the action of the county assessors and board of equalization or the board of valuation

and assessment, has not been discriminated against or denied the equal protection of the laws within the meaning of the Fourteenth Amendment to the Constitution of the United States. *King* v. *Mullins*, 171 U. S. 436; Judson on Taxation, §§ 437, 562; *Head Money Cases*, 112 U. S. 595; *National Bank* v. *Baltimore*, 100 Fed. Rep. 27; *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S. 233; *Merchants' &c. Bank* v. *Pennsylvania*, 167 U. S. 464; *Col. & So. R. Co.* v. *Wright*, 151 U. S. 478; *Florida Central &c. R. Co.* v. *Reynolds*, 183 U. S. 476; *Kentucky Railroad Cases*, 115 U. S. 321; *Charlotte C. & A. R. Co.* v. *Gibbes*, 142 U. S. 386; *Wagoner* v. *Loomis*, 37 Ohio St. 571; *Lowell* v. *County Commissioners*, 152 Massachusetts, 375; *Cent. Railroad Co.* v. *State Board*, 48 N. J. L. 7; *Louisville Railway Co.* v. *Commonwealth*, 105 Kentucky, 710.

Mr. James P. Helm, with whom *Mr. Helm Bruce* was on the brief, for appellee:

A State cannot through its administrative officers, intentionally, uniformly and systematically make some of its citizens bear, proportionately to their wealth, one-fifth more of the burdens of state government than it requires of all the rest of its citizens. Or, putting the proposition a little differently, it is not competent to the State to make a certain class of its citizens pay on the value of their property one dollar on the hundred, for the support of the State, and require of all the rest of the citizens that they should pay only eighty cents on the hundred dollars, for the same purpose. It cannot do this directly, and it ought to require no argument to prove that it cannot do it indirectly. In other words, great principles do not depend upon mere form, but on substance.

The lower court after a prolonged and most careful consideration of the evidence finds no room to doubt that the condition was the result of design. The language of the court is that all the property in the State subject to equalization, had been "systematically, habitually and intentionally undervalued to at least twenty per cent for the year 1902, first by

the local assessing officials and then by the equalizers." *Spalding* v. *Hill*, 86 Kentucky, 656; see opinion of Taft, J., in *Taylor* v. *Louisville & Nashville Ry. Co.*, 88 Fed. Rep. 364, and authorities there referred to.

As to the effect of practical construction by those whose duty it is to execute a statute, see *Harrison* v. *Commonwealth*, 83 Kentucky, 163; *Louisville* v. *Barbour*, 83 Kentucky, 95; *Clark's Run* v. *Commonwealth*, 96 Kentucky, 532; *City* v. *Garr*, 97 Kentucky, 588.

As to the meaning of the word "controlled," see *United States* v. *Northern Securities Co.*, 120 Fed. Rep. 721, and cases cited.

Appellants insist that the board of valuation and assessment assessed the property of the appellee at less than its real value. It surely could not be contended by the appellee that they were guilty of fraud or wrongdoing, in making the assessment, and it is not so contended. On the contrary they say that they in good faith endeavor to assess the property at its full and fair cash value. Under these circumstances the cases of *P., C., C. &c. R. Co.* v. *Backus*, 154 U. S. 434; *West. Un. Tel. Co.* v. *Taggart*, 163 U. S. 1; *Adams Express Co.* v. *Ohio*, 165 U. S. 2, are conclusive that whenever a question of fact is thus submitted to the determination of a special tribunal, its decision creates something more than a mere presumption of fact, and if such determination comes into inquiry before the courts, it cannot be overthrown by evidence going only to show that the fact was otherwise than was found and determined. On this branch of the case we do not feel justified in going into the evidence in detail for the purpose of showing that the valuation of the appellee's property fixed by the board of valuation and assessment was a full value. That question is fully discussed by the lower court in its opinion.

Mr. Justice Holmes delivered the opinion of the court.

This is a bill brought by the railroad company, appellee, a

Kentucky corporation, against citizens of Kentucky, the members of the state board of valuation and assessment, and respectively auditor of public accounts, treasurer and secretary of state. The only ground of jurisdiction alleged is that under the tax laws of the State of Kentucky, as administered by its executive officers, the railroad company is deprived of the equal protection of the laws contrary to the Fourteenth Amendment. The constitution of the State requires all property not exempted from taxation to be assessed at its fair cash value, but the bill alleges that the county assessors uniformly assess the property assessed by them, which is the great body of tangible property in the State, below its cash value. It alleges that, in like manner, the board of equalization equalizes the county assessments at a percentage not above eighty per cent of the fair cash value of the property taxed. On the other hand the defendants, who assess the franchise tax on the railroad company, are alleged to have assessed the company's property in Kentucky at its full value, viz., $33,788,724.50, for the year 1902, and then, deducting the tangible property locally taxed, $23,103,825, to have made the taxable franchise $10,774,899.50. Whereas, if eighty per cent of the value of the company's property had been taken, then, deducting as before, the taxable franchise would be only a little over four million dollars.

The railroad company contends that when there is a uniform and general undervaluation of other property, then the only way in which the company can be put on an equality with other taxpayers is by a similar undervaluation in its case. The railroad company contends further that although this contravenes the letter of the statute, the requirement of equality so far outweighs the requirement of a tax on the full value of property, that if by misconduct elsewhere both cannot be observed, the rule of equality must prevail. It should be mentioned that the franchise tax is both state and local, and that after the same has been laid and apportioned between the State and county, etc., by the defendants, the

state auditor, who is one of them, certifies to the county clerks their proportion of the tax. The bill prays for an injunction against such an apportionment and certification, and also against collection by the officers of the State. There was a general demurrer to the bill and an answer and replication. The demurrer was overruled. Much evidence was taken, and at the final hearing a decree was entered by the Circuit Court enjoining the defendants as prayed, and requiring the defendant Hager, treasurer of the State, to execute a receipt in full of the state taxes on the franchise for 1902, the plaintiff having paid the sum which was due on its view of the case. 131 Fed. Rep. 282. The defendants appealed to this court. It may be assumed from an affidavit filed, if not from the pleadings, that the amount in controversy is over $2,000. See *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 310.

From a consideration of different kinds of evidence the Circuit Court reached the conclusion that the county assessors had systematically and intentionally undervalued the property assessed by them. In the first place it found a settled habit of undervaluing, recognized by the legislature and the state court, before the adoption of the Constitution of 1891, which required the fair cash value to be assessed. It found that while the value of land had increased or, at least, had not diminished since 1891, the assessments had varied very little, while those of 1891 were not more than seventy per cent of the value at any time. It considered testimony that from 1893 to 1896 the assessments were equalized at seventy per cent, following earlier statutes, notwithstanding the constitution of 1891. It then compared tabulated statements of sales in the different counties, which were required by statute to be furnished to the board of equalization, with the local assessments and with the results reached by the last named board. It thus found an additional and independent reason for believing that there was systematic undervaluation in the counties, and it inferred from comparisons and from testimony to that effect

that the board paid little attention to the tabulated statements, even on a basis of eighty per cent, but really was governed by the assessment of the previous year. Finally it confirmed its conclusions by direct testimony as to the practice in certain counties and the rules practically adopted by the board. The reasoning is careful and elaborate and cannot be read without an impression that probably it is correct to the extent of establishing a general undervaluation of land.

On the other hand, there was testimony that the statements of sales did not afford satisfactory evidence of average values, or at least, for various reasons, were not regarded by the board of equalization as affording it. Most of the members of the board testified that they tried in good faith to reach fair cash values, and there were many affidavits to a like effect as to the past and present conduct of the county assessors. It was sworn that, so far as percentages of the reported sales were used, they were used on an estimate of what proportion actual values would bear to the sums named in the deeds. The Circuit Court, while regarding it as the condition of equitable relief that the property other than that of the plaintiff should have been undervalued systematically and intentionally, hardly dealt with this evidence in its bearing on the question of intent. Yet, of course, no court would venture to intervene merely on the ground of a mistake of judgment on the part of the officer to whom the duty of assessment was entrusted by the law.

The other half of the plaintiff's case is that its franchise was valued at its full cash value. It might even require consideration, if necessary, whether it ought not to be shown further that the appellants, in valuing the franchise, consciously adopted a different standard from that which they understood to be adopted in the counties. On the foregoing questions one of the three appellants testified that he had dissented from the majority on several occasions, believing that the assessments were higher than those for other kinds of property, and that he understood that the majority assessed

the franchise at its full value. One testified that he thought at the time, and still thought, that the franchise was valued lower than it ought to be. The third was not explicit, but showed that the valuation was reduced after hearing. Different well known modes were used in approaching the valuation, but probably there was an element of arbitrary judgment at the end. This certainly was the case in regard to the proportion of mileage in the State, which, by the statutes, was to "be considered" in fixing the value of the franchise, and which the appellants contend was underestimated so much as to compensate for any other mistake, if there was any, which is denied.

We need not stop to show that so much of the bill as seeks an injunction against collecting the state tax, and the portion of the decree which orders a receipt to be executed on the part of the State, cannot be maintained. See *Coulter* v. *Weir*, 127 Fed. Rep. 897, 906, 912. On the other hand, in a proper case, a bill may be brought to restrain apportionment and certification to the counties. *Fargo* v. *Hart*, 193 U. S. 490, 495, 503. The question is whether such a case has been made out, and we may assume for purposes of decision, without deciding, that, if we otherwise agreed with the railroad company's contention, the injunction might be granted, although the franchise was valued as the law required in every respect except in the proportion which the assessment bore to the other valuations. The decisions are not agreed upon this point.

We have stated as much as we deem necessary to the answering of the question just put. It must be obvious on even that short statement how uncertain are the elements of the evidence and in what unusual paths it moves. On the face of their records the proceedings of the defendants, of the county assessors and of the equalizing board all are regular. If it be a fact that the franchise of a Kentucky corporation is taxed at a different rate from the tangible property in the State, there can be no question that the State had power to tax it at a different rate, so far as the Constitution of the United States

is concerned. *Bell's Gap R. R.* v. *Pennsylvania*, 134 U. S. 232; *Merchants' & Manufacturers' Bank* v. *Pennsylvania*, 167 U. S. 461, 464; *Magoun* v. *Illinois Trust and Savings Bank*, 170 U. S. 283, 295. It is doubtful, at least, if any further question should have been asked in this case. *Missouri* v. *Dockery*, 191 U. S. 165. But as the claim of right under the United States Constitution was not merely colorable, *Penn. Mut. Life Ins. Co.* v. *Austin*, 168 U. S. 685, 695, and as the evidence is here, we have considered the evidence also, and our conclusion from that, as well as from the law, is that the bill must be dismissed.

Looking first at the assessment of the franchise, there is no such certainty that it was made on a different scale of values from that adopted elsewhere, as would warrant an attack upon it under the Fourteenth Amendment, even if otherwise that attack could be maintained. But the supposed infringement of the Fourteenth Amendment is the only ground on which the railroad company could come into the Circuit Court, and if that ground fails, and obviously fails, the court should be very cautious, at least, in interfering with the State's administration of its taxes upon other considerations which would not have given it jurisdiction.

The undervaluation in the counties, looked at from the point of view just indicated, also does not appear to have been such as to warrant the action of the court. It is not contended that a mere undervaluation would be enough. It is admitted that it must have been systematic and intentional. There is, no doubt, a natural inclination to think such an undervaluation probable when it is suggested. But what is the proof? The state constitution, whatever the statutes may have said, seems popularly to have been understood to have made a great change in the law. Practice before its adoption, therefore hardly can raise a presumption as to practice afterwards, even on the liberal assumption that it properly could be considered in evidence. It is obvious that the accidental sales in a given year may be a misleading guide to average values,

apart from the testimony that some at least of the conveyances did not report true prices, yet they furnish the chief weapon of attack. The testimony as to the board of equalization taking eighty per cent of the reported sales, was explained by the members of the board. It would be going very far to assume that they were committing perjury because to another mind the sales seemed more significant and the explanations not very good. Inequality, we repeat, is nothing, unless it was in pursuance of a scheme. To make out that scheme the anomalous course was followed of putting members of a tribunal established by law upon the witness stand to testify to the operations of their minds in doing the work entrusted to them. *Fayerweather* v. *Ritch*, 195 U. S. 276, 306, 307. But the prevailing testimony was that no such scheme was entertained.

