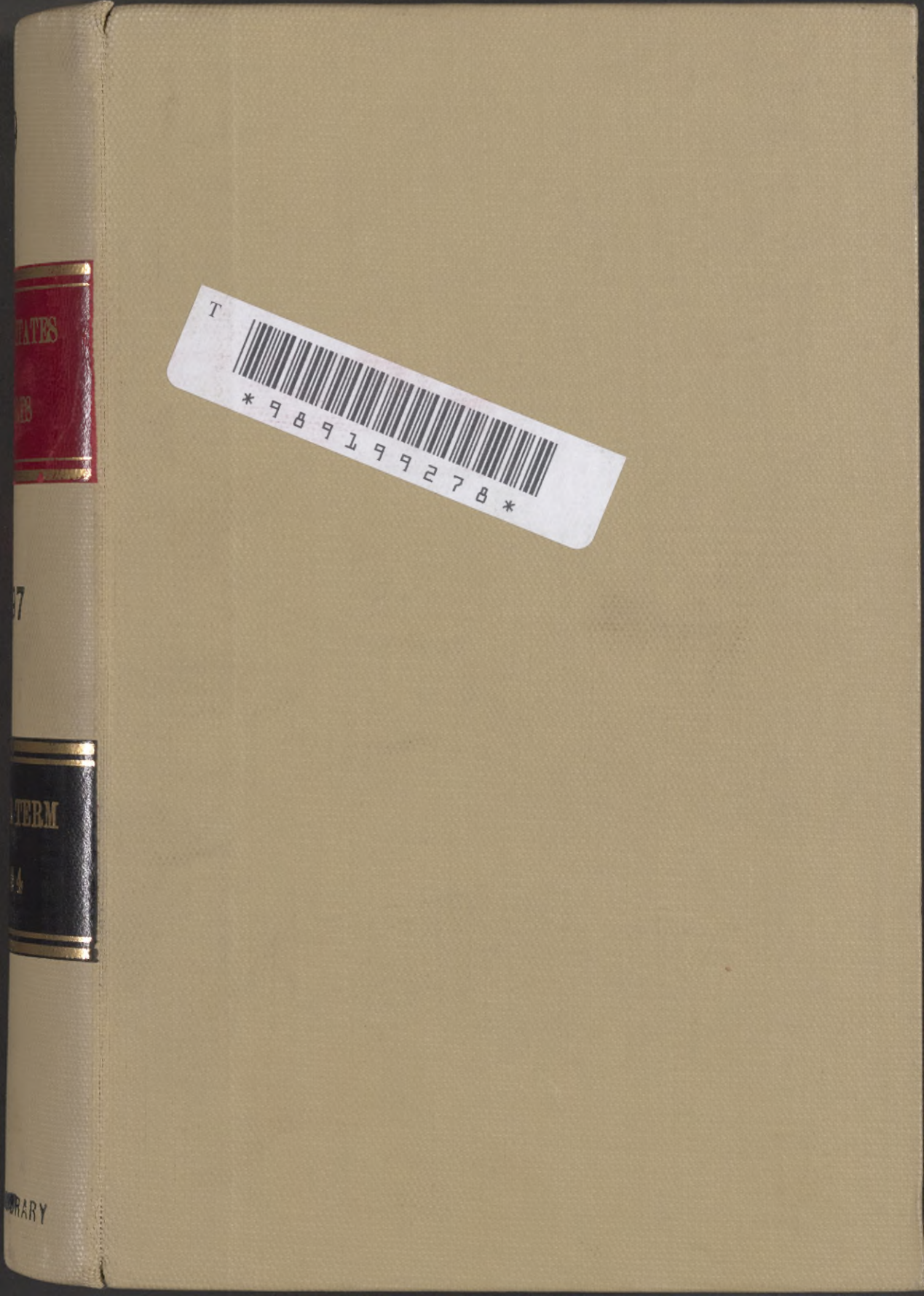
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UNITED STATES REPORTS

VOLUME 197

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1904

CHARLES HENRY BUTLER

REPORTER

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

MELVILLE WESTON FULLER, Chief Justice.
JOHN MARSHALL HARLAN, Associate Justice.
DAVID JOSIAH BREWER, Associate Justice.
HENRY BILLINGS BROWN, Associate Justice.
EDWARD DOUGLASS WHITE, Associate Justice.
RUFUS W. PECKHAM, Associate Justice.
JOSEPH McKENNA, Associate Justice.
OLIVER WENDELL HOLMES, Associate Justice.
WILLIAM R. DAY, Associate Justice.

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

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1904.

NORTHERN PACIFIC RAILWAY COMPANY *v.* ELY.
SAME *v.* SAME.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

Nos. 102, 88. Submitted December 15, 1904.—Decided February 20, 1905.

Northern Pacific Railway Company v. *Townsend*, 190 U. S. 267, affirmed as to the point that individuals cannot for private purposes acquire by adverse possession under a state statute of limitations any portion of the right of way granted to the Northern Pacific Railway Company. But by the act of April 28, 1904, that right of way was narrowed to two hundred feet in width and title acquired to land outside of a strip of that width was confirmed.

As the decree in this case was rendered and a writ of error therefrom was pending in this court prior to April 28, 1904, the decree must be reversed and the case remanded to the state courts to be dealt with in view of the application of the act of April 28, 1904.

THE facts are stated in the opinion.

Mr. C. W. Bunn and *Mr. James B. Kerr* for plaintiff in error.

Mr. William E. Cullen and *Mr. Samuel R. Stern* for Ely, defendant in error.

Mr. Harold Preston and *Mr. F. T. Post* for Browne and others, defendants in error, cited to effect that a railroad company may lose by abandonment or adverse possession unused portions of its right of way: *Pittsburg &c. Ry. Co.* v. *Stickley*, 155 Indiana, 312; *Railroad* v. *Houghton*, 126 Illinois, 233; *Railroad* v. *O'Connor*, 154 Illinois, 550; *Railroad* v. *Moore*, 160 Illinois, 9; *Railroad* v. *Donohue*, 165 Illinois, 640; *Railroad* v. *Wakefield*, 173 Illinois, 564; *Matthews* v. *Lake Shore R. R.*, 110 Michigan, 170; *Turner* v. *Fitchburg R. R.*, 145 Massachusetts, 143; *Gay* v. *Boston A. R. Co.*, 141 Massachusetts, 407; *Paxton* v. *Yazoo & M. V. R. R.*, 76 Mississippi, 536; *Spottswood* v. *Morris E. R. Co.*, 61 N. J. Law, 322; *Townsend* v. *N. P. R. R. Co.*, 84 Minnesota, 152; *Bobbitt* v. *Railway Co.*, 9 Q. B. Div. 424; *Newton* v. *Railway Co.*, 13 Ch. Div. 268; *Rosseau* v. *Railway Co.*, 17 Ont. App. 483.

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

This was a suit brought by the Northern Pacific Railway Company, successor to the Northern Pacific Railroad Company, in the Superior Court of the County of Spokane, State of Washington, against a large number of persons, to quiet title, remove clouds and recover possession of certain parcels of real estate, alleged to be portions of its right of way in that county.

The complaint alleged that plaintiff was the owner and entitled to a strip of land, four hundred feet wide, on which defendants had wrongfully entered. Some of the defendants were defaulted. Separate answers were interposed by others, separate trials had, separate verdicts rendered, and bill of exceptions granted. As to one defendant, the case was submitted to the court for trial, and findings of fact and conclusions of law were made and filed.

A single decree was rendered in favor of contesting defendants, from which the railway company appealed to the Supreme Court of the State, where the decree was affirmed. 25 Washington, 384.

The opinion of that court was filed June 29, 1901, and judgment of affirmance entered July 30, 1901. On May 4, 1903, the case of *Northern Pacific Railway Company* v. *Townsend*, 190 U. S. 267, was decided. May 28, 1903, the railway company was allowed a writ of error from this court, the judgment of the State Supreme Court being described as entered June 29, 1901. The case was docketed July 23, 1903, and is now numbered 88. June 30 a second writ of error was taken out and filed below, the papers correctly describing the judgment as entered July 30, 1901, and was docketed here August 13, 1903, and is now numbered 102.

Plaintiff moved for leave to amend the record in No. 88 so that the date of the judgment might be correctly given, and that thereupon No. 102 be dismissed, or, in the alternative, that No. 88 be dismissed. We grant the latter application and dismiss No. 88 without prejudice to proceeding in No. 102. *Wheeler* v. *Harris*, 13 Wall. 51; *Silsby* v. *Foote*, 20 How. 290.

The facts on which the State Supreme Court proceeded are thus stated:

"It may be conceded, we think, that the right of way which embraces the land in dispute was granted to the Northern Pacific Railroad Company by act of Congress in 1864, and that, to the title to the right of way thus granted to the Northern Pacific Railroad Company, the Northern Pacific Railway Company has succeeded. It may also be conceded, for the purposes of this case, that the Northern Pacific Railway Company has complied with all the terms and provisions of the act of Congress aforesaid, and has constructed its railroad through the whole of the line of road between the points named in the granting act; that a map of definite location was filed October 4, 1880, prior to the acquiring of the title to the land in question by the defendants or their predecessors or grantors; and that said railroad has been continuously operated since its construction. The defendants, answering, claim title by patent from the United States Government. The land was acquired under the preëmption and homestead acts, respec-

tively, and all the defendants or their grantors have been in quiet, peaceful, undisturbed, and undisputed possession of said land for more than ten years immediately prior to the commencement of this action, many of them for nearly twenty years. Valuable improvements have been made by the defendants, the said land consisting of town lots in the city of Spokane, and having been platted and laid out as additions to the city of Spokane by the defendants or their grantors after acquiring title to the same from the United States Government. During all these years no claim whatever to these lands has been made by the appellant. It has stood by and seen improvements made thereon, and, in the case of defendant Brown, an agreement was entered into between him and General Sprague, who was then the general superintendent of the Northern Pacific Railroad Company, that they would plat their lots so that the streets of the addition which the railroad company was dedicating would correspond with and meet the streets which Brown was dedicating to the city of Spokane, and the agreement was carried out by arranging the streets in accordance therewith. These streets have been used by the public for from ten to eighteen years. The testimony shows that, in addition to the improvements which these defendants have made upon their lots, many thousands of dollars have been paid by them for assessments levied upon abutting land for the improvement of streets running through this right of way; that the appellant has never paid these assessments; that they have never been assessed to the appellant and that no question has ever been raised by the appellant as to the right and obligation of the defendants to pay the same. While the record does not show that any of the lands owned by the defendants were deeded to them by the appellant, it does show that the Northern Pacific Railroad Company has deeded to other parties lots in the city of Spokane situated within the 400 feet of right of way, upon which valuable improvements have been made by its grantees."

It may be added that it was only as to some of the parcels

that the filing of the map of definite location and the construction of the railroad preceded the filing of the entries. But we regard the case as falling within the rule holding the grant of the right of way effective from the date of the act. *Railroad Company* v. *Baldwin*, 103 U. S. 426.

The Supreme Court held that the action was barred by the statute of limitations; that the company was estopped from asserting title by reason of the circumstances; and that: "Where, through the negligence and laches of a railroad company, the occupancy by others of portions of the right of way granted to it by the Government has ripened into title by adverse possession, the company cannot set up the defense that the right of way was granted for public purposes only and that it would be against public policy to permit either its abandonment by the company or the acquisition of adverse rights therein by way of estoppel or of the bar of the statute of limitations."

As before stated, on the fourth day of May, 1903, the decision of this court in *Northern Pacific Railway Company* v. *Townsend*, 190 U. S. 267, was announced. We there ruled that individuals could not for private purposes acquire by adverse possession, under a state statute of limitations, any portion of a right of way granted by the United States to a railroad company in the manner and under the conditions that the right of way was granted to the Northern Pacific Railroad Company. At the same time it was not denied that such right of way granted through the public domain within a State was amenable to the police power of the State. And we said: "Congress must have assumed when making this grant, for instance, that in the natural order of events, as settlements were made along the line of the railroad, crossings of the right of way would become necessary, and that other limitations in favor of the general public upon an exclusive right of occupancy by the railroad of its right of way might be justly imposed. But such limitations are in no sense analogous to claim of adverse ownership for private use."

We are not prepared to overrule that decision, and tested by it, the judgment in this case must be reversed. But we were then dealing with the original right of way, which was of a width of four hundred feet. April 28, 1904, an act of Congress entitled "An act validating certain conveyances of the Northern Pacific Railroad Company and the Northern Pacific Railway Company," was approved, 33 Stat. 538, c. 1782, reading as follows:

"That all conveyances heretofore made by the Northern Pacific Railroad Company or by the Northern Pacific Railway Company, of land forming a part of the right of way of the Northern Pacific Railroad, granted by the Government by any act of Congress, are hereby legalized, validated, and confirmed: *Provided*, That no such conveyance shall have effect to diminish said right of way to a less width than one hundred feet on each side of the center of the main track of the railroad as now established and maintained.

"SEC. 2. That this act shall have no validating force until the Northern Pacific Railway Company shall file with the Secretary of the Interior an instrument in writing, accepting its terms and provisions."

The terms and provisions of the act were accepted by the railway company June 22, 1904, and the acceptance, duly certified, was filed in the Interior Department July 7, 1904.

In the *Townsend case* it was said, among other things (p. 271):

"Manifestly, the land forming the right of way was not granted with the intent that it might be absolutely disposed of at the volition of the company. On the contrary, the grant was explicitly stated to be for a designated purpose, one which negated the existence of the power to voluntarily alienate the right of way or any portion thereof. The substantial consideration inducing the grant was the perpetual use of the land for the legitimate purposes of the railroad, just as though the land had been conveyed in terms to have and to hold the same so long as it was used for the railroad right of way. In effect the grant was of a limited fee, made on an implied condition

of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted. . . . Congress having plainly manifested its intention that the title to and possession of the right of way should continue in the original grantee, its successors and assigns, so long as the railroad was maintained, the possession by individuals of portions of the right of way cannot be treated without overthrowing the act of Congress as forming the basis of an adverse possession which may ripen into a title good as against the railroad company." 190 U. S. 271, 272.

The act of April 28, 1904, in view of our decision in that case, was obviously intended to and did have the effect to narrow the right of way to two hundred feet in width, so far at least as outside of that strip the original right of way had been parted with.

The rule in the State of Washington as to adverse possession is thus stated by the Supreme Court in this case:

"One holding land adversely to the rights of another can be divested only by the action of the other, even with a better right, within the time prescribed by the statute of limitations, and this is true, even though he may have originally entered under a void grant or sale. But his claim ripens into a perfect title and becomes absolute, if such possession is not disturbed within the time prescribed. As is said by 3 Washburn on Real Property, 5th ed., p. 176:

" 'The operation of the statute takes away the title of the real owner and transfers it, not in form, indeed, but in legal effect, to the adverse occupant. In other words, the statute of limitations gives a perfect title. The doctrine is stated thus strongly, because it seems to be the result of modern decisions, although it was once held that the effect of the statute was merely to take away the remedy, and did not bind the estate, or transfer the title.' " 25 Washington, 388.

In *Sharon* v. *Tucker*, 144 U. S. 533, 543, where the statute of limitations in force in the District of Columbia was applied, Mr. Justice Field, speaking for the court, said:

"It is now well settled that by adverse possession for the period designated by the statute, not only is the remedy of the former owner gone, but his title has passed to the occupant, so that the latter can maintain ejectment for the possession against such former owner should he intrude upon the premises. In several of the States this doctrine has become a positive rule, by their statutes of limitations declaring that uninterrupted possession for the period designated to bar an action for the recovery of land shall, of itself, constitute a complete title. *Leffingwell* v. *Warren*, 2 Black, 599; *Campbell* v. *Holt*, 115 U. S. 620, 623."