Whatever we may surmise or apprehend, making allowance for a certain vagueness of ideas to be expected in the lay mind, for the reasonable differences of opinion among the most instructed and competent men, and for the uncertainty of the elements from which a judgment was to be formed in the first instance, considering the still greater uncertainty of those from which the local judgment must be controlled, if at all, by persons having only the printed record before them, considering further that to maintain the bill imputes perjury to many witnesses whose character is not impeached, and finally recalling once more that we are dealing with a case that properly was not cognizable in the Circuit Court, we are of opinion that the bill must be dismissed.

Decree reversed.

SCOTTISH UNION AND NATIONAL INSURANCE COMPANY *v.* BOWLAND.

BOWLAND *v.* SCOTTISH UNION AND NATIONAL INSURANCE COMPANY.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

Nos. 360, 361. Argued January 4, 5, 1905.—Decided February 20, 1905.

While technically municipal bonds deposited with the insurance commissioner under the laws of Ohio regulating the right of foreign companies to do business within the State are investments in bonds, they are also a part of the capital stock of the company invested in Ohio and required to be so invested for the security of domestic policy holders, and for the purposes of taxation to be considered as part of the capital stock of the company and included within the statutory definition of personal property required to be returned by foreign and domestic corporations for taxation.

While no tax can be levied without express authority of law, statutes are to receive a reasonable construction with a view to carrying out their purpose and intent, and

The collection by distraint of goods to satisfy taxes lawfully levied is one of the most ancient methods known to the law and in this case the law of Ohio authorizing it does not violate the constitutional right of a foreign insurance company and deprive it of its property without due process of law.

There is nothing in the exemption of Government bonds from taxation which prevents them from being seized for taxes due upon unexempt property.

The laws of the State of Ohio as construed by the Supreme Court of that State have conferred the right to tax bonds deposited by a foreign insurance company with the insurance commissioner under the laws regulating the right to do business in the State.

Where municipal bonds so deposited are withdrawn before the return day and Government bonds substituted therefor as provided by law the company is not liable for taxation on the bonds so withdrawn.

Where there is no personal liability for taxes the defense can be set up in an action at law and there is no necessity to resort to equity to enjoin prosecution of suits therefor. It will be presumed that if the claim of the party taxed is right no personal judgment will be entered.

THESE cases are cross-appeals from a decree rendered in the Circuit Court upon bill and demurrer. The Scottish Union

and National Insurance Company, a corporation of Great Britain, filed its bill to enjoin the defendants Willis G. Bowland, treasurer, and L. Ewing Jones, auditor of Franklin County, Ohio; Arthur I. Vorys, superintendent of insurance, and William S. McKinnon, treasurer, of the State of Ohio, from the collection of taxes levied on certain bonds deposited by the complainant under the laws of Ohio regulating the right of foreign insurance companies to do business in that State. It appears from the averments of the bill that the bonds were deposited under section 3660 of the Revised Statutes of Ohio, as amended in 1894. 91 Ohio Laws, 40. They were municipal bonds of the county of Lucas and State of Ohio. Fifty thousand dollars thereof was deposited on September 14, 1894, and $50,000 on November 7, 1894. The bonds were registered in the name of the superintendent of insurance, in trust for the benefit and security of the policyholders of the insurance company, residing in Ohio, and were delivered by him to the state treasurer for safe keeping, and remained in the office of the treasurer of the State at Columbus, Franklin County, Ohio, until withdrawn on April 2, 1903, when United States bonds were substituted therefor.

The insurance company is transacting the business of insurance in Ohio, but it avers that its home office is in the city of Edinburgh, Scotland, and its chief office and managing agency for this country is at Hartford, Connecticut, from which office it conducts its business in Ohio.

Acting under the Ohio statute, section 2781*a* (94 Ohio Laws, 62), the auditor of Franklin County, by notice served on one of the local agents of the Scottish Union and National Insurance Company, notified it to appear and show cause why the said bonds should not be taxed against it on the duplicate of Franklin County, Ohio, and taxes collected thereon for the years 1895 to 1900, inclusive. The auditor entered upon the tax duplicate taxes against the insurance company for $2,700 each for the years 1895 to 1897, inclusive, and $2,750 each for the years 1898 to 1900 inclusive, and five per cent

penalty thereon. On November 15, 1900, the treasurer of Franklin County brought a civil action against the company for taxes so assessed. This action at the time of the filing of the bill was still pending in the Court of Common Pleas of Franklin County, Ohio.

On December 4, 1903, another notice was served upon the company, through its local agent, and the auditor entered taxes against such company for the years 1901, 1902 and 1903, in all the sum of $8,935.50. On April 2, 1904, the treasurer of Franklin County procured a warrant of distraint, and upon such warrant demanded of the superintendent of insurance and the state treasurer the United States bonds so substituted on April 2, 1903, for such municipal bonds, for the purpose of seizing and selling the same to satisfy the taxes which had been assessed against the company with respect to the municipal bonds for the years 1895 to 1903, inclusive. It is averred that to permit the collection of these taxes by suit for personal judgment or distraint will be violative of complainant's treaty rights as a subject of Great Britain, and will be taking complainant's property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

The prayer of the bill is, that the defendant, the treasurer of Franklin County, be restrained from collecting or attempting to collect any of the taxes against the complainant personally; that the said treasurer be restrained from collecting or attempting to collect said taxes or any portion of them by distraint against either such bonds of the United States so deposited or any personal property of complainant which may now or hereafter be situated in the county of Franklin or the State of Ohio; that the defendants, the superintendent of insurance and treasurer of the State of Ohio, be enjoined from delivering or attempting to deliver said United States bonds or any part thereof to the said county treasurer, and for such other relief as equity and good conscience may require.

The respondents having interposed demurrers to the bill,

the court held that the municipal bonds on deposit in Ohio were subject to taxation under the laws of the State; that there was no personal liability of the complainant on account of said taxes, and therefore a civil action to recover the taxes should be enjoined; that for the year 1903 the collection of taxes could not be enforced, as the United States bonds were substituted before the time for returning property for that year; that the bonds might be seized by distraint to satisfy the taxes levied upon the municipal securities for the years they were on deposit, and the court therefore refused to enjoin the execution of the distress warrant, except for the taxes and penalty for the year 1903, and rendered a decree enjoining the collection of the taxes by civil action.

Both parties appealed, the company from so much of the decree as permitted distraint of the United States securities for the collection of taxes levied with respect to the municipal bonds, the treasurer and auditor of Franklin County from so much of the decree as denies the right of the State to prosecute a civil action against the company to recover the taxes aforesaid, and from so much thereof as restrained the officials from attempting to collect the taxes assessed against the municipal bonds for the year 1903.

Mr. Judson Harmon and *Mr. Hartwell Cabell*, with whom *Mr. W. O. Henderson* was on the brief, for Scottish Union and National Insurance Company, appellant in No. 360 and appellee in No. 361:

The municipal bonds deposited with the superintendent of insurance by foreign insurance companies under the requirements of section 3660, Revised Statutes, Ohio, are not taxed by the laws of Ohio.

Under *State Tax on Foreign Held Bonds Case*, 15 Wall. 300; *Walker* v. *Jack*, 31 C. C. A. 462; *New Orleans* v. *Stempel*, 175 U. S. 309; *Blackstone* v. *Miller*, 188 U. S. 189, a State has the right to class municipal bonds as tangible personal property, and to tax them when found in the State, but the State of

Ohio has elected to treat such securities, not as tangible property, but as a species of intangible property, depending for taxability, not upon the situs of the paper, but upon the situs of some person in Ohio sustaining a specified relation to the bonds; that as the constitution and statutes have been construed by the Supreme Court of Ohio, these requirements do not here exist.

Judge Lurton in *West. Assurance Co.* v. *Halliday*, 126 Fed. Rep. 257, which was a case similar to this, ignores the fact that the State has not by statute taxed such bonds. As such the decision was contrary to the decisions of the Supreme Court of Ohio, see Art. XII. Ohio Const. 1851; *Lamb* v. *Lane*, 8 Ohio St. 167; *Chisholm* v. *Shields*, 67 Ohio St. 374; §§ 2730–2735 and 2744–2746, Rev. Stat. Ohio; *Exchange Bank* v. *Hines*, 3 Ohio St. 1, 39; *Worthington* v. *Sebastian*, 25 Ohio St. 1, 8; *Myers* v. *Seaberger*, 45 Ohio St. 232; *Lander* v. *Burke*, 65 Ohio St. 532.

Credits as well as municipal or railroad bonds would fall within Judge Lurton's definition of personal property under his construction of the same section and could be taxed whenever the paper evidence is found in Ohio, although neither held nor owned by a person in the State, and *contra* this proposition see *Brown* v. *Noble*, 42 Ohio St. 405, 409; *Sommers* v. *Boyd*, 48 Ohio St. 648; *Payne* v. *Watterson*, 37 Ohio St. 121; *Sims* v. *Best*, 1 Ohio. Cir. Ct. Rep. (N. S.) 41; *S. C.*, 25 Ohio Cir. Ct. Rep. 149; *Heintz* v. *Cameron*, 70 Ohio St. 491.

As to construction of a proviso such as that in § 21 of the act of 1852, now § 2745, see Dwarris on Statutes, 514; *Minis* v. *United States*, 15 Pet. 423, 445; *In re Webb*, 24 How. Pr. 247; *Boon* v. *Joliet*, 22 Illinois, 258; *Walsh* v. *Van Horn*, 22 Ill. App. 170.

As to how these bonds are held and whether any person in the State holds them in such capacity as would bring him within the law requiring their return for taxation or as to whether the superintendent of insurance is a trustee, see *Myers* v. *Seaberger*, 45 Ohio St. 232; *Walker* v. *Jack*, 79 Fed. Rep. 138;

McNeill v. *Hagerty*, 51 Ohio St. 255, 266; *French* v. *Bobe*, 64 Ohio St. 323, 341; *State* v. *Matthews*, 64 Ohio St. 419. For the construction of other state statutes similar to those of Ohio, see *People* v. *Home Ins. Co.*, 29 California, 534, 544; *Life Ins. Co.* v. *Commissioners*, 28 How. Pr. 41, 57; *Catlin* v. *Hull*, 21 Vermont, 152; *Hoyt* v. *Commissioners*, 23 N. Y. 224; *Life Ins. Co.* v. *Comptroller*, 31 N. Y. 32. The treatment of Ohio of foreign insurance companies does not indicate the intentions attributed in the *Halliday Case*, 126 Fed. Rep. 257. See *State* v. *Reinmund*, 45 Ohio St. 214.

Appellant is a non-resident, absent from the State, and personal judgment cannot be rendered against it. Rev. Stat., Ohio, § 2859; Judson on Taxation, § 414; Cooley on Taxation, 3d ed., 24; Pomeroy's Remedial Rights, § 1; *State Tax on Foreign Held Bonds*, 15 Wall. 300, 319; *Dewey* v. *Des Moines*, 173 U. S. 193, 201; *New York* v. *McLean*, 170 N. Y. 374; *Bristol* v. *Washington County*, distinguished, and see *Assessors* v. *Comptoir National*, 191 U. S. 388, 403; *Lafayette Ins. Co.* v. *French*, 18 How. 404.

The municipal bonds formerly on deposit being no longer within the State, the taxes levied with respect to them cannot now be collected by distraint or other proceeding *in rem* directed against the complainant's United States bonds now deposited in the State.

For construction of §§ 2838 and 2731, see *Spence* v. *Frye*, 2 Wkly. Law Gaz. 103; *Citizens' Bank Assignment*, 2 West. L. Monthly, 121; *Chisholm* v. *Shields*, 67 Ohio St. 374. See also as to freedom of bonds from lien, *New Orleans* v. *Stempel*, 175 U. S. 309.