This was quoted in *Toltec Ranch Company* v. *Cook*, 191 U. S. 532, 538, and it was remarked:

"Adverse possession, therefore, may be said to transfer the title as effectually as a conveyance from the owner; it may be considered as tantamount to a conveyance."

So far as title to portions of the right of way could be lawfully acquired from the railway company, defendants below, appellees in the Supreme Court, had acquired title to their parcels by adverse possession, and occupied the same position as if they had received conveyances, which the act of April 28, 1904, operated to confirm. The act is remedial and to be construed accordingly. The lots of some of the defendants were outside of the two hundred feet. The lots of others were partly within and partly without the strip. But the act was passed after the judgment of the Supreme Court was rendered and while the case was pending here, and it must be left to the state courts to deal with the matter in the light of the conclusions at which we have arrived.

In *Railway Company* v. *Twombly*, 100 U. S. 78, which was a writ of error to the Supreme Court of the Territory of Colorado, the act authorizing the action was repealed while the writ was pending in this court, and we, in the exercise of appellate jurisdiction, declined to send the case back to the court below with instructions to enter a judgment of nonsuit, and affirmed the judgment because we found no error.

In the present case, the parties will not be compelled to resort to some form of original proceeding to obtain relief under the act of April 28, 1904, as, apart from the statute, the decree must be reversed, and thereupon the record will be open for such adjudication as the then situation may demand.

In No. 88, *writ of error dismissed; in No.* 102, *decree reversed and cause remanded for further proceedings not inconsistent with this opinion.*

MR. JUSTICE HARLAN was of opinion that the decree of the state Supreme Court should be affirmed for the reasons given, and, therefore, dissented.

NORTHERN PACIFIC RAILWAY COMPANY *v.* HASSE.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 118. Submitted January 6, 1905.—Decided February 20, 1905.

This case is governed by the decision in *Northern Pacific Railway Company* v. *Townsend,* 190 U. S. 267, and *Northern Pacific Railway Company* v. *Ely, ante,* p. 1.

THE facts are stated in the opinion.

Mr. C. W. Bunn and *Mr. James B. Kerr* for plaintiff in error.

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

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

This was an action of ejectment brought by the Northern Pacific Railway Company in the Superior Court of Kittitas

County, Washington, to recover possession of part of its right of way, the land being partly within and partly without a right of way of two hundred feet in width. Defendants asserted title by virtue of a homestead application, filed May 24, 1883, final proof July 12, 1888, and patent September 27, 1889; and adverse possession for the period named in the statute of limitations. Judgment was entered in favor of the railway company, and defendants carried the case by appeal to the Supreme Court of Washington, which held the statute of limitations applicable, reversed the judgment below and remanded the case with directions to dismiss the action. 28 Washington, 353.

The grant of right of way, unlike the land grant, was effective from the date of the act, and the fact that the railroad was not built until after defendants' entry does not affect the disposition of the case. *Railroad Company* v. *Baldwin*, 103 U. S. 426; *Bybee* v. *Oregon & California Railroad Company*, 139 U. S. 663, 679.

The judgment must be reversed on the authority of *Northern Pacific Railway Company* v. *Townsend*, 190 U. S. 267, and remanded for further proceedings not inconsistent with the opinion of this court in *Northern Pacific Railway Company* v. *Ely*, *ante*, p. 1.

Judgment reversed.

MR. JUSTICE HARLAN dissented.

JACOBSON v. MASSACHUSETTS.

ERROR TO THE SUPREME COURT OF THE STATE OF MASSACHUSETTS.

No. 70. Argued December 6, 1904.—Decided February 20, 1905.

The United States does not derive any of its substantive powers from the Preamble of the Constitution. It cannot exert any power to secure the declared objects of the Constitution unless, apart from the Preamble such power be found in, or can properly be implied from, some express delegation in the instrument.

While the spirit of the Constitution is to be respected not less than its letter, the spirit is to be collected chiefly from its words.

While the exclusion of evidence in the state court in a case involving the constitutionality of a state statute may not strictly present a Federal question, this court may consider the rejection of such evidence upon the ground of incompetency or immateriality under the statute as showing its scope and meaning in the opinion of the state court.

The police power of a State embraces such reasonable regulations relating to matters completely within its territory, and not affecting the people of other States, established directly by legislative enactment, as will protect the public health and safety.

While a local regulation, even if based on the acknowledged police power of a State, must always yield in case of conflict with the exercise by the General Government of any power it possesses under the Constitution, the mode or manner of exercising its police power is wholly within the discretion of the State so long as the Constitution of the United States is not contravened, or any right granted or secured thereby is not infringed, or not exercised in such an arbitrary and oppressive manner as to justify the interference of the courts to prevent wrong and oppression.

The liberty secured by the Constitution of the United States does not import an absolute right in each person to be at all times, and in all circumstances wholly freed from restraint, nor is it an element in such liberty that one person, or a minority of persons residing in any community and enjoying the benefits of its local government, should have power to dominate the majority when supported in their action by the authority of the State.

It is within the police power of a State to enact a compulsory vaccination law, and it is for the legislature, and not for the courts, to determine

in the first instance whether vaccination is or is not the best mode for the prevention of smallpox and the protection of the public health.

There being obvious reasons for such exception, the fact that children, under certain circumstances, are excepted from the operation of the law does not deny the equal protection of the laws to adults if the statute is applicable equally to all adults in like condition.

The highest court of Massachusetts not having held that the compulsory vaccination law of that State establishes the absolute rule that an adult must be vaccinated even if he is not a fit subject at the time or that vaccination would seriously injure his health or cause his death, this court holds that as to an adult residing in the community, and a fit subject of vaccination, the statute is not invalid as in derogation of any of the rights of such person under the Fourteenth Amendment.

THIS case involves the validity, under the Constitution of the United States, of certain provisions in the statutes of Massachusetts relating to vaccination.

The Revised Laws of that Commonwealth, c. 75, § 137, provide that "the board of health of a city or town if, in its opinion, it is necessary for the public health or safety shall require and enforce the vaccination and revaccination of all the inhabitants thereof and shall provide them with the means of free vaccination. Whoever, being over twenty-one years of age and not under guardianship, refuses or neglects to comply with such requirement shall forfeit five dollars."

An exception is made in favor of "children who present a certificate, signed by a registered physician that they are unfit subjects for vaccination." § 139.

Proceeding under the above statutes, the Board of Health of the city of Cambridge, Massachusetts, on the twenty-seventh day of February, 1902, adopted the following regulation: "Whereas, smallpox has been prevalent to some extent in the city of Cambridge and still continues to increase; and whereas, it is necessary for the speedy extermination of the disease, that all persons not protected by vaccination should be vaccinated; and whereas, in the opinion of the board, the public health and safety require the vaccination or revaccination of all the inhabitants of Cambridge; be it ordered, that

all the inhabitants of the city who have not been successfully vaccinated since March 1, 1897, be vaccinated or revaccinated."

Subsequently, the Board adopted an additional regulation empowering a named physician to enforce the vaccination of persons as directed by the Board at its special meeting of February 27.

The above regulations being in force, the plaintiff in error, Jacobson, was proceeded against by a criminal complaint in one of the inferior courts of Massachusetts. The complaint charged that on the seventeenth day of July, 1902, the Board of Health of Cambridge, being of the opinion that it was necessary for the public health and safety, required the vaccination and revaccination of all the inhabitants thereof who had not been successfully vaccinated since the first day of March, 1897, and provided them with the means of free vaccination, and that the defendant, being over twenty-one years of age and not under guardianship, refused and neglected to comply with such requirement.

The defendant, having been arraigned, pleaded not guilty. The government put in evidence the above regulations adopted by the Board of Health and made proof tending to show that its chairman informed the defendant that by refusing to be vaccinated he would incur the penalty provided by the statute, and would be prosecuted therefor; that he offered to vaccinate the defendant without expense to him; and that the offer was declined and defendant refused to be vaccinated.

The prosecution having introduced no other evidence, the defendant made numerous offers of proof. But the trial court ruled that each and all of the facts offered to be proved by the defendant were immaterial, and excluded all proof of them.

The defendant, standing upon his offers of proof, and introducing no evidence, asked numerous instructions to the jury, among which were the following:

That section 137 of chapter 75 of the Revised Laws of Massachusetts was in derogation of the rights secured to the defendant by the Preamble to the Constitution of the United

States, and tended to subvert and defeat the purposes of the Constitution as declared in its Preamble;

That the section referred to was in derogation of the rights secured to the defendant by the Fourteenth Amendment of the Constitution of the United States, and especially of the clauses of that amendment providing that no State shall make or enforce any law abridging the privileges or immunities of citizens of the United States, nor deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws; and

That said section was opposed to the spirit of the Constitution.

Each of the defendant's prayers for instructions was rejected, and he duly excepted. The defendant requested the court, but the court refused, to instruct the jury to return a verdict of not guilty. And the court instructed the jury in substance that if they believed the evidence introduced by the Commonwealth and were satisfied beyond a reasonable doubt that the defendant was guilty of the offense charged in the complaint, they would be warranted in finding a verdict of guilty. A verdict of guilty was thereupon returned.

The case was then continued for the opinion of the Supreme Judicial Court of Massachusetts. That court overruled all the defendant's exceptions, sustained the action of the trial court, and thereafter, pursuant to the verdict of the jury, he was sentenced by the court to pay a fine of five dollars. And the court ordered that he stand committed until the fine was paid.

Mr. George Fred Williams, with whom *Mr. James A. Halloran* was on the brief, for plaintiff in error:

The right of the State under police power to enforce vaccination upon its inhabitants has not yet been determined, or more than remotely considered by this court; references are made to it in *Lawton* v. *Steele,* 152. U. S. 133; *Hannibal &*

St. J. R. R. Co. v. *Husen*, 95 U. S. 465; *Am. School of Healing* v. *McAnnulty*, 187 U. S. 94. The plaintiff in error knows of no other cases in which the subject of vaccination has been considered by this court. From a summary of vaccination laws and vaccination statutes in the United States it appears that thirty-four States of the Union have no compulsory vaccination law, as follows: Alabama, Arkansas, California, Colorado, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oregon, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia and Wisconsin.

Compulsory vaccination exists in eleven States, as follows: Connecticut, Georgia, Kentucky, Maryland (of children), Massachusetts, Mississippi, North Carolina, Pennsylvania (in second class cities), South Carolina, Virginia and Wyoming. In thirteen States exclusion of unvaccinated children from the public schools is provided, as follows: California, Georgia, Iowa, Maine, Massachusetts, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, South Dakota and Virginia.

Three-quarters of the States have not entered upon the policy of enforcing vaccination by legal penalty. Not one of the States undertakes forcible vaccination, while Utah and West Virginia expressly provide that no such compulsion shall be used.

Smallpox has ceased to be the scourge which it once was, and there is a growing tendency to resort to sanitation and isolation rather than vaccination. The States which make no provision for vaccination are not any more afflicted with smallpox than those which compel vaccination. Even New York, which imports the major part of the immigrants who annually enter this country, has not undertaken to force it upon the people. As to other countries, the Queen of Holland has recently recommended the repeal of the compulsory vac-

cination laws. There are no vaccination laws in New Zealand, and Switzerland has by plebiscite abolished all compulsory vaccination.

The English law, 61 & 62 Vict., ch. 49, provides only for the vaccination of children, under a penalty, and furnishes to the people a special vaccinator.

See ch. 299, Laws of Minnesota of 1903, abolishing vaccination, and veto in 1901 of Governor La Follette of vaccination law of Wisconsin. In 1904 there were riots in Brazil arising from attempts to enforce vaccination.

For decisions of state courts involving vaccination laws which have mainly been decided upon statutes relating to the exclusion of children from the public schools see *Bissell* v. *Davison*, 65 Connecticut, 183; *Abeel* v. *Clark*, 84 California, 226; *State* v. *Zimmerman*, 86 Minnesota, 353; *Osborn* v. *Russell*, 64 Kansas, 507; *Potts* v. *Breen*, 167 Illinois, 67; *Duffield* v. *Williamsport School District*, 162 Pa. St. 476; *State* v. *Burdge*, 95 Wisconsin, 390; *Re Rebenack*, 62 Mo. App. 8; *Blue* v. *Beach*, 155 Indiana, 121. The only cases which have considered general compulsory vaccination laws are *State* v. *Hay*, 126 N. Car. 999; *Morris* v. *Columbus*, 102 Georgia, 792; *Re William H. Smith*, 146 N. Y. 68.

None of these cases are as extreme as the decision in the case at bar and the laws providing that unvaccinated children shall not attend the public schools are widely variant from laws compelling the vaccination of adult citizens.

As to admitted functions of the police power, see 4 Blackstone, 162; Cooley's Const. Lim. 704; *Han. & St. Jo. R. R. Co.* v. *Husen*, 95 U. S. 465, 470; but the power is for the security of liberty and not for oppression. *Barbier* v. *Connelly*, 113 U. S. 27; *Lawton* v. *Steele*, 152 U. S. 133.

A compulsory vaccination law is unreasonable, arbitrary and oppressive; it is only effective in the protection of lawbreakers; the legal penalty is illogical and unjust. See under English Act, 30 & 31 Vict., ch. 84, extent of penalties. *Regina*

v. *Justice*, L. R. 17 Q. B. D. 191; *Dutton* v. *Atkinson*, L. R. 6 Q. B. 373; *Pitcher* v. *Stafford*, 4 Vest. & S. 775; *Allen* v. *Worthy*, L. R. 5. Q. B. 163; *Tebb* v. *Jones*, 37 L. T. (N. S.) 576. The law is not of general application as children are exempted. Compulsion to introduce disease into a healthy system is a violation of liberty. The right to preserve life is the most sacred right of man, *Slaughter House Cases*, 16 Wall. 36, and is specially provided for in the Preamble of the Federal Constitution. If injured the person vaccinated is damaged without compensation. *Miller* v. *Horton*, 152 Massachusetts, 546. The law is not within any cognizable principle of criminal law. 1 Bishop, §§ 204, 230, 490, 513; *Commonwealth* v. *Thompson*, 6 Massachusetts, 134. The exemptions are unconstitutional. Minors are exempt while adults are penalized. The classification is not a reasonable one. *M., K. & T. Ry. Co.* v. *May*, 194 U. S. 267; *Gulf, Colo. & S. F.* v. *Ellis*, 165 U. S. 150.

Plaintiff in error offered to show that he had suffered seriously from previous vaccination, thus indicating that his system was sensitive to the poison of vaccination virus. The like illness of his son indicated that a hereditary condition existed which would cause the system to rebel against the introduction of the vaccine matter. If the plaintiff in error had offered the opinion of a physician that vaccination might even be deadly in its effects upon the plaintiff, the law recognized no such defense, and the evidence must have been excluded. The law itself testifies to its own oppressive and unreasonable character. It is not due process of law, when such defense is excluded. It is not equal protection of the laws, when such defense is open to parents for the protection of children and is not open to parents themselves. The right is of such an important and fundamental character as to deprive plaintiff of his liberty without due process of law. *West* v. *Louisiana*, 194 U. S. 258, 262.