The municipal bonds belonging to complainant formerly on deposit having been removed from the State eleven days prior to the day preceding the second Monday in April, 1903, no taxes can be assessed with reference to such bonds for the year then beginning or any part thereof.

As to construction on § 2737 see *Shotwell* v. *Moore*, 129 U. S. 590.

Mr. Augustus T. Seymour, with whom *Mr. Wade H. Ellis*, Attorney General of the State of Ohio, *Mr. Edward L. Taylor, Jr.*, *Mr. Karl T. Webber* and *Mr. Thomas Ross* were on the brief, for Bowland and others, appellees in No. 360 and appellants in No. 361.

The bonds have a situs for taxation in Ohio and were properly taxed. *West. Assurance Co.* v. *Halliday*, 110 Fed. Rep. 259; *S. C.*, 126 Fed. Rep. 257; *S. C.*, 193 U. S. 673.

Municipal bonds are in such a concrete tangible form that they are subject to taxation where found, irrespective of the domicile of the owner, and a State has the right to tax such bonds whenever they can be localized within its jurisdiction. *State Tax on Foreign Held Bonds*, 15 Wall. 300; *Savings Loan Society* v. *Multnomah Co.*, 169 U. S. 421; *New Orleans* v. *Stempel*, 175 U. S. 309; *Bristol* v. *Washington Co.*, 177 U. S. 133; Judson on Taxation, § 394; *Blackstone* v. *Miller*, 188 U. S. 189; *Board of Assessors* v. *Comptoir National*, 191 U. S. 388, 403; *Carstairs* v. *Cochran*, 193 U. S. 10; *Lee* v. *Sturges*, 46 Ohio St. 153; *Hubbard* v. *Brush*, 61 Ohio St. 252.

Under the constitution and statute law of Ohio, investments in bonds held in that State and owned by non-residents of the State, are taxable within the State. Const. § 2, Art. XII; § 3, Art. XIII; 44 Ohio Laws, 85; §§ 2734–2737, 2744, 2745, Rev. Stat.; *Lee* v. *Sturges*, 46 Ohio St. 153; *Worthington* v. *Sebastian*, 25 Ohio St. 1; *Grant* v. *Jones*, 39 Ohio St. 506; *Sims* v. *Best*, 25 Ohio Cir. Dec. 149; *Heintz* v. *Cameron*, 70 Ohio St. 491.

The nature of the deposit required by § 3660 is not such as to exempt bonds so deposited from taxation within the State. *British &c. Ins. Co.* v. *Commission*, 18 Abb. Pr. 118; *Int. Life Ins. Co.* v. *Commission*, 28 Barb. 318; *People* v. *Home Ins. Co.*, 29 California, 533.

Section 2745 provides a method of taxation for foreign insurance companies in addition to the general statutes authorizing the levy of taxes, and the legislature had no power to substitute a special method of taxation for the provision of the general laws relating thereto.

Statutes which strip a government of any portion of its prerogative or give exemption from the general burden, should receive a strict interpretation. 1 Desty on Taxation, 180; *Yazoo &c. Ry. Co.* v. *Thomas*, 132 U. S. 174; *New Orleans &c. Ry. Co.* v. *New Orleans*, 143 U. S. 192; *Chicago &c. Ry.* v. *Guffey*, 120 U. S. 569; *Phœnix Ins. Co.* v. *Tennessee*, 161 U. S. 174; *Erie Ry. Co.* v. *Pennsylvania*, 21 Wall. 492; *Delaware R. R. Tax*, 18 Wall. 206.

The privilege exercised by appellant under § 3660 to substitute United States bonds for the municipal bonds upon deposit with the superintendent of insurance, leaves the substituted bonds subject to all the obligations against the property originally on deposit.

The power of the State to impose conditions upon a non-resident seeking to engage in business within its borders is beyond question. *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28; *Cooper* v. *California*, 155 U. S. 648; Judson on Taxation, § 158.

The provisions in the statutes for summarily collecting the taxes are not repugnant to the Fourteenth Amendment. The right of the sovereign to proceed in this manner is as old as the common law. 2 Desty on Tax. 750, 776; Judson on Tax. § 330; *Palmer* v. *McMahon*, 133 U. S. 660; *Murray's Lessee* v. *Hoboken Land & Imp. Co.*, 18 How. 272, 281; *Springer* v. *United States*, 102 U. S. 586; Cooley on Tax. 302; Ohio Act of 1792, Chase's Statutes, 119; 1 Ohio Laws, 58; 25 Ohio Laws, 25; 29 Ohio Laws, 291; Rev. Stat. Ohio, § 1095.

There is no constitutional objection to the right of a State to collect unpaid taxes, assessed on account of personal property, owned by a non-resident, having a taxing situs within the State, by distraint of any property belonging to such non-resident found within the territorial limits of the State. Desty on Tax. § 6, pp. 7, 11, and cases cited; Black's Law Dict. 253; Blackstone, Bk. I, p. 138; Bk. II, pp. 2–15; 27 Am. & Eng. Ency. of Law, 648, 673. As to obligation to pay taxes, see *Railway Co.* v. *Reynolds*, 183 U. S. 475; *Allen* v. *Armstrong*,

16 Iowa, 512; *Buck* v. *Miller*, 147 Indiana, 586, 597; *Green* v. *Gruber*, 26 Louisiana, 694; *Cappen* v. *Hull*, 21 Vermont, 152; Remo on Non-Residents, §§ 25, 136; *Picquet* v. *Swan*, 5 Mason, 35; *McGoon* v. *Scales*, 9 Wall. 23; Drake on Attachments, § 57; *Pyrolucite W. Co.* v. *Ward*, 73 Georgia, 491; Waples on Attachments, § 32; *State* v. *Meyer*, 41 La. Ann. 439; *Hall* v. *Am. Refrigerator Co.*, 24 Colorado, 291; *Am. Refrigerator Co.* v. *Hall*, 174 U. S. 70; *Union Refrigerator Co.* v. *Lynch*, 177 U. S. 149; *New York* v. *McClain*, 170 N. Y. 374; *Dewey* v. *Des Moines*, 173 U. S. 193, distinguished, and see *Bristol* v. *Washington County*, 177 U. S. 133, 145; *Pullman Co.* v. *Pennsylvania*, 141 U. S. 18; *Marye* v. *Balt. & Ohio Ry. Co.*, 127 U. S. 117, 123.

The United States bonds owned by a non-resident are subject to distraint to satisfy a charge against the owner. *Plummer* v. *Coler*, 178 Ohio St. 115; 27 Am. & Eng. Ency. of Law, 791. The auditor's duty to list property omitted to be returned does not depend on the presence of the property within the State. *Sturges* v. *Carter*, 114 U. S. 511, 518; *Winona and St. Peter Land Co.* v. *Minnesota*, 159 U. S. 526; *Weyerhauser* v. *Minnesota*, 176 U. S. 550; *Gager* v. *Prout*, 48 Ohio St. 89.

When the question under consideration is the right to an exemption from taxation the statute is strictly construed against the exemption. *Railway Co.* v. *New Orleans*, 143 U. S. 192; *Insurance Co.* v. *Tennessee*, 161 U. S. 174; *Delaware R. R. Tax*, 18 Wall. 206.

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

These cases may be considered together, as they are appeals from a single decree and involve the right to assess and collect taxes upon the municipal bonds deposited by the insurance company under the laws of Ohio.

A considerable part of the opinion of the court below and the discussion in the briefs of counsel goes to the question of the

power of the State to tax bonds, held as these were, within its jurisdiction. At the oral argument, however, the learned counsel representing the insurance company conceded that there was legislative power to impose the taxes in question. A reference to the decisions of this court makes it perfectly plain that such taxation is within the power of the State *New Orleans* v. *Stempel*, 175 U. S. 309; *Bristol* v. *Washington County*, 177 U. S. 133; *Blackstone* v. *Miller*, 188 U. S. 189; *Board of Assessors* v. *Comptoir National*, 191 U. S. 388, 403; *Carstairs* v. *Cochran*, 193 U. S. 10.

The contention for the company is, that conceding the power of the State, it has never been exercised in the only way to make it effectual, which is by statutory enactment, and that the policy and statutes of Ohio have never authorized taxation of bonds deposited under the conditions shown in this case.

The question, therefore, is, have the statutes of Ohio, read in the light of the construction placed upon them by the Supreme Court of the State, conferred the right to tax these municipal bonds?

Before entering upon a consideration of the statutes we may say, in general terms, that we agree with the learned counsel for the insurance company, that the scheme of taxation of personal property in Ohio involves the requirement that it shall be returned or listed by some person or corporation whose duty it is by law to return or list such property. Provision is not made for assessing or taxing personal property by proceedings *in rem*, but before a recovery for taxes can be justified, either by action or distraint, it must appear that it was required to be returned for the purpose of taxation under some law of the State.

The proceedings under which the taxes for the years included in this case were charged against the insurance company by the auditor of Franklin County are under a statute (Revised Statutes of Ohio, section 2781*a*), having for its purpose the correction of returns by those whose duty it was to return

property for taxation, and making correction of returns so as to include property which should have been returned, but had been omitted, by some person charged by law with that duty.

Was it the duty of the insurance company or any one acting for it to return these municipal bonds for taxation? They were required to be deposited under section 3660, Rev. Stat. of Ohio, as amended, which reads as follows:

"SEC. 3660. [*Certain companies must make deposit.*]—A company incorporated by or organized under the laws of a foreign government shall deposit with the superintendent of insurance, for the benefit and security of the policyholders residing in this State, a sum not less than one hundred thousand dollars in stock or bonds of the United States, or the State of Ohio, or any municipality or county thereof, which shall not be received by the superintendent at a rate above their par value; the stocks and securities so deposited may be exchanged from time to time for other like securities; so long as the company so depositing continues solvent and complies with the laws of this State, it shall be permitted by the superintendent to collect the interest or dividends on such deposits; and for the purpose of this chapter the capital of any foreign company doing fire insurance business in this State shall be deemed to be the aggregate value of its deposits with the insurance or other departments of this State and of the other States of the United States, for the benefit of policyholders in this State or in the United States, and its assets and investments in the United States certified according to the provisions of this chapter; but such assets and investments must be held within the United States and invested in and held by trustees, who must be citizens of the United States, appointed by the board of directors of the company and approved by the insurance commissioner of the State where invested, for the benefit of the policyholders and creditors in the United States; and the trustees so chosen may take, hold and convey real and personal property for the purpose of the trust, subject

to the same restrictions as companies of this State. [91 v. 40; 70 v. 147, § 21; (S. & S. 212).]"

This section is part of the chapter of the Ohio statutes regulating insurance companies other than life. In the same chapter may be found other sections regulating the manner of doing business in Ohio by insurance companies, and in section 3637 we find a provision as to how the capital of domestic insurance companies shall be invested, and such companies are required to invest their capital in certain United States, state, county and municipal bonds, etc. These domestic companies are in like manner required to deposit such securities with the commissioner for the benefit of their policyholders (Rev. Stat. of Ohio, §§ 3593, 3595), and without such deposit are not authorized to do business within the State. As a condition of doing business in Ohio companies organized under the laws of foreign governments are, by section 3660, required to invest a portion of their capital in the stock or bonds of the United States or of the State of Ohio, or some municipality or county thereof, and make deposit of such bonds with the superintendent of insurance for the benefit of local policyholders. Subsequent provisions of the section further show that this deposit is to be regarded as a part of the capital of such foreign insurance company which may be considered in determining the aggregate capital of the company required by law. The companies are permitted to collect the interest or dividends on the securities. These deposits constitute a fund primarily for the benefit of such policyholders, and after their claims are satisfied may be turned over to an assignee or devoted to other purposes. *Falkenbach* v. *Patterson*, 43 Ohio St. 359; *State* v. *Matthews*, 64 Ohio St. 419.

This statute, therefore, provides for the manner of investment of a portion of the capital stock of a foreign insurance company within the State of Ohio for the protection of the policyholders within the State. It is more than a mere "investment in bonds." It is also a part of the capital stock required to be deposited as a condition of doing business

within the State and devoted to the benefit of local stockholders.