The Board of Health is entrusted with arbitrary powers, and determines the necessity for, and methods of, vaccination

and plaintiff's rights in regard thereto without a hearing, thus depriving him of his liberty without due process of law. *Chi., M. & St. P.* v. *Minnesota*, 134 U. S. 418; *Hagan* v. *Reclamation Dist.*, 111 U. S. 701.

The law is not justified by necessity. *Miller* v. *Horton*, 152 Massachusetts, 546; *Am. School of Healing* v. *McAnnulty*, 187 U. S. 94.

Plaintiff in error was entitled to show the facts as they existed about vaccination and its effects.

Mr. Frederick H. Nash, with whom *Mr. Herbert Parker*, Attorney General of the State of Massachusetts, was on the brief, for defendant in error:

It is no argument that the conviction was repugnant to the spirit or to the Preamble of the Constitution. An act of the legislature of a State and regular proceedings under it are to be overthrown only by virtue of some specific prohibition in the paramount law. *Forsythe* v. *City of Hammond*, 68 Fed. Rep. 774; *Walker* v. *Cincinnati*, 21 Ohio St. 14, 41; *State* v. *Staten*, 6 Coldwell, 233, 252; *State* v. *Gerhardt*, 145 Indiana, 439, 450; *State* v. *Smith*, 44 Ohio St. 348, 374; *People* v. *Fisher*, 24 Wend 214, 219; *Redell* v. *Moores*, 63 Nebraska, 219, overruling *State* v. *Moores*, 55 Nebraska, 480. The Fifth Amendment does not apply to action by a State. *Barron* v. *Baltimore*, 7 Pet. 243, 247; *Eilenbecker* v. *Plymouth Co.*, 134 U. S. 31; *McElvaine* v. *Brush*, 142 U. S. 155, 158; *Brown* v. *New Jersey*, 175 U. S. 172; *Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238; *Lloyd* v. *Dollison*, 194 U. S. 445.

It is now too late to argue that the provisions of the Fifth Amendment, securing the fundamental rights of the individual as against the exercise of Federal power, are by virtue of the Fourteenth Amendment to be regarded as privileges and immunities of a citizen of the United States. *Slaughter House Cases*, 16 Wall. 36; *Maxwell* v. *Dow*, 176 U. S. 581.

The privileges and immunities of the plaintiff in error except where he comes in contact with the machinery of the

Federal Government, are those which his own State gives him. In his relations with his State he takes no benefit from the Fifth Amendment or from the Preamble of the United States Constitution.

In its unquestioned power to preserve and protect the public health, it is for the legislature of each State to determine whether vaccination is effective in preventing the spread of smallpox or not, and deciding in the affirmative to require doubting individuals to yield for the welfare of the community. *In re Smith*, 146 N. Y. 68, 77; *Powell* v. *Pennsylvania*, 127 U. S. 678, 683.

The statute in the present case was enacted as a health measure, and has a real and substantial relation to that object.

Compare, by contrast, the statute forbidding the manufacture of cigars in tenement-houses, *In re Jacobs*, 98 N. Y. 98, the statute forbidding people to give away articles in connection with a sale of food, *People* v. *Gillson*, 109 N. Y. 389, and the statute forbidding bakers' employés to work more than ten hours a day, *People* v. *Lochner*, 177 N. Y. 145. Dissenting opinion.

Only in such cases of legislative dissimulation is it held that a law, apparently looking to the protection of the public health and working without undue classification, is a violation of the Fourteenth Amendment. *Mugler* v. *Kansas*, 123 U. S. 623; *Sentell* v. *New Orleans &c. Ry. Co.*, 166 U. S. 698, 704, 705; *Hawker* v. *New York*, 170 U. S. 189, 192; *Holden* v. *Hardy*, 169 U. S. 366.

In *Lawton* v. *Steele*, 152 U. S. 133, 136, it is said, by way of illustration, that compulsory vaccination is a proper exercise of the police power, see also *Morris* v. *City of Columbus*, 102 Georgia, 792, and *State* v. *Hay*, 126 N. Car. 999.

The courts may not listen to conflicting expert testimony as to the efficacy or hurtfulness of vaccination in general. The legislature is the only body which has power to determine whether the anti-vaccinationists or the majority of the medical profession are in the right.

That the legislature has large discretion to determine what personal sacrifice the public health, morals and safety require from individuals is elementary. Cases cited *supra*, and *Booth* v. *Illinois*, 184 U. S. 425; *Austin* v. *Tennessee*, 179 U. S. 343; *Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659.

The legislature of Massachusetts has power to require the vaccination of its inhabitants and fix appropriate penalties for refusal. As to the form of the legislation and its application to the plaintiff in error, the exception of minors and wards from the provisions of the statute, rests upon a reasonable basis of classification and denies to nobody the equal protection of the laws. The advantage of uniform and general laws is best attained by vesting discretionary power in local administrative bodies. *Wilson* v. *Eureka City*, 173 U. S. 32; *Health Department* v. *Rector of Trinity Church*, 145 N. Y. 32.

A perfectly equal law may easily be the most unjust. A statute requiring the vaccination of all the inhabitants of a State at a specified time irrespective of the presence of smallpox and without regard to individual conditions of health, or a set of rules and regulations made by the legislature itself, which must necessarily be more or less inelastic, would be far less just than this statute which delegates discretion to local public officials. It is wise legislation which leaves the necessity for general vaccination and the decision as to the time for vaccination of each individual to the local boards of health. If they act in an arbitrary manner, depriving any individual of a right protected by the Fourteenth Amendment, their action in such individual case is void. Thus the law in general stands, but particular cases of oppression may be prevented. Compare *Yick Wo* v. *Hopkins*, 118 U. S. 356, and *Jew Ho* v. *Williamson*, 103 Fed. Rep. 10, with *Williams* v. *Mississippi*, 170 U. S. 213; *Ex parte Virginia*, 100 U. S. 339; *Carter* v. *Texas*, 177 U. S. 442; *Tarrence* v. *Florida*, 188 U. S. 519.

The order of the Board of Health is clearly within the authority of the statute. *Matthews* v. *Board of Education*, 127

Michigan, 530; *Potts* v. *Breen*, 167 Illinois, 67; *State* v. *Burdge*, 95 Wisconsin, 390; *Lawbaugh* v. *Board of Education*, 177 Illinois, 572; *In re Smith*, 146 N. Y. 68; *Wong Wai* v. *Williamson*, 103 Fed. Rep. 1; *Wilson* v. *Alabama &c. R. R. Co.*, 77 Mississippi, 714; *Hurst* v. *Warner*, 102 Michigan, 238, distinguished, as the rules were held to be broader than the statute. And see where regulations were sustained, *Field* v. *Robinson*, 198 Pa. St. 638; *State* v. *Board of Education*, 21 Utah, 401; *Blue* v. *Beach*, 155 Indiana, 121; *Bissell* v. *Davidson*, 65 Connecticut, 183; *Morris* v. *City of Columbus*, 102 Georgia, 792. In *State* v. *Hay*, 126 N. Car. 999, the court observed that if the jury had found that the defendant's health made it unsafe for him to be vaccinated that would be a sufficient excuse for his non-compliance, since to vaccinate him under such conditions would be an arbitrary and unreasonable enforcement of the statute. See also *Abeel* v. *Clark*, 84 California, 226; *State* v. *Bell*, 157 Indiana, 25; *State* v. *Zimmerman*, 86 Minnesota, 353; *Matter of Walters*, 84 Hun, 457.

The action taken by the Board of Health in the case of the plaintiff in error did not infringe his rights under the Federal Constitution. Arbitrary action by the Board of Health, "with evil mind," might result in a denial of due process of law. If they picked out one class of persons arbitrarily for immediate vaccination, while indefinitely postponing action toward all others, or if they otherwise abused their discretion their action might be in violation of the Fourteenth Amendment, cases cited *supra*, but there is no suggestion of arbitrary conduct. It is not even hinted that in the exercise of their discretion they failed to make proper discrimination as to temporary conditions. If there were special reasons why the plaintiff in error could not be vaccinated at the time required by the Board of Health, he should have made them a ground of his refusal; and, if the Board neglected to consider them, a defense to his prosecution. *Penn. R. R. Co.* v. *Jersey City*, 47 N. J. L. 286. The statute did not require the vaccination and revaccination of all the inhabitants, without discrimination,

but left the matter to the discretion of the local authorities. This was an unobjectionable method of legislation. *Field* v. *Clark*, 143 U. S. 649, 693, 694.

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

We pass without extended discussion the suggestion that the particular section of the statute of Massachusetts now in question (§ 137, c. 75) is in derogation of rights secured by the Preamble of the Constitution of the United States. Although that Preamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power conferred on the Government of the United States or on any of its Departments. Such powers embrace only those expressly granted in the body of the Constitution and such as may be implied from those so granted. Although, therefore, one of the declared objects of the Constitution was to secure the blessings of liberty to all under the sovereign jurisdiction and authority of the United States, no power can be exerted to that end by the United States unless, apart from the Preamble, it be found in some express delegation of power or in some power to be properly implied therefrom. 1 Story's Const. § 462.

We also pass without discussion the suggestion that the above section of the statute is opposed to the spirit of the Constitution. Undoubtedly, as observed by Chief Justice Marshall, speaking for the court in *Sturges* v. *Crowninshield*, 4 Wheat. 122, 202, "the spirit of an instrument, especially of a constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words." We have no need in this case to go beyond the plain, obvious meaning of the words in those provisions of the Constitution which, it is contended, must control our decision.

What, according to the judgment of the state court, is the

scope and effect of the statute? What results were intended to be accomplished by it? These questions must be answered.

The Supreme Judicial Court of Massachusetts said in the present case: "Let us consider the offer of evidence which was made by the defendant Jacobson. The ninth of the propositions which he offered to prove, as to what vaccination consists of, is nothing more than a fact of common knowledge, upon which the statute is founded, and proof of it was unnecessary and immaterial. The thirteenth and fourteenth involved matters depending upon his personal opinion, which could not be taken as correct, or given effect, merely because he made it a ground of refusal to comply with the requirement. Moreover, his views could not affect the validity of the statute, nor entitle him to be excepted from its provisions. *Commonwealth* v. *Connelly*, 163 Massachusetts, 539; *Commonwealth* v. *Has*, 122 Massachusetts, 40; *Reynolds* v. *United States*, 98 U. S. 145; *Regina* v. *Downes*, 13 Cox C. C. 111. The other eleven propositions all relate to alleged injurious or dangerous effects of vaccination. The defendant 'offered to prove and show by competent evidence' these so-called facts. Each of them, in its nature, is such that it cannot be stated as a truth, otherwise than as a matter of opinion. The only 'competent evidence' that could be presented to the court to prove these propositions was the testimony of experts, giving their opinions. It would not have been competent to introduce the medical history of individual cases. Assuming that medical experts could have been found who would have testified in support of these propositions, and that it had become the duty of the judge, in accordance with the law as stated in *Commonwealth* v. *Anthes*, 5 Gray, 185, to instruct the jury as to whether or not the statute is constitutional, he would have been obliged to consider the evidence in connection with facts of common knowledge, which the court will always regard in passing upon the constitutionality of a statute. He would have considered this testimony of experts in connection with the facts that for nearly a century most of the members of the medical profession

have regarded vaccination, repeated after intervals, as a preventive of smallpox; that while they have recognized the possibility of injury to an individual from carelessness in the performance of it, or even in a conceivable case without carelessness, they generally have considered the risk of such an injury too small to be seriously weighed as against the benefits coming from the discreet and proper use of the preventive; and that not only the medical profession and the people generally have for a long time entertained these opinions, but legislatures and courts have acted upon them with general unanimity. If the defendant had been permitted to introduce such expert testimony as he had in support of these several propositions, it could not have changed the result. It would not have justified the court in holding that the legislature had transcended its power in enacting this statute on their judgment of what the welfare of the people demands." *Commonwealth* v. *Jacobson*, 183 Massachusetts, 242.

While the mere rejection of defendant's offers of proof does not strictly present a Federal question, we may properly regard the exclusion of evidence upon the ground of its incompetency or immateriality under the statute as showing what, in the opinion of the state court, is the scope and meaning of the statute. Taking the above observations of the state court as indicating the scope of the statute—and such is our duty, *Leffingwell* v. *Warren*, 2 Black, 599, 603, *Morley* v. *Lake Shore Railway Co.*, 146 U. S. 162, 167, *Tullis* v. *L. E. & W. R. R. Co.*, 175 U. S. 348, *W. W. Cargill Co.* v. *Minnesota*, 180 U. S. 452, 466—we assume for the purposes of the present inquiry that its provisions require, at least as a general rule, that adults not under guardianship and remaining within the limits of the city of Cambridge must submit to the regulation adopted by the Board of Health. Is the statute, so construed, therefore, inconsistent with the liberty which the Constitution of the United States secures to every person against deprivation by the State?

The authority of the State to enact this statute is to be

referred to what is commonly called the police power—a power which the State did not surrender when becoming a member of the Union under the Constitution. Although this court has refrained from any attempt to define the limits of that power, yet it has distinctly recognized the authority of a State to enact quarantine laws and "health laws of every description;" indeed, all laws that relate to matters completely within its territory and which do not by their necessary operation affect the people of other States. According to settled principles the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety. *Gibbons* v. *Ogden*, 9 Wheat. 1, 203; *Railroad Company* v. *Husen*, 95 U. S. 465, 470; *Beer Company* v. *Massachusetts*, 97 U. S. 25; *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650, 661; *Lawton* v. *Steele*, 152 U. S. 133. It is equally true that the State may invest local bodies called into existence for purposes of local administration with authority in some appropriate way to safeguard the public health and the public safety. The mode or manner in which those results are to be accomplished is within the discretion of the State, subject, of course, so far as Federal power is concerned, only to the condition that no rule prescribed by a State, nor any regulation adopted by a local governmental agency acting under the sanction of state legislation, shall contravene the Constitution of the United States or infringe any right granted or secured by that instrument. A local enactment or regulation, even if based on the acknowledged police powers of a State, must always yield in case of conflict with the exercise by the General Government of any power it possesses under the Constitution, or with any right which that instrument gives or secures. *Gibbons* v. *Ogden*, 9 Wheat. 1, 210; *Sinnot* v. *Davenport*, 22 How. 227, 243; *Missouri, Kansas & Texas Ry. Co.* v. *Haber*, 169 U. S. 613, 626.

We come, then, to inquire whether any right given, or secured by the Constitution, is invaded by the statute as in-

terpreted by the state court. The defendant insists that his liberty is invaded when the State subjects him to fine or imprisonment for neglecting or refusing to submit to vaccination; that a compulsory vaccination law is unreasonable, arbitrary and oppressive, and, therefore, hostile to the inherent right of every freeman to care for his own body and health in such way as to him seems best; and that the execution of such a law against one who objects to vaccination, no matter for what reason, is nothing short of an assault upon his person. But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others. This court has more than once recognized it as a fundamental principle that "persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the State; of the perfect right of the legislature to do which no question ever was, or upon acknowledged general principles ever can be made, so far as natural persons are concerned." *Railroad Co.* v. *Husen*, 95 U. S. 465, 471; *Missouri, Kansas & Texas Ry. Co.* v. *Haber*, 169 U. S. 613, 628, 629; *Thorpe* v. *Rutland & Burlington R. R.*, 27 Vermont, 140, 148. In *Crowley* v. *Christensen*, 137 U. S. 86, 89, we said: "The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community. Even liberty

itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is then liberty regulated by law." In the constitution of Massachusetts adopted in 1780 it was laid down as a fundamental principle of the social compact that the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for "the common good," and that government is instituted "for the common good, for the protection, safety, prosperity and happiness of the people, and not for the profit, honor or private interests of any one man, family or class of men." The good and welfare of the Commonwealth, of which the legislature is primarily the judge, is the basis on which the police power rests in Massachusetts. *Commonwealth* v. *Alger*, 7 Cush. 53, 84.

Applying these principles to the present case, it is to be observed that the legislature of Massachusetts required the inhabitants of a city or town to be vaccinated only when, in the opinion of the Board of Health, that was necessary for the public health or the public safety. The authority to determine for all what ought to be done in such an emergency must have been lodged somewhere or in some body; and surely it was appropriate for the legislature to refer that question, in the first instance, to a Board of Health, composed of persons residing in the locality affected and appointed, presumably, because of their fitness to determine such questions. To invest such a body with authority over such matters was not an unusual nor an unreasonable or arbitrary requirement. Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members. It is to be observed that when the regulation in question was adopted, smallpox, according to the recitals in the regulation adopted by the Board of Health, was prevalent to some extent in the city of Cambridge and the disease was increasing. If such was

the situation—and nothing is asserted or appears in the record to the contrary—if we are to attach any value whatever to the knowledge which, it is safe to affirm, is common to all civilized peoples touching smallpox and the methods most usually employed to eradicate that disease, it cannot be adjudged that the present regulation of the Board of Health was not necessary in order to protect the public health and secure the public safety. Smallpox being prevalent and increasing at Cambridge, the court would usurp the functions of another branch of government if it adjudged, as matter of law, that the mode adopted under the sanction of the State, to protect the people at large, was arbitrary and not justified by the necessities of the case. We say necessities of the case, because it might be that an acknowledged power of a local community to protect itself against an epidemic threatening the safety of all, might be exercised in particular circumstances and in reference to particular persons in such an arbitrary, unreasonable manner, or might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of such persons. *Wisconsin &c. R. R. Co.* v. *Jacobson*, 179 U. S. 287, 301; 1 Dillon Mun. Corp., 4th ed., §§ 319 *to* 325, and authorities in notes; Freund's Police Power, § 63 *et seq.* In *Railroad Company* v. *Husen*, 95 U. S. 465, 471–473, this court recognized the right of a State to pass sanitary laws, laws for the protection of life, liberty, health or property within its limits, laws to prevent persons and animals suffering under contagious or infectious diseases, or convicts, from coming within its borders. But as the laws there involved went beyond the necessity of the case and under the guise of exerting a police power invaded the domain of Federal authority and violated rights secured by the Constitution, this court deemed it to be its duty to hold such laws invalid. If the mode adopted by the Commonwealth of Massachusetts for the protection of its local communities against smallpox proved to be distressing, inconvenient or objectionable to some—if nothing more could be reasonably

affirmed of the statute in question—the answer is that it was the duty of the constituted authorities primarily to keep in view the welfare, comfort and safety of the many, and not permit the interests of the many to be subordinated to the wishes or convenience of the few. There is, of course, a sphere within which the individual may assert the supremacy of his own will and rightfully dispute the authority of any human government, especially of any free government existing under a written constitution, to interfere with the exercise of that will. But it is equally true that in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand. An American citizen, arriving at an American port on a vessel in which, during the voyage, there had been cases of yellow fever or Asiatic cholera, although apparently free from disease himself, may yet, in some circumstances, be held in quarantine against his will on board of such vessel or in a quarantine station, until it be ascertained by inspection, conducted with due diligence, that the danger of the spread of the disease among the community at large has disappeared. The liberty secured by the Fourteenth Amendment, this court has said, consists, in part, in the right of a person "to live and work where he will," *Allgeyer* v. *Louisiana*, 165 U. S. 578; and yet he may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, or even his religious or political convictions, to take his place in the ranks of the army of his country and risk the chance of being shot down in its defense. It is not, therefore, true that the power of the public to guard itself against imminent danger depends in every case involving the control of one's body upon his willingness to submit to reasonable regulations established by the constituted authorities, under the

sanction of the State, for the purpose of protecting the public collectively against such danger.

It is said, however, that the statute, as interpreted by the state court, although making an exception in favor of children certified by a registered physician to be unfit subjects for vaccination, makes no exception in the case of adults in like condition. But this cannot be deemed a denial of the equal protection of the laws to adults; for the statute is applicable equally to all in like condition and there are obviously reasons why regulations may be appropriate for adults which could not be safely applied to persons of tender years.

Looking at the propositions embodied in the defendant's rejected offers of proof it is clear that they are more formidable by their number than by their inherent value. Those offers in the main seem to have had no purpose except to state the general theory of those of the medical profession who attach little or no value to vaccination as a means of preventing the spread of smallpox or who think that vaccination causes other diseases of the body. What everybody knows the court must know, and therefore the state court judicially knew, as this court knows, that an opposite theory accords with the common belief and is maintained by high medical authority. We must assume that when the statute in question was passed, the legislature of Massachusetts was not unaware of these opposing theories, and was compelled, of necessity, to choose between them. It was not compelled to commit a matter involving the public health and safety to the final decision of a court or jury. It is no part of the function of a court or a jury to determine which one of two modes was likely to be the most effective for the protection of the public against disease. That was for the legislative department to determine in the light of all the information it had or could obtain. It could not properly abdicate its function to guard the public health and safety. The state legislature proceeded upon the theory which recognized vaccination as at least an effective if not the best known way in which to meet and suppress the

evils of a smallpox epidemic that imperilled an entire population. Upon what sound principles as to the relations existing between the different departments of government can the court review this action of the legislature? If there is any such power in the judiciary to review legislative action in respect of a matter affecting the general welfare, it can only be when that which the legislature has done comes within the rule that if a statute purporting to have been enacted to protect the public health, the public morals or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." *Mugler* v. *Kansas*, 123 U. S. 623, 661; *Minnesota* v. *Barber*, 136 U. S. 313, 320; *Atkin* v. *Kansas*, 191 U. S. 207, 223.

Whatever may be thought of the expediency of this statute, it cannot be affirmed to be, beyond question, in palpable conflict with the Constitution. Nor, in view of the methods employed to stamp out the disease of smallpox, can anyone confidently assert that the means prescribed by the State to that end has no real or substantial relation to the protection of the public health and the public safety. Such an assertion would not be consistent with the experience of this and other countries whose authorities have dealt with the disease of smallpox.[1] And the principle of vaccination as a means to

[1] "State-supported facilities for vaccination began in England in 1808 with the National Vaccine Establishment. In 1840 vaccination fees were made payable out of the rates. The first compulsory act was passed in 1853, the guardians of the poor being entrusted with the carrying out of the law; in 1854 the public vaccinations under one year of age were 408,825 as against an average of 180,960 for several years before. In 1867 a new Act was passed, rather to remove some technical difficulties than to enlarge the scope of the former Act; and in 1871 the Act was passed which compelled the boards of guardians to appoint vaccination officers. The guardians also appoint a public vaccinator, who must be duly qualified to practice medicine, and whose duty it is to vaccinate (for a fee of one shilling and sixpence) any child resident within his district brought to him for that purpose, to examine the same a week after, to give a certificate, and to certify to the vaccination officer the fact of vaccination or of insusceptibility. . . .

prevent the spread of smallpox has been enforced in many States by statutes making the vaccination of children a condition of their right to enter or remain in public schools. *Blue* v. *Beach*, 155 Indiana, 121; *Morris* v. *City of Columbus*, 102

Vaccination was made compulsory in Bavaria in 1807, and subsequently in the following countries: Denmark (1810), Sweden (1814), Würtemburg, Hesse, and other German states (1818), Prussia (1835), Roumania (1874), Hungary (1876), and Servia (1881). It is compulsory by cantonal law in ten out of the twenty-two Swiss cantons; an attempt to pass a federal compulsory law was defeated by a plebiscite in 1881. In the following countries there is no compulsory law, but Government facilities and compulsion on various classes more or less directly under Government control, such as soldiers, state employés, apprentices, school pupils, etc.: France, Italy, Spain, Portugal, Belgium, Norway, Austria, Turkey. . . . Vaccination has been compulsory in South Australia since 1872, in Victoria since 1874, and in Western Australia since 1878. In Tasmania a compulsory Act was passed in 1882. In New South Wales there is no compulsion, but free facilities for vaccination. Compulsion was adopted at Calcutta in 1880, and since then at eighty other towns of Bengal, at Madras in 1884, and at Bombay and elsewhere in the presidency a few years earlier. Revaccination was made compulsory in Denmark in 1871, and in Roumania in 1874; in Holland it was enacted for all school pupils in 1872. The various laws and administrative orders which had been for many years in force as to vaccination and revaccination in the several German states were consolidated in an imperial statute of 1874." 24 *Encyclopædia Britannica* (1894), *Vaccination*.

"In 1857 the British Parliament received answers from 552 physicians to questions which were asked them in reference to the utility of vaccination, and only two of these spoke against it. Nothing proves this utility more clearly than the statistics obtained. Especially instructive are those which Flinzer compiled respecting the epidemic in Chemitz which prevailed in 1870–71. At this time in the town there were 64,255 inhabitants, of whom 53,891, or 83.87 per cent., were vaccinated, 5,712, or 8.89 per cent. were unvaccinated, and 4,652, or 7.24 per cent., had had the smallpox before. Of those vaccinated 953, or 1.77 per cent., became affected with smallpox, and of the uninocculated 2,643, or 46.3 per cent., had the disease. In the vaccinated the mortality from the disease was 0.73 per cent., and in the unprotected it was 9.16 per cent. In general, the danger of infection is six times as great, and the mortality 68 times as great, in the unvaccinated as in the vaccinated. Statistics derived from the civil population are in general not so instructive as those derived from armies, where vaccination is usually more carefully performed and where statistics can be more accurately collected. During the Franco-German war (1870-71) there was in France a widespread epidemic of smallpox, but the German army lost

Georgia, 792; *State* v. *Hay*, 126 N. Car. 999; *Abeel* v. *Clark*, 84 California, 226; *Bissell* v. *Davidson*, 65 Connecticut, 183; *Hazen* v. *Strong*, 2 Vermont, 427; *Duffield* v. *Williamsport School District*, 162 Pa. St. 476.

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during the campaign only 450 cases, or 58 men to the 100,000; in the French army, however, where vaccination was not carefully carried out, the number of deaths from smallpox was 23,400." 8 *Johnson's Universal Cyclopædia* (1897), *Vaccination.*

"The degree of protection afforded by vaccination thus became a question of great interest. Its extreme value was easily demonstrated by statistical researches. In England, in the last half of the eighteenth century, out of every 1,000 deaths, 96 occurred from smallpox; in the first half of the present century, out of every 1,000 deaths, but 35 were caused by that disease. The amount of mortality in a country by smallpox seems to bear a fixed relation to the extent to which vaccination is carried out. In all England and Wales, for some years previous to 1853, the proportional mortality by smallpox was 21.9 to 1,000 deaths from causes; in London it was but 16 to 1,000; in Ireland, where vaccination was much less general, it was 49 to 1,000, while in Connaught it was 60 to 1,000. On the other hand, in a number of European countries where vaccination was more or less compulsory, the proportionate number of deaths from smallpox about the same time varied from 2 per 1,000 of causes in Bohemia, Lombardy, Venice, and Sweden, to 8.33 per 1,000 in Saxony. Although in many instances persons who had been vaccinated were attacked with smallpox in a more or less modified form, it was noticed that the persons so attacked had been commonly vaccinated many years previously." 16 *American Cyclopedia, Vaccination,* (1883).

"'Dr. Buchanan, the medical officer of the London Government Board, reported [1881] as the result of statistics that the smallpox death rate among adult persons vaccinated was 90 to a million; whereas among those unvaccinated it was 3,350 to a million; whereas among vaccinated children under 5 years of age, 42½ per million; whereas among unvaccinated children of the same age it was 5,950 per million.' *Hardway's Essentials of Vaccination* (1882). The same author reports that among other conclusions reached by the Académie de Médicine of France, was one that 'without vaccination, hygienic measures (isolation, disinfection, etc.) are of themselves insufficient for preservation from smallpox.'" *Ib.*

"The Belgian Academy of Medicine appointed a committee to make an exhaustive examination of the whole subject, and among the conclusions reported by them were: 1. 'Without vaccination, hygienic measures and means, whether public or private, are powerless in preserving mankind from smallpox. . . . 3. Vaccination is always an inoffensive operation when

The latest case upon the subject of which we are aware is *Viemeister* v. *White, President &c.*, decided very recently by the Court of Appeals of New York, and the opinion in which has not yet appeared in the regular reports. That case involved the validity of a statute excluding from the public schools all children who had not been vaccinated. One contention was that the statute and the regulation adopted in exercise of its provisions was inconsistent with the rights, privileges and liberties of the citizen. The contention was overruled, the court saying, among other things: "Smallpox is known of all to be a dangerous and contagious disease. If vaccination strongly tends to prevent the transmission or spread of this disease, it logically follows that children may be refused admission to the public schools until they have been vaccinated. The appellant claims that vaccination does not tend to prevent smallpox, but tends to bring about other diseases, and that it does much harm, with no good.

"It must be conceded that some laymen, both learned and unlearned, and some physicians of great skill and repute, do not believe that vaccination is a preventive of smallpox. The common belief, however, is that it has a decided tendency to prevent the spread of this fearful disease and to render it less dangerous to those who contract it. While not accepted by all, it is accepted by the mass of the people, as well as by most members of the medical profession. It has been general in our State and in most civilized nations for generations. It is

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practiced with proper care on healthy subjects. . . . 4. It is highly desirable, in the interests of the health and lives of our countrymen, that vaccination should be rendered compulsory.'" *Edwards' Vaccination* (1882).

The English Royal Commission, appointed with Lord Herschell, the Lord Chancellor of England, at its head, to inquire, among other things, as to the effect of vaccination in reducing the prevalence of, and mortality from, smallpox, reported, after several years of investigation: "We think that it diminishes the liability to be attacked by the disease; that it modifies the character of the disease and renders it less fatal, of a milder and less severe type; that the protection it affords against attacks of the disease is greatest during the years immediately succeeding the operation of vaccination."

generally accepted in theory and generally applied in practice, both by the voluntary action of the people and in obedience to the command of law. Nearly every State of the Union has statutes to encourage, or directly or indirectly to require, vaccination, and this is true of most nations of Europe. . . .

"A common belief, like common knowledge, does not require evidence to establish its existence, but may be acted upon without proof by the legislature and the courts. . . .

"The fact that the belief is not universal is not controlling, for there is scarcely any belief that is accepted by everyone. The possibility that the belief may be wrong, and that science may yet show it to be wrong, is not conclusive; for the legislature has the right to pass laws which, according to the common belief of the people, are adapted to prevent the spread of contagious diseases. In a free country, where the government is by the people, through their chosen representatives, practical legislation admits of no other standard of action; for what the people believe is for the common welfare must be accepted as tending to promote the common welfare, whether it does in fact or not. Any other basis would conflict with the spirit of the Constitution, and would sanction measures opposed to a republican form of government. While we do not decide and cannot decide that vaccination is a preventive of smallpox, we take judicial notice of the fact that this is the common belief of the people of the State, and with this fact as a foundation we hold that the statute in question is a health law, enacted in a reasonable and proper exercise of the police power." 72 N. E. Rep. 97.

Since then vaccination, as a means of protecting a community against smallpox, finds strong support in the experience of this and other countries, no court, much less a jury, is justified in disregarding the action of the legislature simply because in its or their opinion that particular method was—perhaps or possibly—not the best either for children or adults.