The authority to enact laws for the imposition of taxes is found in the constitution of the State, Article 12, section 2, which provides: "Laws shall be passed, taxing by a uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and also all real and personal property according to its true value in money."

Section 2731 provides, in language similar to that used in the constitution, for the taxation of all property, real and personal, in the State, and all moneys, credits, investments in bonds, stock, or otherwise, of persons residing in the State. This section is found in the first chapter of Title 13, "Taxation," of the Ohio Statutes, and is in part in the following language:

"SEC. 2731. All property whether real or personal in this State, and whether belonging to individuals or corporations; and all moneys, credits, investments in bonds, stocks, or otherwise, of persons residing in this State, shall be subject to taxation, except only such as may be expressly exempted therefrom; and such property, moneys, credits, and investments shall be entered on the list of taxable property as prescribed in this title."

The argument for the insurance company is, that this preliminary section, read with the other sections of the Ohio law upon the subject, excludes "investment in bonds" from being embraced in a general description of personal property, and limits their taxation to persons residing in the State, or (under section 2730) where they are held within the State for others by persons residing therein.

Section 2730 of the same chapter is a section giving definitions of terms used in the title. So far as it is pertinent in this connection, that section is as follows:

"SEC. 2730. . . . The terms 'investments in bonds,' shall be held to mean and include all moneys in bonds, or certificates of indebtedness, or other evidences of indebted-

ness of whatever kind, whether issued by incorporated or unincorporated companies, towns, cities, villages, townships, counties, States or other incorporations, or by the United States, held by persons residing in this State, whether for themselves or others."

If these sections embrace all the statutory laws of the State, together they tax investments in bonds held by residents, because of jurisdiction over the person of the owner, and those held by residents for other owners, and if such reside out of the State, because of jurisdiction over the property held within the State.

Section 2744 undertakes to make provision for the taxation of corporations generally, and is as follows:

"SEC. 2744. [*Corporations generally; their returns.*]—The president, secretary, and principal accounting officer of every canal or slackwater navigation company, turnpike company, plank-road company, bridge company, insurance company, telegraph company, or other joint stock company, except banking or other corporations whose taxation is specifically provided for, for whatever purpose they may have been created, whether incorporated by any law of this State or not, shall list for taxation, verified by the oath of the person so listing, all the personal property, which shall be held to include all such real estate as is necessary to the daily operations of the company, moneys and credits of such company or corporation within the State, at the actual value in money, in manner following: In all cases return shall be made to the several auditors of the respective counties where such property may be situated, together with a statement of the amount of said property which is situated in each township, village, city or ward therein. The value of all movable property shall be added to the stationary and fixed property and real estate, and apportioned to such wards, cities, villages, or townships, *pro rata*, in proportion to the value of the real estate and fixed property in said ward, city, village or township, and all property so listed shall be subject to and pay the same taxes as other prop-

erty listed in such ward, city, village or township. It shall be the duty of the accounting officer aforesaid to make return to the auditor of State during the month of May of each year of the aggregate amount of all property by him returned to the several auditors of the respective counties in which the same may be located. It shall be the duty of the auditor of each county, on or before the first Monday of May, annually, to furnish the aforesaid president, secretary, principal accounting officer, or agent, the necessary blanks for the purpose of making aforesaid returns; but no neglect or failure on the part of the county auditor to furnish such blanks shall excuse any such president, secretary, principal accountant, or agent, from making the returns within the time specified herein. If the county auditor to whom returns are made is of the opinion that false or incorrect valuations have been made, or that the property of the corporation or association has not been listed at its full value, or that it has not been listed in the location where it properly belongs, or in cases where no return has been made to the county auditor, he is hereby required to proceed to have the same valued and assessed: provided, that nothing in this section shall be so construed as to tax any stock or interest in any joint stock company held by the State. [73 v. 139, § 16; (S. & C. 1446).]"

This section is broad in its terms, and requires the return of the property, among others, of insurance companies, whether incorporated by the laws of Ohio or not, and such companies are required to list for taxation "all the personal property, which shall be held to include all such real estate as is necessary to the daily operations of the company, moneys and credits of such company or corporation within the State, at its actual value in money."

The Supreme Court of Ohio has expressly held that this section applies to foreign as well as domestic corporations. *Hubbard* v. *Brush*, 61 Ohio St. 252; *Lander* v. *Burke*, 65 Ohio St. 532, 542.

This section, therefore, requires of both foreign and domestic

insurance companies that they return the personal property mentioned which is within the State. What is meant by "personal property," in this connection? Referring to section 2730 we find it provided that the terms "personal property," when used in the title, shall be held to mean and include, among other things, the capital stock, undivided profits and all other means not forming a part of the capital stock of every company.

In the case of domestic corporations, and assuming that this statute applies, as has been held by the Supreme Court of Ohio, with equal force to foreign corporations, this definition of personal property must be held to include not only the paid-in capital stock of the company, but as well the bonds, or securities in which it may be invested.

This question was before the Supreme Court of Ohio in *Jones* v. *Davis*, 35 Ohio St. 474.

In that case the act of May 11, 1878, was before the court. It contained provisions similar to those of the Revised Statutes, requiring personal property of every description, moneys and credits, investments in bonds, stock, joint stock companies, or otherwise, to be listed in the name of the person who is the owner thereof on the day preceding the second Monday of April in each year.

Section 11 of that act made provisions similar to those found in section 2744, requiring incorporated companies to list for taxation all their personal property which, by the terms of the statute, was made to include all such real estate as was necessary to the daily operation of the company, and all its moneys and credits within the State at their actual value in money. After citing *Bank Tax Case*, 2 Wall. 200, and *Farrington* v. *Tennessee*, 95 U. S. 679, Judge Boynton, delivering the opinion of the court, said:

"For the purposes of taxation, the capital stock is represented by whatever it is invested in. Personal property, by the express wording of the statute, is made to include the capital stock of a corporation; and the provision above referred

to requires all corporations doing business in this State, except banking and others whose taxation is specifically provided for, to list all their personal property, including in the return thereof all such real estate as is necessary to the daily operation of their business, together with their moneys and credits of every description within the State. That the legislature intended, by this description of property, to embrace the capital stock of the company is too obvious to be misunderstood. No other meaning can be drawn from the language employed, and no other construction is better calculated to do justice."

In *Lee* v. *Sturges*, 46 Ohio St. 153, 160, Judge Spear, speaking for the court, said:

"It may be assumed that 'capital stock' and 'capital and property' mean practically the same thing. Primarily the 'capital stock' is the money paid in by the stockholders in compliance with the terms of their subscriptions. It soon, however, takes the form of real estate, or personal property, or both, including machinery, buildings, credits, rights in action, etc. So that it may here be taken to mean personal property, and such real estate as may be necessary to the daily operations of the company, and its moneys and credits. The capital is thus represented by the property in which it has been invested."

We think this language pertinent in the consideration of the case before us. While technically the bonds deposited with the insurance commissioner are investments in bonds, they are also a part of the capital stock of the company invested in Ohio, and require to be so invested for the security of domestic policyholders, and, for the purposes of taxation, to be considered a part of the capital stock of the company and included within the definition of "personal property," as given in section 2730.

This conclusion is reinforced by the decision in *Hubbard* v. *Brush*, 61 Ohio St. 252. In that case the Supreme Court of Ohio held that a foreign corporation transacting business in Ohio was required to return its property within the State where

it was carrying on business, although the corporation was organized under the laws of West Virginia.

The court admitted that the situs of intangible property is ordinarily at the local residence of the corporation, within the State where it was incorporated. Nevertheless, as the promissory notes and book accounts and other evidence of indebtedness must be presumed to have been in the company's office in this State, they were taxable as personal property under section 2744.

In the course of the opinion Judge Bradbury said:

"Where foreign corporations voluntarily bring their property and business into this State to avail themselves of advantages found here which they believe will enhance the probabilities that the business they intend to pursue will be profitable, they should not be heard to complain of laws which tax them as domestic corporations are taxed by the State. We hold, therefore, that the provisions of section 2744, which make it the duty of foreign corporations to list for taxation in this State, their choses in action, where they are held within this State and grow out of the business they conduct herein, is a valid exercise of the taxing powers vested in the State."

Under section 2744, corporations, foreign and domestic, are required to return all personal property for taxation, which, among other things, the statute expressly declares shall include moneys and credits of such company or corporation within the State. If the construction contended for shall prevail, a corporation, with capital invested in bonds, would escape taxation, while one holding its investments in notes or certificates of deposit in bank will be compelled to return them for taxation—a condition of things so manifestly unjust that we cannot hold it to have been within the intent of the legislature in framing taxing laws unless the statutes clearly admit of no other construction. The purpose of the Ohio constitution and statutes passed in pursuance thereof, as has been frequently declared by the Supreme Court of Ohio, is to tax by a uniform rule all property owned or held within the State.

A narrow construction, which will defeat this purpose, should not be adopted.

The statutes, specifically mentioning "investments in bonds," were intended to reach and tax, and not to exempt, that class of personal property. The purpose to tax all real and personal property, declared in the statute, was further emphasized by express mention of certain classes of property, such as investments in bonds, so that by no process of exclusion could such securities escape the burdens imposed upon all property owned or held within the State.

The sections taxing individuals holding such securities were not intended to put limitations upon other sections of the law taxing the property of corporations held within the State and enjoying the protection of its laws, and affording a basis for credit in the transacting of business. There is no reason why the law should tax such securities in the hands of individual residents, whether owned or held by them for others, and permit them to escape taxation when they represent invested capital of incorporated companies, sharing the protection of the Government and equally bound in morals, at least, to help bear the burdens of the State.

That such securities might justly be taxed was freely admitted in the argument at bar, and the sole contention was that the lack of statutory power to tax these securities is a *casus omissus* in legislation which the courts cannot supply.

It may be conceded that no tax can be levied without express authority of law, but the statutes are to receive a reasonable construction with a view to carrying out their purpose and intent.

We have examined the decisions of the Supreme Court of Ohio, cited by counsel, construing the statutes of the State, and believe none of them to be inconsistent with the conclusions we have reached, and those above cited, in our opinion, are direct authority for the construction given. All the sections must be construed together to attain the object and intent of the law. Section 2731, standing alone, might limit the

right to tax investments in bonds to residents of the State. It is certainly enlarged by section 2730 to include such investments when held for others by residents within the State. Read with sections 2734, 2735, 2744 and 2746, we think the purpose is manifest to require the return and taxation of all personal property, except the small exemptions allowed, within the jurisdiction of the State.

But it is urged if section 2744 could otherwise be held to require a return of these bonds by the insurance company, that the company comes within the exception of the statute excluding banking or other corporations whose taxation is specifically provided for in other parts of the Title. And it is argued that section 2745 of the Revised Statutes of Ohio makes express provision for the taxation of foreign insurance companies.

Examination of this section shows that it imposes a tax upon the business of the company in Ohio, and is not a property but a privilege tax. An insurance company is required to return in each county the amount of the gross premium receipts of its agency for the previous calendar year, and under certain regulations the company is taxed upon the amount of business done.

This section does not levy a tax upon property. There are subsequent statutory provisions of a special character, upon which the exception of section 2744 may operate, taxing the property of railroad companies, banks, express, telegraph and telephone companies, etc., but there is no other provision imposing a property tax upon foreign insurance companies within the State.

The requirement that these bonds should be deposited for the security of the local policyholders brought a part of the capital of such company into the State of Ohio upon the strength of which it transacts its business and obtains credit within the State. Clearly, such property is not intended to be taxed within the provisions reaching the business done in the State of Ohio under section 2745.

But it is said that there is no person within the State required to return this property. We think it is the duty of the officers of the insurance company, under section 2744, to return the property, and that the place to return it is where the property is situated. This is clearly required by the terms of this section, and section 2735, making provision for the place of listing personal property, provides:

"And all other personal property, moneys, credits, and investments, except as otherwise specially provided, shall be listed in the township, city, or village in which the person to be charged with taxes thereon may reside at the time of the listing thereof, if such person reside within the county where the same are listed, and if not, then in the township, city, or village where the property is when listed."

These bonds were the property of the corporation taxable under the statutes, and, at the time when they should have been listed, were held in the city of Columbus, Franklin County, Ohio, and should have been there returned.

It is further argued that to distrain the property of the company for the collection of these taxes would be a violation of the constitutional rights of the insurance company, and the taking of its property without due process of law. Section 1095 provides:

"SEC. 1095. [*Overdue taxes may be collected by distress.*]—When taxes are past due and unpaid, as stated in the preceding section, the county treasurer, or his deputy, may distrain sufficient goods and chattels belonging to the person or persons charged with such taxes, if found within his county, to pay the taxes so remaining due and the costs that have accrued; and shall immediately proceed to advertise the same in three public places in the township where such property was taken, stating the time when, and the place where, such property will be sold; and if the taxes and costs which have accrued thereon are not paid before the day appointed for such sale, which shall be not less than ten days after the taking of such property, such treasurer, or his deputy, shall proceed to sell such prop-

erty at public vendue, or so much thereof as will be sufficient to pay said taxes and the costs of such distress and sale. (29 v. 291, § 19; S. & C. 1586.)"

This section authorizes the distraint of goods to satisfy taxes lawfully levied against property within the county and State. This method of collecting taxes is one of the most ancient known to the law, and has frequently received the sanction of the courts. *Murray's Lessees* v. *Hoboken Land &c. Co.*, 18 How. 272, 276; *Springer* v. *United States*, 102 U. S. 586; Cooley on Taxation, 302; *Palmer* v. *McMahon*, 133 U. S. 660.

There is nothing in the exemption of Government bonds from taxation which prevents them from being seized for taxes due upon unexempt property. We have held that the taxes were lawfully assessed. The statute authorizing a distraint gave the right to proceed against personal property within the jurisdiction of the State. The taxes were lawful, and the property belonging to a foreign corporation which could be seized within the authority of the State might be taken under this statute, and we do not perceive that any constitutional right of the company is violated by seizing its property under such circumstances. *Bristol* v. *Washington County*, 177 U. S. 133; *Marye* v. *Baltimore & Ohio R. R. Co.*, 127 U. S. 117.

As to the right to assess taxes for the year 1903, it appears that these municipal bonds were withdrawn from the State some time before the return day, which is the day preceding the second Monday in April, and such withdrawal was in the exercise of a lawful right of the company to do, and other securities were substituted as provided by law. We do not think that the fact that it had bonds in the State for a time which were taxable justified the imposition of this tax, where the non-taxable securities were substituted before the return day.

As to the question of personal liability of the insurance company to judgment in an action brought to recover the amount of the taxes, we think the court should not have issued an injunction, as was done, against the prosecution of civil suits

for this purpose. If there is no personal liability for these taxes—a point which we do not feel called upon to decide—it is perfectly clear that if service could be had which would make a personal judgment proper, the company could set up its defense by answer in the action at law, and there is no necessity to resort to a court of equity for relief. It will be presumed, if the claim of the company is right, no personal judgment will be rendered against it, and if its theory of the controversy is correct no such judgment can be lawfully rendered. In such case the authorities are uniform that equity will not interfere by injunction, but leave the party to his defense at law. Revised Statutes of United States, § 723; *Insurance Company* v. *Bailey,* 13 Wall. 616, 623; *Grand Chute* v. *Winegar,* 15 Wall. 373; *Deweese* v. *Reinhard,* 165 U. S. 386.

Upon the whole case we reach the conclusion that the Circuit Court was right in sustaining the demurrer so far as the bill averred the non-taxability of these bonds, or the right of the treasurer to proceed by distraint, and in overruling the demurrer as to the taxes for the year 1903; but, for the reasons stated, erred in enjoining the prosecution of a civil action seeking a personal judgment.

In this view, the decree below will be reversed and the cause remanded for further proceedings in conformity to this opinion.

OPINIONS PER CURIAM, ETC., FROM DECEMBER 13, 1904, TO FEBRUARY 20, 1905.

No. 106. SAMUEL A. V. HARTWELL, APPELLANT, *v.* JOHN H. HAVIGHORST. Appeal from the Supreme Court of the Territory of Oklahoma. Argued December 15, 1904. Decided December 19, 1904. *Per Curiam.* Decree affirmed with costs. *Johnson* v. *Towsley,* 13 Wall. 72; *Marquez* v. *Frisbie,* 101 U. S. 473; *Quinby* v. *Conlan,* 104 U. S. 420; *Gardner* v. *Bonestell,* 180 U. S. 362; *Potter* v. *Hall,* 189 U. S. 292; *Payne* v. *Robertson,* 169 U. S. 323. Case reported below 11 Oklahoma, 189, and see *Paine* v. *Foster,* 9 Oklahoma, 213, 257; *Acers* v. *Snyder,* 8 Oklahoma, 659. *Mr. William C. Prentiss* for appellant. *Mr. A. G. C. Bierer* for appellee.

No. —, ORIGINAL. *Ex parte:* IN THE MATTER OF EDWARD E. BESSETTE, PETITIONER. Submitted December 19, 1904. Decided January 3, 1905. Motion for leave to file petition for a writ of mandamus denied. *Mr. William Velpau Rooker* for petitioner.

No. 314. THE UNITED STATES, APPELLANT, *v.* JOCK COE; No. 315. THE UNITED STATES, APPELLANT, *v.* BONG MENG; and No. 316. THE UNITED STATES, APPELLANT, *v.* WOO JOE. Appeals from the District Court of the United States for the Northern District of Ohio. Submitted January 3, 1905. Decided January 9, 1905. *Per Curiam.* Final orders and decrees reversed, and causes remanded for further proceedings in conformity to law. *United States, Petitioner,* 194 U. S. 194; *Fong Yue Ting* v. *United States,* 149 U. S. 698; *Chin Bak*

Kan v. *United States*, 186 U. S. 193; *Ah How* v. *United States*, 193 U. S. 65; *United States* v. *Sing Tuck*, 194 U. S. 161. *The Attorney General* and *Mr. Assistant Attorney General McReynolds* for appellant. No brief filed for appellees.

No. —, ORIGINAL. *Ex parte:* IN THE MATTER OF THOMAS E. BARRETT, PETITIONER; No. —, Original. *Ex parte:* IN THE MATTER OF JOHN P. DOLAN, PETITIONER; and No. —, ORIGINAL. *Ex parte:* IN THE MATTER OF FRANK GARRETT, PETITIONER. Submitted January 3, 1905. Decided January 9, 1905. Motions for leave to file petitions for writs of *habeas corpus* denied. *Mr. Chester H. Krum* and *Mr. James L. Minnis* for petitioners.

No. 140. NG HONG LI, APPELLANT, *v.* THE UNITED STATES. Appeal from the District Court of the United States for the Eastern District of New York. Argued January 20, 1905. Decided January 23, 1905. *Per Curiam.* Judgment affirmed on the authority of *Ah How* v. *United States*, 193 U. S. 65, and cases cited. *Mr. Max J. Kohler* for appellant. *The Attorney General* and *Mr. Assistant Attorney General Robb* for appellee.

No. 189. F. M. WIRGMAN ET AL., APPELLANTS, *v.* H. H. PERSONS ET AL., RECEIVERS, ETC. Appeal from the United States Circuit Court of Appeals for the Fourth Circuit. Motions to dismiss or affirm and petition for writ of certiorari submitted January 16, 1905. Decided January 23, 1905. *Per Curiam.* Dismissed for the want of jurisdiction. *United States* v. *Jahn*, 155 U. S. 109; *McLish* v. *Roff*, 141 U. S. 661; *Robinson* v. *Caldwell*, 165 U. S. 359; *American Sugar Refining*

Company v. *New Orleans*, 181 U. S. 277; *Ayres* v. *Polsdorfer*, 187 U. S. 585; *Colorado Mining Company* v. *Turck*, 150 U. S. 138; *Ex parte Jones*, 164 U. S. 691. Case below, 126 Fed. Rep. 449, 454. Petition for a writ of certiorari denied. *Mr. F. H. Busbee* for appellants. *Mr. Norris Morey* for appellees.

No. 156. The Board of Supervisors of Riverside County Cal. et al., Plaintiffs in Error, *v.* Robert H. Thompson. In error to the United States Circuit Court of Appeals for the Ninth Circuit. Submitted January 24, 1905. Decided January 30, 1905. *Per Curiam.* Dismissed for the want of jurisdiction. *Press Publishing Company* v. *Monroe*, 164 U. S. 105; *Ex parte Jones*, 164 U. S. 691; *Benjamin* v. *New Orleans*, 169 U. S. 161; *Rouse* v. *Letcher*, 156 U. S. 47; *Gregory* v. *Van Ee*, 160 U. S. 643. Case below, 122 Fed. Rep. 860; 116 Fed. Rep. 832. *Mr. John D. Works* for plaintiffs in error. *Mr. C. C. Wright* for defendant in error.

No. 510. Thomas Dennison, Plaintiff in Error, *v.* George M. Christian. In error to the Supreme Court of the State of Nebraska. Motions to dismiss or affirm submitted January 23, 1905. Decided January 30, 1905. *Per Curiam.* Judgment affirmed with costs. *Munsey* v. *Clough*, 196 U. S. 364; *Hyatt* v. *Cockran*, 188 U. S. 691; *Roberts* v. *Reilly*, 116 U. S. 80; *Dower* v. *Richards*, 151 U. S. 658; *Egan* v. *Hart*, 165 U. S. 188; *Blythe* v. *Hinckley*, 180 U. S. 333. Case below, 101 N. W. Rep. 1045. *Mr. H. C. Brome* in support of motions. *Mr. W. J. Connell*, *Mr. C. J. Smyth* and *Mr. Ed. P. Smith* opposing.

No. 388. Emma Thomas et al., Plaintiffs in Error, *v.*

JOSEPH P. BLAIR ET AL. In error to the Supreme Court of the State of Louisiana. Motions to dismiss or affirm submitted January 30, 1905. Decided February 20, 1905. *Per Curiam.* Dismissed for the want of jurisdiction. *Marrow* v. *Brinkley,* 129 U. S. 178; *Israel* v. *Arthur,* 152 U. S. 355, 362; *Central Land Company* v. *Laidley,* 159 U. S. 103, 112; *Harrison* v. *Morton,* 171 U. S. 38; *Pierce* v. *Somerset Railway,* 171 U. S. 641. *Mr. George Denegre* and *Mr. Charles Payne Fenner* in support of motions. *Mr. John G. Johnson, Mr. Elihu Root, Mr. Henry L. Lazarus* and *Mr. Henry Denis* opposing.

Decisions on Petitions for Writs of Certiorari from December 13, 1904, *to February* 20, 1905.

NO. 454. JAMES L. LOMBARD, PETITIONER, *v.* ANGLO-AMERICAN LAND MORTGAGE AND AGENCY COMPANY (LIMITED); NO. 455. B. LOMBARD, JR., PETITIONER, *v.* ANGLO-AMERICAN LAND MORTGAGE AND AGENCY COMPANY (LIMITED); NO. 456. CHESHIRE PROVIDENT INSTITUTION, PETITIONER, *v.* FREDERICK HERBERT RAMSDEN; and NO. 457. KEENE FIVE CENT SAVINGS BANK, PETITIONER, *v.* FREDERICK HERBERT RAMSDEN. December 19, 1904. Petition for writs of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Frank Hagerman* for petitioners. *Mr. John A. Eaton* for respondents.

NO. 470. EDWARD E. BESSETTE, PETITIONER, *v.* THE W. B. CONKEY COMPANY. January 3, 1905. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. William Velpau Rooker* for petitioner. *Mr. Jacob Newman, Mr. S. O. Levinson* and *Mr. B. V. Becker* for respondent.

No. 475. SHEWAN, TOMES & CO., PETITIONER, *v.* MERCHANTS' BANKING COMPANY (LIMITED). January 9, 1905. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Harrington Putnam* and *Mr. Appleton L. Clark* for petitioner. *Mr. Frederick M. Brown* for respondent.