Did the offers of proof made by the defendant present a case which entitled him, while remaining in Cambridge, to

claim exemption from the operation of the statute and of the regulation adopted by the Board of Health? We have already said that his rejected offers, in the main, only set forth the theory of those who had no faith in vaccination as a means of preventing the spread of smallpox, or who thought that vaccination, without benefiting the public, put in peril the health of the person vaccinated. But there were some offers which it is contended embodied distinct facts that might properly have been considered. Let us see how this is.

The defendant offered to prove that vaccination "quite often" caused serious and permanent injury to the health of the person vaccinated; that the operation "occasionally" resulted in death; that it was "impossible" to tell "in any particular case" what the results of vaccination would be or whether it would injure the health or result in death; that "quite often" one's blood is in a certain condition of impurity when it is not prudent or safe to vaccinate him; that there is no practical test by which to determine "with any degree of certainty" whether one's blood is in such condition of impurity as to render vaccination necessarily unsafe or dangerous; that vaccine matter is "quite often" impure and dangerous to be used, but whether impure or not cannot be ascertained by any known practical test; that the defendant refused to submit to vaccination for the reason that he had, "when a child," been caused great and extreme suffering for a long period by a disease produced by vaccination; and that he had witnessed a similar result of vaccination not only in the case of his son, but in the cases of others.

These offers, in effect, invited the court and jury to go over the whole ground gone over by the legislature when it enacted the statute in question. The legislature assumed that some children, by reason of their condition at the time, might not be fit subjects of vaccination; and it is suggested—and we will not say without reason—that such is the case with some adults. But the defendant did not offer to prove that, by reason of his then condition, he was in fact not a fit subject of vaccination

at the time he was informed of the requirement of the regulation adopted by the Board of Health. It is entirely consistent with his offer of proof that, after reaching full age he had become, so far as medical skill could discover, and when informed of the regulation of the Board of Health was, a fit subject of vaccination, and that the vaccine matter to be used in his case was such as any medical practitioner of good standing would regard as proper to be used. The matured opinions of medical men everywhere, and the experience of mankind, as all must know, negative the suggestion that it is not possible in any case to determine whether vaccination is safe. Was defendant exempted from the operation of the statute simply because of his dread of the same evil results experienced by him when a child and had observed in the cases of his son and other children? Could he reasonably claim such an exemption because "quite often" or "occasionally" injury had resulted from vaccination, or because it was impossible, in the opinion of some, by any practical test, to determine with absolute certainty whether a particular person could be safely vaccinated?

It seems to the court that an affirmative answer to these questions would practically strip the legislative department of its function to care for the public health and the public safety when endangered by epidemics of disease. Such an answer would mean that compulsory vaccination could not, in any conceivable case, be legally enforced in a community, even at the command of the legislature, however widespread the epidemic of smallpox, and however deep and universal was the belief of the community and of its medical advisers, that a system of general vaccination was vital to the safety of all.

We are not prepared to hold that a minority, residing or remaining in any city or town where smallpox is prevalent, and enjoying the general protection afforded by an organized local government, may thus defy the will of its constituted authorities, acting in good faith for all, under the legislative sanction of the State. If such be the privilege of a minority

then a like privilege would belong to each individual of the community, and the spectacle would be presented of the welfare and safety of an entire population being subordinated to the notions of a single individual who chooses to remain a part of that population. We are unwilling to hold it to be an element in the liberty secured by the Constitution of the United States that one person, or a minority of persons, residing in any community and enjoying the benefits of its local government, should have the power thus to dominate the majority when supported in their action by the authority of the State. While this court should guard with firmness every right appertaining to life, liberty or property as secured to the individual by the Supreme Law of the Land, it is of the last importance that it should not invade the domain of local authority except when it is plainly necessary to do so in order to enforce that law. The safety and the health of the people of Massachusetts are, in the first instance, for that Commonwealth to guard and protect. They are matters that do not ordinarily concern the National Government. So far as they can be reached by any government, they depend, primarily, upon such action as the State in its wisdom may take; and we do not perceive that this legislation has invaded any right secured by the Federal Constitution.

Before closing this opinion we deem it appropriate, in order to prevent misapprehension as to our views, to observe—perhaps to repeat a thought already sufficiently expressed, namely—that the police power of a State, whether exercised by the legislature, or by a local body acting under its authority, may be exerted in such circumstances or by regulations so arbitrary and oppressive in particular cases as to justify the interference of the courts to prevent wrong and oppression. Extreme cases can be readily suggested. Ordinarily such cases are not safe guides in the administration of the law. It is easy, for instance, to suppose the case of an adult who is embraced by the mere words of the act, but yet to subject whom to vaccination in a particular condition of his health

or body, would be cruel and inhuman in the last degree. We are not to be understood as holding that the statute was intended to be applied to such a case, or, if it was so intended, that the judiciary would not be competent to interfere and protect the health and life of the individual concerned. "All laws," this court has said, "should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of that character. The reason of the law in such cases should prevail over its letter." *United States* v. *Kirby*, 7 Wall. 482; *Lau Ow Bew* v. *United States*, 144 U. S. 47, 58. Until otherwise informed by the highest court of Massachusetts we are not inclined to hold that the statute establishes the absolute rule that an adult must be vaccinated if it be apparent or can be shown with reasonable certainty that he is not at the time a fit subject of vaccination or that vaccination, by reason of his then condition, would seriously impair his health or probably cause his death. No such case is here presented. It is the case of an adult who, for aught that appears, was himself in perfect health and a fit subject of vaccination, and yet, while remaining in the community, refused to obey the statute and the regulation adopted in execution of its provisions for the protection of the public health and the public safety, confessedly endangered by the presence of a dangerous disease.

We now decide only that the statute covers the present case, and that nothing clearly appears that would justify this court in holding it to be unconstitutional and inoperative in its application to the plaintiff in error.

The judgment of the court below must be affirmed.

It is so ordered.

Mr. Justice Brewer and Mr. Justice Peckham dissent.

UTERMEHLE *v.* NORMENT.

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

No. 63. Argued November 28, 29, 1904.—Decided February 20, 1905.

Mere ignorance of the law standing alone does not constitute any defense against its enforcement, and a mistake of law, pure and simple, without the addition of any circumstances of fraud or misrepresentation constitutes no basis for relief at law or in equity and forms no excuse in favor of the party asserting that he made the mistake.

The rule of law is that a party taking a benefit of a provision in his favor under a will is estopped from attacking the validity of the instrument; and where an heir at law has taken a benefit under the will, acquiesced in its validity for many years, permitted the legatees and devisees to act upon such consent and acquiescence, has so changed his position on that account that he cannot be restored to it, and meanwhile witnesses have died, this estoppel is not affected because he was at the time ignorant of this rule of law.

THE plaintiff in error seeks by this writ to review the judgment of the Court of Appeals of the District of Columbia (not yet reported), affirming the decree of the Supreme Court of that District, sitting as a court of probate, admitting the will of George W. Utermehle to probate as a will of real estate, by virtue of the jurisdiction conferred upon the court by the act of Congress of June 8, 1898. 30 Stat. 434. The same will had been admitted to probate in the District in the year 1889 as a will of personalty (which was all the jurisdiction at that time possessed by the court), with the concurrence and consent of the plaintiff in error. The facts upon which the case hinges are in substance the following:

George W. Utermehle, the testator, died in the city of Washington on the sixteenth day of April, 1889, leaving a large amount of real and personal property, the real estate amounting, as is said, to about a million dollars, and the personalty to between six hundred thousand and a million of dollars. He left a will, bearing date December 7, 1887, which

appeared on its face to have been duly executed for the conveyance of real estate. The testator left him surviving his widow, two daughters—Mrs. Taylor and Mrs. Norment—and the plaintiff in error, his grandson, the son of his deceased son, as his sole heirs at law and next of kin. The widow was named executrix of the will, and she propounded the same for probate April 26, 1889. It was duly admitted to probate on that day, on the petition of the widow, as executrix, with the written consent of the daughters and the plaintiff in error. The executrix gave a bond in the sum of $20,000 for the payment of all just debts and claims against the deceased and for the payment of the legacies bequeathed by the will, and letters were issued to her. She duly administered upon the estate, paid the funeral expenses and other charges, and the legacies mentioned in the will, including that to the plaintiff in error. She filed no inventory but made a statement of account on the fourteenth day of May, 1890. The personal property, except such as was otherwise disposed of under the will, and in payment of debts and legacies, she retained for herself, as sole and absolute owner, in accordance with the terms of the will. Of this amount it is said that she thereafter disposed of a large part in charities. By the will of George W. Utermehle, he bequeathed to each of his three nieces, residing in Germany, the sum of three thousand dollars; he devised to his grandson, the plaintiff in error, the property known as the Young Law Building in Washington; he also bequeathed to him the interest due or to become due on a note for $750, secured on a lot in Washington, and also the principal of the same; he bequeathed to his wife, Sarah Utermehle, all the rest of his personal property, of every kind, to be taken by her in lieu of dower, and to be disposed of by her by deed, will or otherwise, as she pleased; he devised to her his then present residence and the property adjoining, being square 765 in the city of Washington; he then bequeathed all the rest and residue of his real estate wherever situated, and all the real estate of which he might die seized and possessed, other than

that already devised, to his two daughters, Mamie Norment and Rosa Taylor, as tenants in common, share and share alike; he appointed his wife sole executrix of his will and revoked all other wills theretofore made by him; he suggested that, as he had no debts and his personal estate was to go to his wife, a very moderate bond should be required of her as executrix.

After the death of his grandfather the plaintiff was present at his late residence and heard this will read.

Immediately after the reading of the will he left the house, but Mrs. Taylor, one of his aunts, as he was leaving, asked him to come over the next day, which he did. He testified on this trial that he arrived at the house and went into the dining room, and Mrs. Taylor, Mrs. Norment and his grandmother were there. Mrs. Taylor did the talking, and started the conversation by stating to the plaintiff in error that the will had virtually cut him off, and that if it had not been for her and the Doctor (her husband) the plaintiff in error would not have been left the property called the Young Law Building, but that they had had his grandfather paint it up and put it into repair, so that when it came into his possession it would not be any expense to him to put it in condition at the time. She further said that his grandmother was left all the personal property, which amounted to almost, if not quite as much as that which they (his aunts) would receive under the will, and that when his grandmother died she proposed to make him right, to make him equal with them by equalizing his share; that his grandmother wanted to know what the mortgage on his farm was, as she understood that there was a mortgage; that she wanted to pay it off; that she wanted to start him off without any debts on him. His grandmother was sitting there at the time but said nothing. He was asked what the mortgage was on his farm. He told them $11,500. The only remarks made were those between Mrs. Taylor (his aunt) and himself, and the only statement he made was what the mortgage on the farm was. He also testified on the trial

below that he believed that what was then promised him, as to what his grandmother would do when she made her will; that he had no doubt whatever that she would fulfill her promise. His grandmother told him at that interview she would give him a check for the mortgage in a few days, and he then went home. Subsequently and on the twenty-sixth day of April, 1889, he signed the consent to the probate of the will. He did it in reliance, as he said, upon the promise above mentioned.

From the time of the probate of his grandfather's will up to the time of the death of his grandmother, he did nothing to attack the will of his grandfather, but relied upon the promise made by or on the part of his grandmother, the day after the funeral. After the probate of his grandfather's will he received from his grandmother, as the executrix, the legacy spoken of therein, and gave receipt therefor; he also took possession of the real estate given him by the will, called Young's Law Building, and received the rents therefor for nearly two years, and (on March 24, 1891) sold it for $20,000, and kept the proceeds. The sisters took the real estate devised to them by the will. They commenced an action of partition and the real estate was partitioned between them, and each thereafter treated the real estate set off to her under the partition as her own absolute property. Some of it they conveyed and disposed of so that it passed beyond their control. They assumed and supposed that the real estate given to them in the will was their own, as the plaintiff in error had consented to the probate of the will, and had made no objections whatever since that time to its validity, or questioned it in any way.

On the thirteenth of March, 1893, the grandmother died, leaving a will dated July 5, 1889, less than three months after the promise alleged to have been made by her, or in her behalf, to the plaintiff in error immediately after the funeral of his grandfather. The will of the grandmother was admitted to probate, by the consent of all the parties interested, on the

seventeenth day of March, 1893. The two daughters were executrices under the will, but, on objection being made by the plaintiff in error to their receiving commissions, they waived their right to them, and performed the services without pay. By the terms of this will the two aunts and the plaintiff in error were made to share equally in the estate of the grandmother, which turned out to amount to something over $200,000, the grandmother having, during her lifetime, as is stated, disposed of a large amount of the personal property bequeathed to her under the will of her husband, in charities. When the terms of the will of the grandmother were read to the plaintiff in error he testified on the trial below that he then said, "So far as I am concerned I have got the worst of and I have got to stand it. I never made but one mistake in my life, and that was when I held still once before, and now I have to stand still."

He received under the will of his grandmother $84,256.87, being the same share as was received by each of his aunts. He received, under the will of his grandfather and that of his grandmother a total of between $140,000 and $150,000. After the death of his grandmother he took no steps showing an intention to contest the will of either, until May 19, 1900, which was ten years after the settlement of the estate of his grandfather and nearly seven years after the settlement of the estate of his grandmother. On the date named he addressed two letters of the same tenor, one to Mrs. Taylor and the other to Mrs. Norment, in which he states that he had been under a misapprehension and was ignorant regarding his rights at the time his grandfather died, and that misrepresentations had been made to him from those interested, touching his rights and interest in his grandfather's estate, and he therefore notified them that he denied the validity of the paper writing alleged to be the last will and testament of his grandfather, which had been admitted to probate as a will of personal property, and stated that he contended that the alleged will had never been operative in connection with the real property,

and that his claim to the building and ground known as Young's Law Building was merely a one-third interest in the property as tenant in common with the other heirs at law of his deceased grandfather; he also stated that he held himself ready to account, upon demand, to his two aunts for the one-third interest to which each was entitled in that real estate, as two of the heirs at law of his grandfather, in both the property, and the rents and profits from the same, from his grandfather's death; that he held himself as ready, upon demand, to make proper settlement with both of his aunts for the $750 note, with the accrued interest thereon, which had been all paid, and was pretended to have been bequeathed to him under the will of his grandfather. Plaintiff in error testified that he did not receive any answer to either letter, nor any communication from either of his aunts, and soon thereafter he instituted a suit in ejectment, and on June 9, 1900, filed a *caveat* in the Probate Court against the validity of the will, as a will of personalty. The plaintiff in error there charged that the will was procured by the fraud, undue influence and duress of Mrs. Taylor and her husband, and that the testator had no testamentary capacity when the paper was signed by him. Mrs. Taylor and Mrs. Norment answered this *caveat*, and at the same time filed a petition asking for probate of the will of their father, of December 7, 1887, as a will of real estate, under the act of Congress of June 8, 1898, above mentioned. To this petition the plaintiff in error made answer.

Pending proceedings in the Probate Court on this *caveat* of the plaintiff in error, and the petition for the probate of the will as one of real estate, Mrs. Taylor, one of the aunts, died, January 22, 1901, leaving a will by which she devised all of her estate and property to her husband, subject to an annuity to her son, and nominated her husband as executor. This will was duly admitted to probate on the eighteenth day of March, 1901, and letters testamentary were issued to Dr. Taylor (the husband). Thereupon he filed his petition in these

proceedings, wherein he stated that the property devised and bequeathed to him by his wife was in fact to be held in trust by him for the benefit of his son and his children, with the reservation of certain rights and powers for himself, and he asked that the parties named by him be made parties to the present proceedings in place of Mrs. Taylor, and they were accordingly made such.