No. 471. THE CITY OF DAVENPORT, PETITIONER, *v.* WILLIAM RUSSELL ALLEN ET AL. January 16, 1905. Petition for writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Joe R. Lane* for petitioner. *Mr. Frederick N. Judson* for respondents.

No. 465. CHARLES W. MORSE ET AL., PETITIONERS, *v.* READING COMPANY, CLAIMANT, ETC. January 23, 1905. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied. *Mr. Eugene P. Carver* and *Mr. Edward E. Blodgett* for petitioners. *Mr. Robert M. Morse* and *Mr. Wm. M. Richardson* for respondents.

No. 488. AUGUSTUS L. SHAFFER, PETITIONER, *v.* THE UNITED STATES. January 23, 1905. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Henry E. Davis, Mr. Wilton J. Lambert* and *Mr. D. W. Baker* for petitioner. *The Attorney General* and *Mr. Solicitor General Hoyt* for respondent.

No. 474. THOMAS F. HOLDEN, PETITIONER, *v.* THE UNITED

STATES. January 30, 1905. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. R. Ross Perry* and *Mr. R. Ross Perry, Jr.*, for petitioner. *The Attorney General* and *Mr. Solicitor General Hoyt* for respondent.

No. 490. GEORGE E. LORENZ ET AL., PETITIONERS, *v.* THE UNITED STATES. January 30, 1905. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Conrad H. Syme, Mr. Samuel Maddox* and *Mr. Charles A. Douglass* for petitioners. *The Attorney General, Mr. Solicitor General Hoyt* and *Mr. Assistant Attorney General Purdy* for respondent.

No. 506. MINERAL DEVELOPMENT COMPANY, PETITIONER, *v.* WINFIELD SCOTT ET AL. January 30, 1905. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. S. B. Dishman* for petitioner. No appearance for respondents.

No. 508. RUSSIA CEMENT COMPANY, PETITIONER. *v.* ABRAHAM B. FRAUENHAR ET AL. January 30, 1905. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. John F. Dillon* and *Mr. John Dane, Jr.*, for petitioner. *Mr. Ralph Nathan* for respondents.

No. 511. ALBERT R. MOULTON, PETITIONER, *v.* GEORGE M. COBURN ET AL. January 30, 1905. Petition for a writ of

certiorari to the United States Circuit Court of Appeals for the First Circuit denied. *Mr. Charles P. Searle* and *Mr. Lee M. Friedman* for petitioner. *Mr. Frederic D. McKenney* for respondents.

No. 512. Edward H. Harriman et al., Petitioners, *v.* Northern Securities Company. January 30, 1905. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit granted. *Mr. William D. Guthrie, Mr. R. S. Lovett, Mr. D. T. Watson, Mr. John F. Dillon* and *Mr. Maxwell Evarts* for petitioners. *Mr. John G. Johnson, Mr. Elihu Root, Mr. Francis Lynde Stetson* and *Mr. John W. Griggs* for respondent.

No. 467. William E. Brown, Petitioner, *v.* The First National Bank of Newton, Kans. February 20, 1905. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. William Eugene Brown* for petitioner.

No. 502. I. B. Kleinert Rubber Company et al., Petitioners, *v.* Albert Stein et al. February 20, 1905. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Louis C. Raegener* for petitioners. *Mr. James H. Peirce, Mr. George P. Fisher, Jr.,* and *Mr. William Henry Dennis* for respondents.

No. 507. American Alkali Company, etc., Petitioner, *v.* Pedro G. Salom. February 20, 1905. Petition for a writ of certiorari to the United States Circuit Court of Appeals for

the Third Circuit denied. *Mr. Reynolds D. Brown* for petitioner. *Mr. Joseph C. Fraley* for respondent.

No. 518. J. Campbell Thompson, Petitioner, *v.* Augustus H. Skillin, Trustee, etc. February 20, 1905. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, or other writs, denied. *Mr. Roger Foster* for petitioner. *Mr. William Jno. Barr* for respondent.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT FROM DECEMBER 13, 1904, TO FEBRUARY 20, 1905.

No. 300. Banquero & Gandara et al., Appellants, *v.* A. Rauschenplat. Appeal from the District Court of the United States for the District of Porto Rico. December 19, 1904. Dismissed with costs, on motion of *Mr. J. S. Flannery* for the appellants. *Mr. Frederic D. McKenney* and *Mr. J. S. Flannery* for appellants. No appearance for appellee.

No. 485. Charles H. Brooks, Appellant, *v.* The United States. Appeal from the Circuit Court of the United States for the Southern District of California. January 3, 1905. Docketed and dismissed, on motion of *Mr. Solicitor General Hoyt* for the appellee. No one opposing.

No. 486. Carl C. L. Wulff, Appellant, *v.* L. Lindsay et al. Appeal from the Supreme Court of the Territory of Arizona. January 3, 1905. Docketed and dismissed with costs, on motion of *Mr. Charles L. Frailey* for the appellees. No one opposing.

No. 124. WILLIAM R. LYTLE, APPELLANT, *v.* ADOLPHUS GERALD, CHIEF OF POLICE OF THE CITY OF MONTGOMERY, ALA. Appeal from the Circuit Court of the United States for the Middle District of Alabama. January 9, 1905. Dismissed with costs, pursuant to the tenth rule. *Mr. W. S. Reese, Jr.*, for appellant. No appearance for appellee.

No. 132. THE TERRITORY OF OKLAHOMA EX REL. OKLAHOMA GAS AND ELECTRIC COMPANY, APPELLANT, *v.* J. E. DE WOLFE ET AL. Appeal from the Supreme Court of the Territory of Oklahoma. January 16, 1905. Dismissed with costs, on authority of counsel for the appellant. *Mr. Charles B. Ames* for appellant. No appearance for appellees.

No. 190. THE HARTFORD FIRE INSURANCE COMPANY OF CONNECTICUT ET AL., APPELLANTS, *v.* JOHN C. PERKINS, COMMISSIONER OF INSURANCE. Appeal from the Circuit Court of the United States for the District of South Dakota. January 17, 1905. Dismissed with costs, on motion of *Mr. F. W. McReynolds* for the appellants. *Mr. Abner E. Hitchcock* and *Mr. F. W. McReynolds* for appellants. No appearance for appellee.

No. 155. ROBERT PHILPOT, APPELLANT, *v.* FULTON O'BRION ET AL. Appeal from the United States Circuit Court of Appeals for the First Circuit. January 20, 1905. Dismissed with costs, pursuant to the tenth rule. *Mr. Edmund A. Whitman* for appellant. *Mr. Frank H. Stewart* for appellees.

No. 127. SOTIRIOS S. LONTOS CHARALAMBIS, APPELLANT,

v. WILLIAM WILLIAMS, COMMISSIONER OF IMMIGRATION, ETC., Appeal from the Circuit Court of the United States for the Southern District of New York. January 23, 1905. Dismissed with costs, on authority of counsel for appellant. *Mr. Alfred Hayes, Jr.*, for appellant. *The Attorney General* for appellee.

No. 181. FRED SANDERS, PLAINTIFF IN ERROR, *v.* THE COMMONWEALTH OF KENTUCKY. In error to the Court of Appeals of the State of Kentucky. January 30, 1905. Dismissed with costs, per stipulation. *Mr. Charles H. Gibson* for plaintiff in error. *Mr. Napoleon B. Hays* for defendant in error.

No. 187. MAX SCHUBACH, PLAINTIFF IN ERROR, *v.* WARWICK HOUGH, JUDGE, ETC., ET AL. In error to the Supreme Court of the State of Missouri. February 20, 1905. Dismissed with costs, on authority of counsel for the plaintiff in error. *Mr. Henry W. Bond* and *Mr. Frederick N. Judson* for plaintiff in error. *Mr. John F. Dillon* and *Mr. Martin L. Clardy* for defendants in error.

No. 252. RICHARD DILLON, PLAINTIFF IN ERROR, *v.* FRANK MARES. In error to the Supreme Court of the State of Montana. February 20, 1905. Dismissed with costs, on authority of counsel for the plaintiff in error. *Mr. Thomas J. Walsh* for plaintiff in error. *Mr. Henry G. McIntire* for defendant in error.

INDEX.

ADMIRALTY.

See MARITIME LAW.

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See BANKS AND BANKING;
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See COMBINATIONS IN RESTRAINT OF TRADE.

CONSTITUTIONAL LAW.

1. *Commerce clause—Unconstitutionality of sections* 2317, 2318, *Code of Georgia.*

The imposition, by a state statute, upon the initial or any connecting carrier, of the duty of tracing the freight and informing the shipper, in writing, when, where, how and by which carrier the freight was lost, damaged or destroyed, and of giving the names of the parties and their official position, if any, by whom the truth of the facts set out in the information can be established, is, when applied to interstate commerce, a violation of the commerce clause of the Federal Constitution; and §§ 2317, 2318 of the Code of Georgia of 1895, imposing such a duty on common carriers is void as to shipments made from points in Georgia to other States (*Richmond & Alleghany R. R. Co.* v. *Tobacco Company*, 169 U. S. 311 distinguished). *Central of Georgia Ry. Co.* v. *Murphey*, 194.

See CASES EXPLAINED, 2;
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2. *Contracts, impairment of—Validity of chapter* 578, *Laws of Massachusetts of* 1898.

Chapter 578, Laws of Massachusetts of 1898, providing for taxation of street railway companies is not void, as violating the impairment of obligation clause of the Federal Constitution, so far as this case is concerned, because it relieved a railroad company from the obligation to pave and repair streets under the terms and conditions of certain municipal ordinances which the company had duly accepted. *Worcester* v. *Street Railway Co.*, 539.

3. *Due process of law—Failure of taxpayer to avail himself of opportunity to test validity of tax.*

If the taxpayer be given an opportunity to test the validity of a tax at any time before it is made final, either before a board having *quasi* judicial character, or a tribunal provided by the State for that purpose, due process is not denied, and if he does not avail himself of the opportunity to present his defense to such board or tribunal, it is not for this court to determine whether such defense is valid. *Hodge* v. *Muscatine County*, 276.

4. *Due process of law—Validity of section* 5007, *Iowa Code.*

Section 5007, Iowa Code, imposing a tax against every person and upon the real property and the owner thereof whereon cigarettes are sold does not give a license to sell cigarettes, nor is it invalid as depriving the owner of the property of his property without due process of law, because it does not provide for giving him notice of the tax, §§ 2441,

5. *Ex post facto laws—Alteration of state criminal statute subsequent to commission of crime, held not within prohibition.*

By chapter 99, March 9, 1903, Laws of North Dakota, the statutes in force when plaintiff in error committed the crime for which he was tried, and when the verdict of guilty was pronounced were altered to the following effect: Close confinement in the penitentiary for not less than six or more than nine months after judgment and before execution was substituted for confinement in the county jail for not less than three nor more than six months after judgment and before execution, and hanging within an inclosure at the penitentiary by the warden or his deputy was substituted for hanging by the sheriff in the yard of the jail of the county in which the conviction occurred. *Held* that the changes looked at in the light of reason and common sense are to be taken as favorable to the plaintiff in error, and that a statute which mitigates the rigor of the law in force at the time the crime was committed cannot be regarded as *ex post facto* with reference to that crime. *Held* that close confinement does not necessarily mean solitary confinement and the difference in phraseology between close confinement and confinement is immaterial, each only meaning such custody as will insure the production of the criminal at the time set for execution. *Held* that the place of punishment by death within the limits of the States is not of practical consequence to the criminal. *Rooney* v. *North Dakota*, 319.

6. *Equal protection of laws not denied by state taxation of retail dealers and not of others doing an interstate business.*

A classification in a state taxation statute in which a distinction is made between retail and wholesale dealers is not unreasonable and § 5007, Iowa Code, imposing a tax on cigarette dealers is not invalid as denying equal protection of the laws to retail dealers, because it does not apply to jobbers and wholesalers doing an interstate business with customers outside of the State. *Cook* v. *Marshall County*, 261.

7. *Equal protection of laws—State taxation of franchise of corporation at different rates from tangible property.*

A railroad company in Kentucky claimed as its only ground of Federal jurisdiction in an action in the Circuit Court of the United States against members of the state board of valuation and assessment that under the tax laws of the State it was deprived of equal protection of the laws contrary to the Fourteenth Amendment, because while the law of the State required all property to be taxed at its fair cash value there was a uniform and general undervaluation of other property but the company's property was taxed at its full value. There was conflicting testimony as to the valuations, most of the members of the board

CONSTRUCTION.

CONTRACTS.

a process described as patented. The contract provided that in case it should at any time be judicially decided "that the company was not legally entitled under the patent to the process and the product the payment of royalties should cease. In a suit by the company for royalties the United States attempted to deny the validity of the patent while admitting there was no outstanding decision against it. *Held*, that this defense was not open. *Held further*, that under the circumstances of this case, the contract, properly construed, extended to the process actually used even if it varied somewhat from that described in the patent. *United States* v. *Harvey Steel Co.*, 310.

See CONSTITUTIONAL LAW, 2; INSURANCE; INTERSTATE COMMERCE, 1; MAILS; WATERS, 1; WILLS, 3.

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See DAMAGES.

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CORPORATIONS.

1. *Right of creating power to impose regulations concerning ownership of stock.* The sovereign that creates a corporation has the incidental right to impose reasonable regulations concerning the ownership of stock therein and it is not an unreasonable regulation to establish the situs of stock for purposes of taxation, at the principal office of the corporation whether owned by residents or non-residents, and to compel the corporation to pay the tax for the stockholders giving it a right of recovery therefor against the stockholders and a lien on the stock. *Corry* v. *Mayor and Council of Baltimore*, 466.

2. *Validity of regulation establishing situs of stock for purposes of taxation.* Where valid according to the laws of the State such a regulation does not deprive the stockholder of his property without due process of law either because it is an exercise of the taxing power of the State over persons and things not within its jurisdiction, or because notice of the assessment is not given to each stockholder, provided notice is given to the corporation and the statute either in terms, or as construed by the state court, constitutes the corporation the agent of the stockholders to receive notice and to represent them in proceedings for the correction of the assessment. *Ib.*

3. *Provisions of constitution and general laws of State as part of charter.* While the liability of non-resident stockholders for taxes on his stock may not be expressed in the charter of the company if it existed in the general laws of the State at the time of the creation of the corporation or the extension of its charter, and the constitution of the State also contained at such times the reserved right to alter, amend and repeal,

those provisions of the constitution and general laws of the State are as much a part of the charter as if expressly embodied therein. *Ib.*

See CONSTITUTIONAL LAW, 7; JURISDICTION, B 2; MUNICIPAL CORPORATIONS; PROCESS; PUBLIC LANDS, 7; TAXATION, 8.

COSTS.

See PARTIES.

COUPLERS.

See AUTOMATIC COUPLERS.

COURTS.

1. *Federal Circuit Court as court of the State in which it sits—Controlling force of state law.*

In the exercise of the jurisdiction conferred upon it of controversies between citizens of different States, a Circuit Court of the United States is for every practical purpose a court of the State in which it sits and will enforce the rights of the parties according to the law of that State taking care, as a state court must, not to infringe any right secured by the Constitution and the laws of the United States. And in a case of condemnation it would proceed under the sanction of, and enforce, the state law so far as it was not unconstitutional. *Traction Company* v. *Mining Company*, 239.

2. *Rule as to interference by Federal court with State's administration of its taxes.*

Where the only constitutional ground on which the complainant can come into the Circuit Court obviously fails the court should be very cautious in interfering with the State's administration of its taxes upon other considerations which would not have given it jurisdiction. *Coulter* v. *Louisville & Nashville R. R. Co.*, 599.

3. *State—Power to prescribe extent of state statute.*

The power in the state court to determine the meaning of a state statute carries with it the power to prescribe its extent and limitations as well as the method by which they shall be determined. *Smiley* v. *Kansas*, 447.

See FEDERAL QUESTION; JURISDICTION; PRACTICE, 2; PROCESS; PUBLIC LANDS, 3; REMOVAL OF CAUSES; STATES, 3.

COURT AND JURY.

See CRIMINAL LAW, 2; INSTRUCTIONS TO JURY; MASTER AND SERVANT.

COURT-MARTIAL.

See ARMY.

CRIMINAL LAW.

1. *Case arising under section* 1782, *Rev. Stat., relative to taking by United States Senator of compensation in matters to which United States is a party.*

A Senator of the United States was indicted and tried in the Eastern District of Missouri for a violation of § 1782, Rev. Stat., the indictment averring that he had rendered services for a certain corporation before the Post Office Department in matters in which the United States was interested, that is whether a "fraud order" should issue against such corporation, and that he had received payment at St. Louis therefor. The defendant denied that the United States was interested in the matters referred to in the indictment within the meaning of § 1782, Rev. Stat., or that he had rendered any service in violation thereof and alleged that the service which he had rendered to, and had been paid for by, the corporation, were those of general counsel, and not connected with the "fraud order." It was proved without contradiction that the compensation he received under certain counts was sent to him from St. Louis and received by him in Washington in the form of checks on a St. Louis bank which he deposited in his bank in Washington, receiving credit therefor at once, and which checks were subsequently paid in due course. On the trial the jurisdiction of the court was denied, the offense, if any there was, having been committed at Washington and not at St. Louis, and the defendant also asserted his privilege from arrest under § 16, Art. I of the Constitution. The court held that the privilege from arrest was waived and submitted to the jury whether there was any agreement by which the place of payment of the checks was St. Louis and not Washington. *Held*, that the facts alleged in the indictment showed a case that is covered by the provisions of § 1782, Rev. Stat. *Burton* v. *United States*, 283.

2. *Locus criminis where payment by check.*

The payment of the checks to defendant in this manner was a payment at Washington, and if any crime was committed it was not at St. Louis, and, in view of the evidence, it was error to submit to the jury any question as to where the payment was made, and those counts in the indictment which were based on allegations of payments in St. Louis should have been dismissed as the court had no jurisdiction thereover. This is not the case of the commencement of a crime in one district and its completion in another so that the court in either district would have jurisdiction under § 731, Rev. Stat. *Ib.*

See CONSTITUTIONAL LAW, 5;
EXTRADITION.

CUSTOM.

See CONTRACTS, 2.

DAMAGES.

Contribution; rule as to, held inapplicable.

A railroad company delivered a car with imperfect brakes to a terminal

EMINENT DOMAIN.

1. *Taking must be for public purposes.*

It is fundamental in American jurisprudence that private property cannot be taken by the Government, National or state, except for purposes which are of a public character, although such taking be accompanied by compensation to the owner. *Traction Company* v. *Mining Company*, 239.

2. *State laws governing exercise, jurisdiction of Federal court not to be excluded by.*

It is for the State, primarily and exclusively, to declare for what local public purposes private property, within its limits, may be taken upon compensation to the owner, as well as to prescribe a mode in which it may be condemned and taken. But the State may not prescribe any mode of taking private property for a public purpose and of ascertaining the compensation to be made therefor, which would exclude from the jurisdiction of a Circuit Court of the United States a condemnation proceeding which in its essential features is a suit involving a controversy between citizens of different States. *Ib.*

See ACTION.

EQUAL PROTECTION OF LAWS.

See CONSTITUTIONAL LAW, 6, 7.

EQUITY.

See COMBINATIONS IN RESTRAINT OF TRADE;
PLEADING;
TAXATION, 7.

ESTATES.

See WILLS, 1.

ESTATES OF DECEDENTS.

See JURISDICTION, B 1;
LOCAL LAW (P. R.);
WILLS.

EVIDENCE.

See EXTRADITION, 1;
FEDERAL QUESTION, 4;
PUBLIC LANDS, 6;
WILLS, 3.

EXEMPTIONS.

See BANKRUPTCY, 1, 2, 3.

EX POST FACTO LAWS.

See CONSTITUTIONAL LAW, 5.

EXTRADITION.

1. *Interstate rendition—Right to a hearing—Sufficiency of Governor's warrant.*

INSURANCE.

Construction of policy—Contract of insurance a personal one.

A policy of insurance provided that it should be void if the interest of the insured was other than the unconditional and sole ownership or if the property were encumbered by a chattel mortgage. It was in fact subject to certain trust deeds which the insured claimed after loss were different instruments in law. *Held*, that a deed of trust and a chattel mortgage with power of sale are practically one and the same instruments as understood in the District of Columbia. The rule that in case of attempted forfeiture if the policy be fairly susceptible of two constructions the one will be adopted which is more favorable to the insured was inapplicable to this case. The contract of an insurance company is a personal one with the assured and it is not bound to accept any other person to whom the latter may transfer the property. *Hunt* v. *Springfield F. & M. Ins. Co.*, 47.

INTEREST.

See NATIONAL BANKS.

INTERSTATE COMMERCE.

1. *Freedom of contract concerning.*

Bowman v. *Chicago*, 125 U. S. 465, *Leisy* v. *Hardin*, 135 U. S. 100, *Rhodes* v. *Iowa*, 170 U. S. 412, *Vance* v. *Vandercook Co. No.* 1, 170 U. S. 438, rest on the broad principle of the freedom of commerce between the States, or the right of citizens of one State to freely contract to receive and send merchandise from and to another State, and on the want of power of one State to destroy contracts concerning interstate commerce valid in the States where made. The right of the parties thereto to make a contract, valid in the State where made, for the sale and purchase of merchandise and in so doing to fix the time when, and conditions on which, completed title shall pass is beyond question. *American Express Co.* v. *Iowa*, 133.

2. *Original package; term defined.*

The term original package is not defined by statute and while it may be impossible to judicially determine its size or shape, under the principle upon which its exemption while an article of interstate commerce is founded, the term does not include packages which cannot be commercially transported from one State to another. *Cook* v. *Marshall County*, 261.

3. *Original package; cigarette boxes held not to be.*

This court adheres to its decision in *Austin* v. *Tennessee*, 179 U. S. 343, that small pasteboard boxes each containing ten cigarettes, and sealed and stamped with the revenue stamp, whether shipped in a basket or loosely, not boxed, baled or attached together, and not separately or otherwise addressed but for which the express company has given a receipt and agreement to deliver them to a person named therein in another State, are not original packages and are not protected under the commerce

tribunal. The certificate of the lower court is an absolute prerequisite to the exercise of power here unless the record clearly and unequivocally shows that the court sends up for consideration the single and definite question of its jurisdiction as a court of the United States. *Courtney* v. *Pradt*, 89.

2. *Direct appeal from District Court sitting in bankruptcy.*

The bankruptcy court has jurisdiction to determine on a claim asserted by the bankrupt whether property in the hands of the trustee is exempt; and while an erroneous decision against the asserted right may be corrected in the appropriate mode for the correction of errors, the jurisdiction of the court is not in issue within the meaning of the act of March 3, 1891, and a direct appeal to this court will not lie. *Lucius* v. *Cawthon-Coleman Co.*, 149.

3. *To review decisions of state courts—Proper reservation of Federal question.*

This court has no general power to review or correct the decisions of the highest state court and in cases of this kind exercises a statutory jurisdiction to protect alleged violations, in state decisions, of certain rights arising under Federal authority; and if the question is not properly reserved in the state court the deficiency cannot be supplied in either the petition for rehearing after judgment or the assignment of errors in this court, or by the certification of the briefs which are not a part of the record by the clerk of the state Supreme Court. This court will not reverse the judgment of a state court holding an alleged Federal constitutional objection waived, where the record discloses that no authority was cited or argument advanced in its support and it is clear that the decision was based upon other than Federal grounds and the constitutional question was not decided. *Harding* v. *Illinois*, 78.

4. *Review of final judgment of Supreme Court of Oklahoma.*

Under § 9, act of May 2, 1890, 26 Stat. 81, c. 182, final judgments of the Supreme Court of the Territory of Oklahoma in actions at law can only be revised by this court as are judgments of the Circuit Courts of the United States in similar actions—by writ of error and not by appeal. *Comstock* v. *Eagleton*, 99.