The court then determined that issues should be formulated between the parties, to be tried in the Probate Court with a jury, under the act of June 8, 1898, and there were six issues thus drawn: The first was in regard to the question whether the plaintiff in error was estopped to deny the validity of his grandfather's will as a will of personal property; the second, whether he was estopped to deny its validity as one disposing of real property; third, was a question as to the testamentary capacity of the grandfather; the fourth, whether there was undue influence; fifth, whether there was fraud in obtaining the will from the grandfather; and sixth, whether there was duress.

It was stipulated that the question of the application of the statute of limitations, which was raised by the *caveat* and petitions, and all other questions, should be reserved for future determination by the court. Charles H. Utermehle was made plaintiff for the purpose of the trial, and all the other parties were made defendants On March 17, 1902, a jury was impanneled and the trial commenced. The plaintiff proceeded to give his testimony, addressed to the question of estoppel and to an explanation of his delay in asserting his alleged rights. When the counsel for plaintiff in error announced their testimony on the question of estoppel closed, they were about to proceed with their testimony on the other issues, but counsel for the defendants objected, and asked the court to direct a verdict against the plaintiff on the issue of estoppel, and against the plaintiff upon all the other issues. After consideration the court instructed the jury to render a verdict against the plaintiff on each and all the issues, and a verdict

was thus rendered and recorded. Thereupon an order or decree was rendered affirming the decree of April 26, 1889, admitting the grandfather's will to probate as and for a will of personalty, and also admitting it now to probate as and for a will of real estate under the act of Congress of 1898. The Court of Appeals having affirmed this decree, the case has come to us by writ of error on the part of plaintiff.

Mr. D. W. Baker and *Mr. Wilton J. Lambert* for plaintiff in error:

Devisees cannot invoke the doctrine of estoppel who are charged with exercising undue influence or fraud in the making of the will, and in making false and fraudulent misrepresentations to prevent the plaintiff in error from investigating the facts surrounding the making of the will, this last fraud being merely ancillary to the principal fraud charged. *Neblett* v. *MacFarland*, 92 U. S. 193.

Plaintiff acted in ignorance of the facts and in ignorance of his rights and is not estopped from attacking the will after he ascertained the truth. *Fisher* v. *Boyce*, 81 Maryland, 46; *Re Miller*, 159 Pa. St. 562; *Meddill* v. *Snyder*, 61 Kansas, 15; *Lee* v. *Templeton*, 73 Indiana, 317; *Fletcher* v. *Holmes*, 25 Indiana, 469; *Andrews* v. *Lyons*, 11 Allen, 350; *Brant* v. *Virginia Coal Co.*, 93 U. S. 335; *Henshaw* v. *Bissell*, 18 Wall. 271; *Bank* v. *Farwell*, 19 U. S. App. 262; *Halloran* v. *Halloran*, 137 Illinois, 112; *Clinton* v. *Maddan*, 50 Connecticut, 84; *Cumberland C. & I. Co.* v. *Sherman*, 20 Maryland, 117; *Barbour* v. *Moore*, 4 App. D. C. 535; *Magee* v. *Welsh*, 18 App. D. C. 177. Where a person claims title to real property the doctrine of laches can never be invoked where a proceeding is taken within the statutory period. *Pence* v. *Langdon*, 99 U. S. 578.

While a person accepting and holding a beneficial interest under a will cannot, either in equity or law, assert an independent title in other property against the will, after having received a legacy in ignorance of this rule, he may, upon being informed of the rule, return the legacy to the execu-

tor and give him notice that he elects not to take it, and the rule will not apply. *Watson* v. *Watson*, 128 Massachusetts, 152; *Spread* v. *Morgan*, 11 H. L. 587; *Wheeler* v. *Smith*, 9 How. 55; *Sparlook* v. *Brown*, 91 Tennessee, 261; *Williams* v. *Williams*, 63 Maryland, 371.

It was not necessary for caveator to make any tender except to offer to account for anything received from the estate, and he has always been ready to account. He was not compelled to first make restitution. *Bank* v. *Curran*, 72 Connecticut, 349; *Peaslee's Will*, 25 N. Y. Supp. 940; *Probate Judge* v. *Stone*, 44 N. H. 593; *Wheeler* v. *Smith*, 9 How. 55; *Thayer* v. *Knote*, 59 Kansas, 181; *Montgomery* v. *Pickering*, 116 Massachusetts, 227; Bigelow on Fraud, 424; *Howard* v. *Railroad Co.*, 14 App. D. C. 297; *Lyon* v. *Allen*, 11 App. D. C. 549; *Union Pacific* v. *Harris*, 158 U. S. 326; *Girard* v. *Carr Co.*, 123 Missouri, 358; *Westlake* v. *St. Louis*, 77 Missouri, 47; *O'Donnell* v. *Clinton*, 145 Massachusetts, 461; *Smith* v. *Holyoke*, 112 Massachusetts, 517; *Mullen* v. *Old Colony R. R. Co.*, 127 Massachusetts, 86. Cases where payment back has been required can be distinguished. *Hamblett* v. *Hamblett*, 6 N. H. 333; *Holt* v. *Rice*, 54 N. H. 398; *Fisher* v. *Boyce*, 81 Maryland, 46; *Madison* v. *Lamon*, 170 Illinois, 82; *Soule's Will*, 3 N. Y. Supp. 259; *Chipman* v. *Montgomery*, 63 N. Y. 228. The action of caveatees relieved the caveator from any other action than offering to account.

Where defendant refuses, on a tender to receive the money, it is not necessary that the money should be actually produced. *Barker* v. *Parkinhorn*, 2 Wash. C. C. 144; *Hazzard* v. *Barnabas*, 10 Cush. 67. Nor is a technical tender required in a court of equity. *Parkinton* v. *Turvis*, 128 Indiana, 186; *Shuee* v. *Shuee*, 100 Indiana, 477. See also *Wright* v. *Young*, 70 Am. Dec. 453; *Hazzard* v. *Loring*, 10 Cush. 67; *Dorsey* v. *Barbee*, 12 Am. Dec. 296. The law does not require a useless act. *McDonald* v. *Wolf*, 40 Mo. App. 308; *Bank* v. *Hagner*, 1 Pet. 467; *Chaney* v. *Libby*, 134 U. S. 81; *Moore* v. *Crawford*, 130 U. S. 142.

As to declarations of devisor and their admissibility, see *Moore* v. *McDonald*, 68 Maryland, 321; *Griffith* v. *Diffenderfer*, 50 Maryland, 466; *Re Goldthrop*, 94 Iowa, 336; *Harp* v. *Parr*, 16 Illinois, 470; *Whitney* v. *Wheeler*, 116 Massachusetts, 490; *Taylor* v. *Pegram*, 151 Illinois, 106; *Hammond* v. *Dyke*, 42 Minnesota, 272.

Mr. A. S. Worthington, with whom *Mr. T. Percy Woodward* was on the brief, for defendants in error:

The caveator is to be charged not only with what he actually knew in regard to the physical and mental condition of his grandfather and the alleged undue influence, coercion, misrepresentation and fraud, but with the knowledge he could have acquired by the use of reasonable diligence—especially as to matters concerning which what he did know would have led a man of ordinary prudence to make further inquiry. *Upton* v. *Tribilcock*, 91 U. S. 55; *Grymes* v. *Sanders*, 93 U. S. 55, 62; *Wollensak* v. *Reiher*, 115 U. S. 99, and cases cited.

When laches is in issue the plaintiff is chargeable with such knowledge as he might have obtained upon inquiry, provided the facts already known by him were such as to put upon a man of ordinary intelligence the duty of inquiry. *Johnston* v. *Standard Mining Co.*, 148 U. S. 360; *Johnson* v. *West India Transit Co.*, 156 U. S. 618; *McLean* v. *Clapp*, 141 U. S. 429. Silence alone of the adverse party will not excuse the plaintiff's laches. *Wood* v. *Carpenter*, 101 U. S. 135, 143; *Felix* v. *Patrick*, 145 U. S. 317, 331.

Under the circumstances of this case the mere lapse of time has raised an insurmountable obstacle to an attack by the caveator upon his grandfather's will. *Hammond* v. *Hopkins*, 143 U. S. 224, 274; *Galliher* v. *Cadwell*, 145 U. S. 368; *Simmons* v. *Burlington R. R. Co.*, 159 U. S. 291; 2 Pomeroy's Eq. Jur. § 965; *Fulton* v. *Moore*, 25 Pa. St. 468; *Bradfords* v. *Kents*, 43 Pa. St. 474, 483; *Baxter* v. *Bowyer*, 19 Ohio St. 490; *Wilson* v. *Wilson*, 145 Indiana, 662; *Drake* v. *Wild*, 70 Vermont, 52; *Hovey* v. *Hovey*, 61 N. H. 599; *Well's Estate*, 63 Vermont, 116.

This case is governed by the law relating to equitable estoppel, not by the practice or procedure of courts of equity relating to "election;" and ignorance of the law of equitable estoppel is no excuse.

One who takes a benefit under a will is precluded from assailing the instrument as invalid. *Herbert* v. *Wren*, 7 Cranch, 370; *Fisher* v. *Boyce*, 81 Maryland, 46, 52; *Hyde* v. *Baldwin*, 17 Pick. 308; *Smith* v. *Smith*, 14 Gray, 532; *Fry* v. *Morrison*, 159 Illinois, 244; *Drake* v. *Wild*, 70 Vermont, 52; *Williams* v. *Whittell*, 69 App. Div. N. Y. 340, 348; *Bronsan* v. *Watkins*, 96 Georgia, 54; *Van Duyne* v. *Van Duyne*, 14 N. J. Eq. 49. *Madison* v. *Larmon*, 170 Illinois, 65, 82. See also *Cunningham's Estate*, 137 Pa. St. 621; *Lee* v. *Tower*, 124 N. Y. 370.

As to the effect of the general law of estoppel on one who has accepted benefits under the instrument attacked, see *Dickerson* v. *Colgrove*, 100 U. S. 579; *Kirk* v. *Hamilton*, 102 U. S. 68; *Ferguson* v. *Landram*, 5 Bush, 230; *Van Hook* v. *Whitlock*, 26 Wend. 42; *Daniels* v. *Tearney*, 102 U. S. 415, 421; *Davis* v. *Wakelee*, 156 U. S. 680, 691; *Mex. Nat. Ry. Co.* v. *Davidson*, 157 U. S. 201; *Michels* v. *Olmstead*, 157 U. S. 198; *Neblett* v. *Macfarland*, 92 U. S. 101, distinguished. See 2 Pomeroy Eq. Jur. § 802.

Even if there was fraud the estoppel applies. The doctrine of election relied on by caveator does not apply. *Bank* v. *Morgan*, 117 U. S. 96, 112; *O'Donnell* v. *Clinton*, 145 Massachusetts, 462; 11 Am. & Eng. Ency., 2d ed., 431, and cases cited in note. As to distinction between election and equitable estoppel see *Watson* v. *Watson*, 128 Massachusetts, 152; *Spread* v. *Morgan*, 11 H. L. 587; *Robb* v. *Vos*, 155 U. S. 13, 43; *Thompson* v. *Howard*, 31 Michigan, 309; *Smith* v. *Gilmore*, 7 App. D. C. 192.

Ignorance of law did not relieve caveator from the equitable estoppel resulting from his acts. *Hunt* v. *Rousmaniere*, 1 Pet. 1; *Bank* v. *Daniel*, 12 Pet. 32, 55; 3 Rose's Notes, 702; *Wheeler* v. *Smith*, 9 How. 55, 82; *United States* v. *Hodson*, 10 Wall. 395; *Railroad Co.* v. *Soutter*, 13 Wall. 517, 524; *Hunt* v. *Rousmaniere*,

8 Wheat. 174; *Lamborn* v. *Commissioners*, 97 U. S. 181; *Snell* v. *Insurance Co.*, 98 U. S. 85, 92; *United States* v. *Ames*, 99 U. S. 35; *Laver* v. *Dennett*, 109 U. S. 90; *Griswold* v. *Hazard*, 141 U. S. 260, 284; *Allen* v. *Galloway*, 30 Fed. Rep. 466; *Light* v. *Light*, 21 Pa. St. 407, 412; *Rankin* v. *Mortimere*, 7 Watts, 372; *Cox* v. *Rogers*, 77 Pa. St. 160; *Storrs* v. *Barker*, 6 Johns. Ch. 166; *Whitwell* v. *Winslow*, 134 Massachusetts, 343. See also review of authorities on effect of mistake in law in 55 Am. St. Rep. 494.

Before one who has received a legacy or taken any other benefit under a will can assail the will he must return or tender back that which he has received, as a condition precedent to the institution of any proceedings assailing the will. In this case nothing received by caveator has been returned to anybody, and no tender or offer of any kind was made to the executrix, or other successor, under the will of George W. Utermehle. 1 Bigelow on Fraud, 420; *Talty* v. *Trust Co.*, 93 U. S. 321; *Barbour* v. *Hickey*, 2 App. D. C. 207; 11 Am. & Eng. Ency., 2d ed., 98; *Braham* v. *Burchell*, 3 Addams Ec. R. 243; *Hamblett* v. *Hamblett*, 6 N. H. 333; *Chipman* v. *Montgomery*, 63 N. Y. 223, 234; *Re Peaslee*, 73 Hun, 113; *Miller's Estate*, 159 Pa. St. 562, 574; *S. C.*, 166 Pa. St. 97; *Brown* v. *Appleman*, 83 Mo. App. 29; *Balue* v. *Taylor*, 136 Indiana, 368; 1 Daniel's Ch. Pl., 6th ed., 385. Cases relied on by caveator can be distinguished. As to time when tender should be made see *Howard* v. *Railroad Co.*, 14 App. D. C. 297; *Lyons* v. *Allen*, 11 App. D. C. 543; *Smith* v. *Holyoke*, 112 Massachusetts, 517; *Stone* v. *Cook*, 78 S. W. Rep. 80. The judgment is right on the evidence even if rules of estoppel did not apply.

No evidence was admitted improperly which influenced the jury and no new trial should be granted. *Packet Co.* v. *Clough*, 20 Wall. 528; *Railroad Co.* v. *Smith*, 21 Wall. 255; *United States* v. *Niverson*, 1 Mackey, 152. Testimony as to declarations of testator was properly excluded. *Throckmorton* v. *Holt*, 180 U. S. 552.

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

It is true that the plaintiff in error has received out of the estates of his grandfather and grandmother only between the sum of $140,000 and $150,000, while an equal division of the estate of his grandfather, between himself and his aunts, would have given him a much larger sum. What was the reason, if any, for this discrimination, the record does not show.

When the will of his grandfather was read the plaintiff in error was perfectly aware of its contents. He was a young man, nearly twenty-four years of age, married, and there is no proof that he was not of ordinary intelligence and capacity. There is no pretense in the evidence that there was any fraud or misrepresentation connected with obtaining his consent to the probate of the will, without opposition or contest on his part. By his own statement he understood distinctly from one of his aunts, after the reading of the will, that it substantially cut him off; that he would receive under the will a devise of the Young Law Building, worth about $20,000, and a bequest of the note of $750 and accrued interest, amounting to not quite $3,000, and that that was all that was given him under the will. He knew it when the will was read. There is not a particle of evidence that he did not know that, if there had been fraud or undue influence or duress in obtaining the alleged will from his grandfather, or if the latter was without testamentary capacity, such will would be void. The trial court, indeed, observed that he admitted he knew what his legal rights were at the time of the death of his grandfather, if there were no will. He was ignorant only of any evidence on which to base a contest against the proof of the will. He says he did not know at that time that fraud or undue influence or duress had been exercised, in order to obtain the will, nor did he know that his grandfather lacked testamentary capacity to execute a will, but there is no evidence whatever

that any means were used or representation made to prevent him from ascertaining what the facts really were. The reason for his not contesting was, as he said, his reliance on the promise alleged to have been made by or on behalf of his grandmother to make him equal by her own will. On account of this promise he did not contest the will. By reason of his consent, his aunts, the other heirs at law of his grandfather, proceeded to make partition of the real estate given to them by the will, and to use, convey and dispose of it as if it were absolutely their own property. His grandmother received the personal property bequeathed to her by the will and disposed of large amounts of it prior to her death by gifts to charity and otherwise. It would be impossible to place the other heirs in the same position that they were in at the time of the death of the grandfather. The two aunts, if that will had not been proved, would have received their share of the personalty instead of almost the whole of it going to the mother. Under the will, however, the mother took the personalty and spent or disposed of large portions of it, so that she died possessed of only about $200,000, and the two aunts and the plaintiff in error have received an equal share of that sum. The aunts would have received a much larger share of the personalty had it not been for the will of their father. As is stated by the Court of Appeals in the opinion delivered in this case:

"It is impossible to tell from the record before us whether they (the aunts of plaintiff in error) fared any better with the will than they would have fared without it; but it is very evident that by the bequest of the entire personalty by the will to their mother, they lost a valuable interest to which they cannot now be restored. It is impossible to restore the original situation, and the attempt to do so would be to wantonly question titles that have long since accrued, including the very title which the caveator has himself disposed of to the Young Law Building."

Of the witnesses to the grandfather's will, two are dead

and the third paralyzed. From the date of the probate of the grandfather's will in April, 1889, down to nineteenth of May, 1900, the plaintiff in error took no steps towards a contest. On that date he wrote the letters to his aunts, above referred to, and therein he says that misrepresentations were made to him as to his rights and interest in the estate. We find a total absence of all proof as to any such misrepresentations, either as to his rights or his interest in the estate of his grandfather. The trial court also found that the plaintiff in error had not exhibited even reasonable diligence to learn any facts as to the will of his grandfather, and that his alleged ignorance of the law was the only excuse which had the semblance of sufficiency.

We have, therefore, his consent given in April, 1889, to the probate of the will of his grandfather; his taking the legacy provided for under that will; his taking possession of the real estate devised to him by that will; his receipt of its rents and profits, and his subsequent sale thereof for $20,000, and the retention of that sum for his own purposes; his consent to the probate of his grandmother's will, although it clearly does not fulfill the promise he alleges was made on her behalf after the death and funeral of his grandfather; no movement is made on his part or sign of discontent given for about seven years thereafter, and then he writes letters and files his *caveat* and proceeds, as already stated. We have the total lack of diligence in the attempt even to ascertain facts. After his grandmother's death he says that he was still ignorant of the facts which he alleges he has since discovered of the existence of fraud in obtaining the will from his grandfather, and of the latter's lack of testamentary capacity, and the existence of duress and undue influence under which the will was obtained; and he also avers that he was ignorant of the law at the time that he consented to the probate of his grandfather's will that he could not take a devise or bequest under that will, and at the same time seek to prevent its probate or to set it aside as an invalid instrument. The trial court found that right after

the death of his grandmother he had the advice of counsel, and if he had been ignorant of any rights he would have been informed of the same.

The plaintiff in error asserts that he gave consent to the probate of his grandfather's will because of the promise of his grandmother to rectify by her will the injustice resulting from the will of his grandfather, and when he found that the promise was broken, on reading the will of his grandmother after her decease, he then waited seven years before proceeding to attack the will of his grandfather, admitted to probate in 1889. The Court of Appeals doubted the existence of the promise, and said it was probably only a promise that he should share equally in his grandmother's estate, which his grandmother fully performed. He says that after the death of his grandmother he was very ill for six weeks, and that for two years he was not in good health, and that he remained ignorant of the fraud and undue influence and duress and mental incapacity of his grandfather until a short time before the filing of the *caveat* or the writing of the letters. He does not contend that if these facts existed, he did not know that, if proved, they would avoid the will.

He insists, however, that the law pertaining to the taking of a legacy or devise under a will, which prevents the assertion of the invalidity of the same will, ought not to bind him, because he was ignorant that such was the law; in other words, the law should not cover his case because he was ignorant that it was the law.

We know of no case where mere ignorance of the law, standing alone, constitutes any excuse or defense against its enforcement. It would be impossible to administer the law if ignorance of its provisions were a defense thereto. There are cases, undoubtedly, where ignorance of the law, united with fraudulent conduct on the part of others, or mistakes of fact relating thereto, will be regarded as a defense, but there must be some element, other than a mere mistake of law, which will afford an excuse. In addition there ought to be no negligence

in attempting to discover the facts. The ignorance of the plaintiff in error as to his alleged rights, it would seem, was an ignorance of the existence of alleged facts regarding the procurement of the will of his grandfather, but he does not pretend that, had he known of their existence, he was ignorant of their effect as a ground for refusing probate of the alleged will. The ignorance of evidence to substantiate what he knew were his rights is a very different thing from ignorance of the rights themselves, as is stated so clearly by the Court of Appeals; and so it appears in this case that the only obstacle to the enforcement of the rule of estoppel rests in the alleged ignorance of the plaintiff in error that such a rule existed. Although his action in consenting to the probate of the will of his grandfather was not the result of fraud or misrepresentation, and the other parties to this litigation cannot be placed back in the position they occupied when the will was admitted to probate, and this condition is the result of the action of the plaintiff in error in consenting to the probate of the will, yet he now contends, notwithstanding all this, that he must be permitted, after the lapse of eleven years, to attempt to defeat the will of his grandfather because he did not know the law applicable to the case in hand. This is a totally inadmissible proposition.

It has been held from the earliest days, in both the Federal and state courts, that a mistake of law, pure and simple, without the addition of any circumstances of fraud or misrepresentation, constitutes no basis for relief at law or in equity, and forms no excuse in favor of the party asserting that he made such mistake. *Hunt* v. *Rousmaniere's Adm.*, 1 Pet. 1, 15; *Bank of the United States* v. *Daniel*, 12 Pet. 32, 55; *United States* v. *Hodson*, 10 Wall. 379, 409; *Lamborn* v. *County Commissioners*, 97 U. S. 181, 185; *Snell* v. *Insurance Co.*, 98 U. S. 85, 90, 92; *Allen* v. *Galloway*, 30 Fed. Rep. 466, where Hammond, J., in reviewing the decisions of this court, says: "Whatever rule may prevail elsewhere, there can be, in the equity courts of the United States, no relief from a mistake of law." *Drake* v. *Wild*, 70 Vermont, 52, 59; in that case the court said

(p. 59): "That ignorance of the law does not excuse a wrong done or a right withheld: That relief from liabilities under the law, arising from a known state of facts, will be denied. But to these general rules there are exceptions, as where there is a mistake of law caused by fraud, imposition or misrepresentation. We think it will be found that in most of the cases cited in these notes, and in Pomeroy, the party seeking relief was led into error by the action of the other party to a transaction, as in contracts and releases." *Light* v. *Light*, 21 Pa. St. 407, 412; *Storrs* v. *Barker*, 6 Johns. Ch. 166; *Whitwell* v. *Winslow*, 134 Massachusetts, 343, 345; *Alabama &c. Railway* v. *Jones*, 73 Mississippi, 110; *S. C.*, 55 Am. St. Rep. 488, note.

Exceptional cases where relief has been given have been, as stated, where there was fraud or imposition upon the individual by the person seeking to avail himself of the contract of the other party. In this case there was, as we have said, neither fraud nor imposition, nor misrepresentation; plaintiff in error was not advised that, although he took under the will, he could attack it. It is a simple, bald case of an alleged mistake or misapprehension, on the part of plaintiff, of what the law was under certain circumstances, with no representation or persuasion on the part of others to cause him to act upon such mistaken assumption.

As to what is the law relating to a party taking the benefit of a provision in his favor under a will, there is really no foundation to dispute the proposition that he thereby is precluded from at the same time attacking the validity of the very instrument under which he received the benefit.

In *Hyde* v. *Baldwin*, 17 Pick. 303, 308, it was held that one who accepted the beneficial interest under a will was thereby barred from setting up any claim which would defeat the full operation of the will. *Drake* v. *Wild*, 70 Vermont, 52, holds the same doctrine. In that case a party was held to be estopped from asserting her title to a trust fund disposed of by the will, because she had accepted the provisions of the will in her own favor. In *Bronsan* v. *Watkins*, 96 Georgia, 54, it

was held that one who took an estate under a will was thereby estopped from at the same time denying its validity as a will, or from questioning the jurisdiction of the court admitting it to probate, or the regularity of the probate proceedings. In *Smith* v. *Smith*, 14 Gray, 532, it was held that the acceptance of a devise estops the devisee to set up a title in opposition to the will, at law as well as in equity. In *Fry* v. *Morrison*, 159 Illinois, 244, it was held that one who took a beneficial interest under a will was thereby estopped to set up any right or claim of his own, though otherwise well founded, which would bar or defeat the effect of any part of the will. And in *Madison* v. *Larmon*, 170 Illinois, 65, 82, it was again held that one who takes under a will cannot contest it as an heir at law of the devised property. So, in *Fisher* v. *Boyce*, 81 Maryland, 46, 53, the court said: "It is a maxim in a court of equity not to permit the same person to hold under and against a will. . . . It is equally appropriate to the jurisdiction and practice of courts of law. If the appellees claim under the will of their father, they must give it effect as far as they can, and they will then be estopped from denying its validity and genuineness. *Waters' Appeal*, 35 Pa. St. 523; *Thrower* v. *Wood*, 53 Georgia, 458."

When in addition to the fact that he took a benefit under the will, a party has acquiesced in its validity for many years, and the opposing party in interest has acted upon such consent and acquiescence, and has so changed his position on that account that he cannot be restored to it, and where witnesses have in the meantime died, the reason for the rule upon which an estoppel is founded is thereby greatly strengthened.

Two cases, among others, were cited by counsel for plaintiff in error, in the court below, and are referred to in the opinion of the Court of Appeals, and they are also cited here for the purpose of showing his right to maintain these proceedings to set aside the will of his grandfather. They are: *Spread* v. *Morgan*, 11 H. L. Cases, 587, decided in 1864; *Watson* v. *Watson*, 128 Massachusetts, 152, decided in 1878.

In the English case it was held that one remaining in possession of two estates, under titles not consistent with each other, thereby afforded no decisive proof of an election under which title to take. It was there held that the rule was, "that if a party being bound to elect between two properties, not being called upon so to elect, continues in the receipt of the rents and profits of both, such receipt affording no proof of preference, cannot be an election to take the one, and reject the other."

We think the case has no application to the one at bar, and is well distinguished in the opinion of the Court of Appeals in this case.

In *Watson* v. *Watson, supra,* the general doctrine that any person taking a beneficial interest under a will, thereby confirmed it and could not set up any right or claim of his own, which would defeat or in any way prevent the full operation of every part of the will, was recognized and affirmed, but it was said (page 155):

"An election made in ignorance of material facts is, of course, not binding, when no other person's rights have been affected thereby. So, if a person, though knowing the facts, has acted in misapprehension of his legal rights, and in ignorance of his obligation to make an election, no intention to elect, and consequently no election, is to be presumed."

Regarding the legatee who took a legacy under the will, the court continued (at p. 157) as follows:

"But as to Edward the case stands differently. Immediately after being informed of the rule of law, little more than a year after the probate of the will, and before the executor had settled any account in the Probate Court, *or the position of any other person had been changed,* he returned his legacy to the executor, and gave him notice that he elected not to take it. He cannot therefore be held to have made such an election as should deprive him of the right under his independent title to partition of the whole estate, not excepting the parcel claimed by respondent."

In this case the position of other parties to this litigation has most materially changed, as has already been shown (the particulars of which need not be repeated), while the plaintiff in error has been also guilty of extreme negligence even in attempting to discover what he alleges are facts. We are satisfied that the plaintiff in error is estopped from now contesting the will, and that great injustice would result from the overturning of the principle adjudged in so many cases.

We are of opinion the case has been rightly decided, and the judgment of the Court of Appeals of the District of Columbia is

Affirmed.

KEHRER *v.* STEWART.

ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

No. 152. Argued January 24, 25, 1905.—Decided February 27, 1905.

As a tax upon the seller of goods is a tax upon the goods themselves, and a tax upon goods sold in one State delivered to a common carrier and consigned to the purchaser in another State is an illegal interference with interstate commerce, a State cannot impose a privilege tax on agents of packing houses as to meats shipped to him from another State merely for distribution to purchasers from his principal; but where the Supreme Court of the State has held that the tax is void as to interstate shipments and applies only to the domestic business of the agent in the ordinary course of trade, and all other such agents, whether of domestic or foreign packing houses, are subject to the tax, that construction will be accepted by this court as in reality a part of the statute itself, and the tax is within the power of the State and is not as to his domestic business an interference with interstate commerce even though all of the goods sold by an agent may be shipped to him from another State.

Nor is such a tax void because it is laid upon the agents themselves and cannot be apportioned between the interstate and the domestic business carried on by the same person.

While such a tax might not apply to an agent whose domestic business was purely nominal and strictly incidental to his interstate business, it does apply to one whose domestic business is a definite, although a minor, part of his business in the State as the application of the tax does not depend on the greater or less magnitude of the business.

Where such a tax is imposed alike upon the managing agent both of domestic and foreign houses, it does not deny to the agent of a foreign house the equal protection of the laws.

A State has the right to classify occupations and impose different taxes upon different occupations. The necessity for, and the amount of, the tax are exclusively within the control of the state legislature, and, in the absence of discrimination against citizens of other States, its determination in regard thereto is not open to criticism in this court.

Such a tax does not impair the obligation of, or affect, any contract previously made between the principal and the agent. The power of taxation overrides any agreement of an employé to serve for a specific sum.

THIS was an action by Kehrer against the tax collector of the county of Fulton in Georgia to recover back a tax of $200 with interest and costs, paid to Stewart under protest, such tax having been assessed against Kehrer under the general tax law of the State, of December 21, 1900, which provided that there should be assessed and collected "upon all agents of packing houses doing business in this State, two hundred dollars in each county where said business is carried on." Petitioner charged the law to be a violation of the Fourteenth Amendment.

Defendant demurred to the petition, and this demurrer being overruled, a writ of error was taken from the Supreme Court, which reversed the judgment of the court below in overruling the demurrer. 115 Georgia, 184. Plaintiff thereupon amended his petition, insisting that the tax denied him due process of law as well as the equal protection of the law, impaired the obligation of his contract with the firm, and was also in conflict with the commerce clause of the Constitution of the United States. The defendant demurred to the amended petition. The court sustained the demurrer and the Supreme Court affirmed its action. 117 Georgia, 969.

Mr. Alexander W. Smith for plaintiff in error:

The act is obnoxious to the Fourteenth Amendment. *Butchers' Union* v. *Crescent City Co.*, 111 U. S. 476; *Allgeyer* v. *Louisiana*, 165 U. S. 578. The act practically singles out

the manager of Nelson Morris & Co. It is limited in any event to chief clerks and managers and arbitrarily and unreasonably selects this class of persons while other persons with similar privileges are not affected. The act has been construed by the state court to impose a tax on the occupation of agents of packing houses whether the business is wholly interstate or wholly domestic. The act is silent as to any distinction between the tax on the agent of a principal doing interstate business and of one doing a domestic business.