5. *Where Federal question properly invoked, although verdict and judgment below rendered according to law.*

Although when the charge of the state court is not before this court, and the record contains no exception to any part of it, the verdict and judgment must be held to have been rendered according to law, nevertheless, if a provision of the Federal Constitution was properly invoked the motion to dismiss may be denied. *Hamburg American Steamship Co.* v. *Grube*, 407.

6. *Writ of error to District Court—Review not restricted to constitutional question.*

Whether a Senator of the United States has waived his privilege from

there may be and provides for a suit brought by a stockholder against the corporation and other parties on rights which may be properly asserted by the corporation, and when such a suit is between citizens of different States and is not collusive, but the corporation is controlled by interests antagonistic to complainant, it involves a controversy which is cognizable in a Circuit Court of the United States, and the defendant corporation is not to be classed on the same side of the controversy as complainant for the purpose of determining the diversity of citizenship on which the jurisdiction of the Circuit Court must rest. *Doctor* v. *Harrington*, 579.

3. *Scope of power in case removed on ground of diversity of citizenship.* When a case has been removed into the Circuit Court of the United States on the ground of diversity of citizenship, that court is entitled to pass on all questions arising, including the question of jurisdiction over the subject matter in the state courts or the sufficiency of mesne process to authorize the recovery of personal judgment. The right to remove for diversity of citizenship, as given by a constitutional act of Congress, cannot be taken away or abridged by state statutes and the case being removed the Circuit Court has power to so deal with the controversy that the party will lose nothing by his choice of tribunals. *Courtney* v. *Pradt*, 89.

See ACTION; COURTS, 1, 2; EMINENT DOMAIN, 2; REMOVAL OF CAUSES, 1.

OF DISTRICT COURT. *See* Criminal Law, 2.

OF STATE COURTS. *See* Federal Question, 1; Removal of Causes, 1.

OF BANKRUPTCY COURT. *See* Jurisdiction, A 2.

GENERALLY. *See* Process; Waters.

JURY.

See INSTRUCTIONS TO JURY.

LAND DEPARTMENT.

See PUBLIC LANDS, 7.

LAND GRANTS.

See PUBLIC LANDS.

LEGACIES.

See WAR REVENUE ACT, 1.

LICENSE.

See STATUTES, A 1.

LIENS.

See JURISDICTION, B 1; TAXATION, 4.

LIVE STOCK.

See COMBINATIONS IN RESTRAINT OF TRADE.

LOCAL LAW.

California. County ordinance imposing license (see Statutes, A 1). *Flanigan* v. *Sierra County*, 553.

District of Columbia. See District of Columbia.

Georgia. Carriers, sections 2317, 2318, Code of 1895 (see Constitutional Law, 1). *Central of Georgia Ry. Co.* v. *Murphey*, 194.

Iowa. Taxation, sections 5007, 2441, 2442, Code (see Taxation, 3). *Hodge* v. *Muscatine County*, 276 (see Constitutional Law, 4). *Ib.* Section 5007 (see Constitutional Law, 6). *Cook* v. *Marshall County*, 261.

Kansas. Anti-trust act of March 8, 1897 (see Constitutional Law, 8). *Smiley* v. *Kansas*, 447.

Kentucky. Condemnation of lands (see Action). *Traction Company* v. *Mining Company*, 239.

Massachusetts. Chapter 578, Laws of 1898 (see Constitutional Law, 2). *Worcester* v. *Street Railway Co.*, 539.

Montana. Code, section 3612 (see Public Lands, 3). *Butte City Water Co.* v. *Baker*, 119.

New Mexico. Service of process, Compiled Laws of 1897 (see Process). *Caledonian Coal Co.* v. *Baker*, 432.

New York. Foreign corporations (see Federal Question, 1). *Allen* v. *Alleghany Co.*, 458.

North Dakota. Criminal law, chapter 99, March 9, 1903 (see Constitutional Law, 5). *Rooney* v. *North Dakota*, 319.

Ohio. Taxation (see Taxation, 8). *Scottish Union & Nat. Ins. Co.* v. *Bowland*, 611.

Pennsylvania. Foreign corporations (see Federal Question, 1). *Allen* v. *Alleghany Co.*, 458.

Porto Rico. Estates of decedents—Rights of heir ab intestato—Payment by debtor to designated heir during pendency of proceedings by other heirs. Under the law of Porto Rico while an heir to an intestate may assert his rights against one already designated heir *ab intestato* any time within five years after the decree of designation, the heir so designated may within the five-year period collect debts due to the intestate's estate and, where the payment is made in good faith and under the order of the court into which the money was paid by the debtor, and without notice of existence and claims of other heirs, discharge the debtor from liability, notwithstanding such other heirs subsequently assert their claims and are also designated as joint heirs *ab intestato.* Where, however, the debtor has legal notice from the court where the matter is pending that one not originally designated has asserted and is prosecuting a claim to recognition as an heir *ab intestato*, any pay-

within the power reserved to the Postmaster General and the contractor is not entitled to additional compensation therefor. *Ib.*

3. *Contract by local postmaster not binding on Government.*

In the absence of authority shown, a local postmaster has no power or authority to contract in respect to mail messenger service, and is not the agent of nor can he bind the Government for that purpose, and if a contractor performs services which he protests against as not being within his contract, solely on the postmaster's order, he is not entitled to extra compensation therefor after his protest has been sustained and the service let to others. *Ib.*

MARITIME LAW.

Liability, under Harter Act, for damages due to negligence in unloading cargo —Application of act to foreign vessels.

A foreign vessel from Liverpool arrived at its destination, New York, and made fast to the wharf. Owing to unusual gales and weather she was heavily weighted with snow and ice and made top heavy. While the cargo was being unloaded she suddenly rolled over and sank, damaging the cargo remaining in her, some of which had been shipped from points east of Liverpool on bills of lading to Liverpool, thence to be forwarded to New York, and containing certain exemptions of the carrier from liability. The owners and insurers of cargo libelled the vessel; it was found by the District Court and the Circuit Court of Appeals that the damage was due to negligence in unloading cargo and ruled that the negligence fell within section one of the Harter Act and not within section three of the same as negligence in the navigation or management of the vessel. *Held,* that this court will not go behind the findings of the two courts as to negligence and that the rule was correct. When a case may fall under section one and section three of the Harter Act the question which section is to govern must be determined by the primary nature and object of the acts which cause the loss. *Semble.* The standard of conduct is external and not merely co-extensive with the judgment of the individual. The Harter Act will be applied to foreign vessels in suits brought in the United States, and where claimants set up and rely upon the act they must take the burden with the benefits and cannot claim a greater limitation of liability under provisions of bills of lading. *The Germanic,* 589.

MASTER AND SERVANT.

Safe appliances—Increased hazard—Knowledge of employé.

An employé is entitled to assume that his employer has used due care to provide reasonably safe appliances for the doing of his work. Knowledge of the increased hazard resulting from the negligent location in dangerous proximity to a railroad track of a structure will not be imputed to an employé, using ordinary diligence to avoid it if properly located, because he was aware of its existence and general location. It is for the jury to determine from all the evidence whether he had

PROCESS.

What service necessary—Service on officer of corporation while passing through jurisdiction.

A court cannot acquire jurisdiction over the person of a defendant except by actual service of notice upon him within the jurisdiction or upon some one authorized to accept service in his behalf, or by his waiver, by general appearance or otherwise, of the want of due service. Service of a summons in an action in a territorial court of New Mexico on the president of a railway corporation, while passing through New Mexico as a passenger on a railroad train, held insufficient as a personal service of a corporation organized under an act of Congress, having offices in New York, Kansas and Illinois, and none in New Mexico; the mere ownership of lands, the bringing of suits to protect such lands, in New Mexico does not locate the corporation in New Mexico for the purposes of a personal action against it based on such a service of the summons. Nor was such service authorized by the Compiled Laws of New Mexico, 1897. Although the state of the statute law in respect of suits like this may operate injuriously at times the situation cannot be changed by the courts—that can only be done by legislation. *Caledonian Coal Co.* v. *Baker*, 432.

PROPERTY RIGHTS.

See MUNICIPAL CORPORATIONS, 2.

PUBLIC LANDS.

1. *Appropriation; effect of subsequent grant on.*

Unless an intent to the contrary is clearly manifest by its terms, a statute providing generally for the disposal of public lands is inapplicable to lands taken possession of and occupied by the Government for a special purpose. A prior appropriation is always presumed to except land from the scope of a subsequent grant although no reference may be made in the latter to the former. *Scott* v. *Carew*, 100.

2. *Appropriation—Establishment of military post.*

The establishment of a military post under proper orders on public lands amounts to an appropriation of the land for military purposes and withdraws the property occupied from the effect of general laws subsequently passed for the disposal of public lands, and no right of an individual settler attaches to or hangs over the land to interfere with the action of the Government in regard thereto. *Ib.*

3. *Delegation of powers by Congress to local legislatures.*

While the disposal of the public lands is made through the exercise of legislative power entrusted to Congress by the Constitution, yet Congress prescribing the main and substantial conditions thereof may rightfully entrust to local legislatures the determination of those minor matters as to such disposal which amount to mere regulations. Regulations made by the local legislatures in regard to the location of mining claims which are not in conflict with the Constitution and

STATES.

1. *Police power under Constitution.*

The police power of the State does not give it the right to violate any provision of the Federal Constitution. *Central of Georgia Ry. Co.* v. *Murphey*, 194.

2. *Police power; extent of, where freedom of contract involved.*

While there is a certain freedom of contract which the State cannot destroy by legislative enactment, in pursuance whereof parties may seek to further their business interests, the police power of the State extends to, and may prohibit a secret arrangement by which, under penalties, and without any merging of interests through partnership or incorporation an apparently existing competition among all the dealers in a community in one of the necessaries of life is substantially destroyed. *Smiley* v. *Kansas*, 447.

3. *Power to withdraw suit from cognizance of Federal court.*

A State cannot by any statutory provisions withdraw a suit in which there is a controversy between citizens of different States from the cognizance of the Federal courts. *Traction Company* v. *Mining Company*, 239.

4. *Right to tax or prohibit sale of cigarettes.*

A State may reserve to itself the right to tax or prohibit the sale of cigarettes, and while this court is not bound by the construction given to a statute by the highest court of the State as to whether a tax is or is not a license to sell it will accept it unless clearly of the opinion that it is wrong. *Hodge* v. *Muscatine County*, 276.

See Cases Explained, 2; Constitutional Law, 1, 7; Corporations, 2; Eminent Domain, 2; Interstate Commerce, 1, 4, 5; Jurisdiction, A 3; Local Law; Removal of Causes, 3; Waters, 1.

STATUTES.

A. Construction of.

1. *Application of state court's construction of state statutes—California license ordinance held a revenue measure.*

Whether a statute of a State is or is not a revenue measure and how rights thereunder are affected by a repealing statute depends upon the construction of the statutes, and where no Federal question exists this court will lean to an agreement with the state court. Under the California cases the county ordinance imposing licenses involved in this case was a revenue and not a police measure. *Flanigan* v. *Sierra County*, 553.

2. *Repeal extinguishing power derived from statute—Doctrine applied to other than penal statutes.*

While the doctrine that powers derived wholly from a statute are extin-

mission of testator to an insane asylum, from which he had been released apparently in sound condition prior to the execution of the will, were properly excluded both because not sworn and given in a different proceeding and on a different issue. There was no error in submitting the question of testator's insanity to the jury with the instruction that if they found that the insanity was permanent in its nature and character the presumptions were that it would continue and the burden was on those holding under the will to satisfy the jury that he was of sound mind when it was executed. A man may be insane to the extent of being dangerous if set at liberty and yet have sufficient mental capacity to make a will, enter into contracts, transact business and be a witness. *Ib.*

WITNESS.

See WILLS, 2, 3.

WORDS AND PHRASES.

See CONTRACTS, 1;
STATUTES, A 5;
PUBLIC LANDS, 7.