The state court holds the act covers both. The legislature never undertook to classify agents for the conduct of domestic business as a separate class from agents for the conduct of interstate business. Each would be an agent of a packing house. Each would be in the same class. Each would have the same occupation. One must pay the tax—the other must not. Thus analyzing the construction of the act by the Supreme Court of Georgia, it is plainly violative of the Fourteenth Amendment. *Ex parte Virginia*, 100 U. S. 339; *Barbier* v. *Connelly*, 113 U. S. 27, 31; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Gulf, Col. & S. Fé Ry. Co.* v. *Ellis*, 165 U. S. 168; *Railroad Co.* v. *Matthews*, 174 U. S. 76.

The act in this case is nothing more than a revenue law. Its caption so declares it, and the court below so treats it. *Linton* v. *Childs*, 105 Georgia, 567, 573; *In re Yot Sang*, 75 Fed. Rep. 984; *Fraser* v. *McConway*, 82 Fed. Rep. 257, 259; *Randolph* v. *Builders' & Painters' Supply Co.*, 106 Alabama, 501; *N. Y. Life Ins. Co.* v. *Smith*, 41 S. W. Rep. 680; *St. Louis &c. Ry.* v. *Williams*, 49 Arkansas, 492; *Denver &c. Ry.* v. *Outcalt*, 2 Colo. App. 395; *Atchison &c. Ry.* v. *Baty*, 6 Nebraska, 37; *O'Connell* v. *Lumber Co.*, 71 N. W. Rep. 449; *Jacksonville* v. *Carpenter*, 77 Wisconsin, 288; *State* v. *Dering*, 94 Wisconsin, 588; *Pearson* v. *Portland*, 69 Maine, 278; *Burrows* v. *Brooks*, 71 N. W. Rep. 460; *Middleton* v. *Middleton*, 54 N. J. Eq. 692; *State* v. *Goodwill*, 33 W. Va. 179; *Kuhn* v. *Common Council*, 70 Michigan, 538; *State* v. *Hinman*, 65 N. H. 105; *State* v. *Penwyer*, 65 N. H. 116.

The act is void as a burden upon, and a regulation of interstate commerce. *Caldwell* v. *North Carolina*, 187 U. S. 622; *Crutcher* v. *Kentucky*, 141 U. S. 47; *Lyng* v. *Michigan*, 135 U. S. 161, 166; *Osborne* v. *Florida*, 164 U. S. 650; *Pullman Co.* v. *Pennsylvania*, 141 U. S. 18, and cases cited; *Pullman Co.* v. *Adams*, 189 U. S. 420; *Allen* v. *Pullman Co.*, 191 U. S. 172, 183; *Leloup* v. *Mobile*, 127 U. S. 640, 647; *Asher* v. *Texas*, 128 U. S. 129; *West. Un. Tel. Co.* v. *Alabama*, 132 U. S. 477; *Ratterman* v. *West. Un. Tel. Co.*, 127 U. S. 411; *McCall* v. *California*, 136 U. S. 110; *Pollock* v. *Farmers' L. & T. Co.*, 157 U. S. 582; *Adams Express Co.* v. *Ohio*, 165 U. S. 234; *Stockard* v. *Morgan*, 185 U. S. 34; *Atlantic Company* v. *Philadelphia*, 190 U. S. 162.

The purpose underlying the phraseology of the act is to indirectly reach non-resident packers who necessarily do business through agents while local houses escape. For history of legislation in this respect see *Stewart* v. *Beef Co.*, 93 Georgia, 12.

Mr. John C. Hart for defendant in error:

The act as construed by the state court is not violative of the constitution of Georgia. The power of the General Assembly of Georgia to classify for the purpose of taxation is unquestionable. Nor is there anything in the constitution of Georgia which inhibits the taxation of certain vocations or occupations and to exempt, by failing to tax, other occupations. Cooley on Tax., 384; 1 Desty on Tax., 96; *Williams* v. *Fears*, 110 Georgia, 594; *Cutliff* v. *Mayor*, 60 Georgia, 598; *Shepard* v. *Commissioners*, 59 Georgia, 536; *Davis & Co.* v. *Mayor*, 64 Georgia, 129; *Singer Mfg. Co.* v. *Wright*, 33 Fed. Rep. 126; *American Harrow Co.* v. *Shaffer*, 68 Fed. Rep. 750; *Mutual Reserve Life Ass'n* v. *Augusta*, 109 Georgia, 79.

The act is not violative of the Fourteenth Amendment. The object of the Amendment was to preclude the several States from discriminating against citizens of other States. Cooley on Tax., 99; 1 Desty on Tax., 223; *Slaughter House*

Case, 16 Wall. 36. The specific tax levied upon persons engaged in the conduct of a particular business is in no sense obnoxious to the Fourteenth Amendment. *Williams* v. *Fears*, 110 Georgia, 584. The Constitution imposes no restriction on the States in the levy of taxes other than that there shall be no discrimination against citizens of other States.

The contention of the plaintiff in error that the act in question deprives him of his liberty and property without due process of law is answered by an unbroken line of authorities to the effect that due process of law within the meaning of the Fourteenth Amendment is secured if the laws operate on all alike and do not subject the individual to an arbitrary exercise of the powers of government. *Davidson* v. *New Orleans*, 96 U. S. 105; *Giozza* v. *Tiernan*, 148 U. S. 657; *Hager* v. *Reclamation District*, 111 U. S. 709.

The statute is not an illegal interference with interstate commerce. It does not fall within *Caldwell* v. *North Carolina*, 187 U. S. 622. See *Stone* v. *State*, 117 Georgia, 292. The plaintiff in error was engaged in domestic as well as interstate business.

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

This case arose upon the following state of facts: Nelson Morris & Co., citizens of Illinois, were engaged, in the city of Chicago, in the business of packing meats for sale and consumption, and also had a place of business in Atlanta, Georgia, where they sold their products at wholesale, having in their employ several clerks and helpers, one of whom was the petitioner, who was employed as chief clerk and manager at a salary of $25 per week. The firm did not have anywhere within the State of Georgia any packing house for slaughtering, dressing, curing, packing or manufacturing the products of any animals for food or commercial use, but took orders, which were transmitted and filled at Chicago, the meats sent

to Atlanta and there distributed in pursuance of such orders. Certain meats were also shipped from Chicago to Atlanta without a previous sale or contract to sell. These were stored in the Atlanta house of the firm in the original packages, and were kept and held for sale, in the ordinary course of trade, as domestic business. They were offered for sale to such customers as might require them, and until sold were stored and preserved and remained the property of the firm.

1. It was admitted by the Supreme Court of Georgia in its opinion, and by both parties hereto, that a tax upon the seller of goods is a tax upon the goods themselves, *Brown* v. *Maryland,* 12 Wheat. 419; *Welton* v. *Missouri,* 91 U. S. 275; and that a tax upon goods sold in another State, delivered to a common carrier and consigned to the purchaser in the State of Georgia, was an illegal interference with interstate commerce. *Caldwell* v. *North Carolina,* 187 U. S. 622; *Norfolk &c. Ry. Co.* v. *Sims,* 191 U. S. 441; *Stone* v. *State,* 117 Georgia, 292. It was therefore held that the tax, so far as applied to meats sold in Chicago and shipped to the petitioner in Georgia for distribution, could not be supported; but that so far as the petitioner was engaged in the business of selling directly to customers in Atlanta, he was engaged in carrying on an independent business as a wholesale dealer, and was liable to the tax.

This decision was correct. In carrying on the domestic business, petitioner was indistinguishable from the ordinary butcher, who slaughters cattle and sells their carcasses, and in principle it made no difference that the cattle were slaughtered in Chicago and their carcasses sent to Atlanta for sale and consumption in the ordinary course of trade. Upon arrival there they became a part of the taxable property of the State. It made no difference whence they came and to whom they were ultimately sold, or whether the domestic and interstate business were carried on in the same or different buildings. In this particular the case is covered by that of *Brown* v. *Houston,* 114 U. S. 622, wherein it was held that coal mined

in Pennsylvania and sent by water to New Orleans, to be sold in open market there on account of the owners in Pennsylvania, became intermingled with the general property of the State, and liable to taxation under its laws, although it might have been after arrival sold from the vessel on which the transportation was made, without being landed, and for the purpose of being taken out of the country on a vessel bound to a foreign port. The same principle was applied in *Emert* v. *Missouri*, 156 U. S. 296, in which a license tax upon peddlers of goods, which made no distinction between residents and products of the State and of those of other States, was sustained. To the same effect is *Machine Company* v. *Gage*, 100 U. S. 676.

The case is readily distinguishable from that of *Crutcher* v. *Kentucky*, 141 U. S. 47, wherein a state law requiring a license from agencies of foreign express companies was held to be a regulation of interstate commerce, so far as applied to a corporation of another State engaged in interstate business, although as *incidental* thereto it did some local business by carrying goods from one point to another in the State of Kentucky. The court observed that while the local business was probably quite as much for the accommodation of the people of the State as for the advantage of the company, this did not obviate the objection to the tax; that the regulations as to license and capital stock were imposed as conditions on the companies carrying on the business of interstate commerce, which was manifestly the principal object of its organization. "These regulations are clearly a burden and a restriction upon the commerce. Whether intended as such or not they operate as such. But taxes or license fees in good faith imposed exclusively on express business carried on wholly within the State would be open to no such objection."

The same doctrine was applied to telegraph companies in *Leloup* v. *Port of Mobile*, 127 U. S. 640, wherein a general license tax upon the telegraph company was held to affect its entire business, interstate as well as domestic or internal, and was unconstitutional. This case, however, must be read

in connection with *Postal Telegraph Cable Co.* v. *Charleston*, 153 U. S. 692, wherein we held that a license tax upon a telegraph company on business done exclusively within the State, and not including any business done to or from points without the State, and not including any business done for the Government of the United States, was an exercise of the police power, and not an interference with interstate commerce. In line with this case is that of *Ratterman* v. *Western Union Tel. Company*, 127 U. S. 411, in which a percentage tax assessed upon receipts of telegraph companies partly derived from interstate commerce and partly from commerce within the State, and which were capable of separation, but were returned and assessed in gross, and without separation or apportionment, was held invalid in proportion to the extent that such receipts were derived from interstate commerce, but valid as applied to receipts from messages within the State. To the same effect is *Western Union Tel. Co.* v. *Alabama*, 132 U. S. 472.

So, if the stock of a transportation company be taxed by taking as a basis of assessment such proportion of its capital stock as the number of miles of railroad over which its cars are run within the State bear to the whole number of miles over which its cars are run throughout the United States, such assessment does not impinge upon the power of Congress. *Pullman's Car Company* v. *Pennsylvania*, 141 U. S. 18. The case is still simpler, if the tax be imposed in terms upon the domestic commerce, seeing that the corporation is free to abandon the business taxed if it sees fit. *Pullman Company* v. *Adams*, 189 U. S. 420; *Allen* v. *Pullman Company*, 191 U. S. 171.

The only difficulty in this case arises from the fact that the tax is laid not in terms upon the domestic business, nor upon the gross receipts or profits which might be apportioned between interstate and domestic business, but is a gross sum imposed upon the managing agent of packing houses, regardless of the fact that the greater portion of the business may

be interstate in its character. This contingency, however, is met by the case of *Osborne* v. *Florida*, 164 U. S. 650, wherein a license tax imposed upon express companies doing business in Florida had been construed by the Supreme Court of that State as applying solely to business of the company done within the State, and not to its interstate business. Accepting this construction of the state statute as in reality part of the statute itself, we held that it did not in any way violate the Federal Constitution. The statute was sustained, notwithstanding the fact that ninety-five per cent of the business was interstate in its character, and only five per cent consisted of carrying goods and freight between points within the State of Florida. *Crutcher* v. *Kentucky*, 141 U. S. 47, was distinguished as one which prohibited the agent of a foreign express company from carrying on business at all in that State without first obtaining a license from the State. Said the court: "It has never been held, however, that when the business of the company which is wholly within the State, is but (not) a mere incident to its interstate business, such fact would furnish any obstacle to the valid taxation by the State of the business of the company which is entirely local. So long as the regulation as to the license or taxation does not refer to and is not imposed upon the business of the company which is interstate, there is no interference with that commerce by the state statute."

So, in the case under consideration it was expressly held by the Supreme Court of Georgia that that part of the Nelson Morris & Company's business, which consisted in shipping goods to Atlanta to fill orders previously received, the goods being delivered in accordance with such orders, was interstate commerce, not subject to taxation within the State, and that, so far as applied to that business, the tax was void. Accepting this construction of the Supreme Court, we think the act, so far as applied to domestic business, is valid. The record does not show what proportion of such business is interstate and what proportion is domestic, although it is con-

ceded that most of the business is interstate in its character. If the amount of domestic business were purely nominal, as, for instance, if the consignee of a shipment made in Chicago upon an order filled there, refused the goods shipped, and the only way of disposing of them was by sales at Atlanta, this might be held to be strictly incidental to an interstate business, and in reality a part of it, as we held in *Crutcher* v. *Kentucky*, 141 U. S. 47; but if the agent carried on a definite, though a minor, part of his business in the State by the sales of meat there, he would not escape the payment of the tax, since the greater or less magnitude of the business cuts no figure in the imposition of the tax. There could be no doubt whatever that, if the agent carried on his interstate and domestic business in two distinct establishments, one would be subject and the other would not be subject to the tax, and in our view it makes no difference that the two branches of business are carried on in the same establishment. The burden of proof was clearly upon the plaintiff to show that the domestic business was a mere incident to the interstate business.

2. The act in question does not deny to the petitioner the equal protection of the laws, as the tax is imposed alike upon the managing agent both of domestic and of foreign houses. In its first opinion in this case the Supreme Court held that the tax was a vocation or occupation tax, and that it was not designed to apply to every agent or employé of the company, but only to the managing or superintending agent, who is the *alter ego* of the principal by whom he is employed. There is no discrimination in favor of the agents of domestic houses, and, while we may suspect that the act was primarily intended to apply to agents of *ultra* state houses, there is no discrimination upon the face of the act, and none, so far as the record shows, upon its practical administration. As we have frequently held, the State has the right to classify occupations and to impose different taxes upon different occupations. Such has been constantly the practice of Congress under the internal revenue laws. *Cook* v. *Marshall County*, 196 U. S.

261, 275. What the necessity is for such tax, and upon what occupations it shall be imposed, as well as the amount of the imposition, are exclusively within the control of the state legislature. So long as there is no discrimination against citizens of other States, the amount and necessity of the tax are not open to criticism here.

3. The argument that the tax impairs the obligation of a contract between the petitioner and Nelson Morris & Company is hardly worthy of serious consideration. The power of taxation overrides any agreement of an employé to serve for a specific sum. His contract remains entirely undisturbed. There was no stipulation for an employment for a definite period; and if there were, it is inconceivable that the State should lose this right of taxation by the fact that the party taxed had entered into an engagement with his employer for a definite period. The tax is an incident to the business, and probably might under the terms of their contract be charged up against the employer as one of the necessary expenses of carrying it on.

The judgment of the Supreme Court of Georgia is

Affirmed.

SAN FRANCISCO NATIONAL BANK *v.* DODGE.

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

No. 44. Argued November 7, 1904.—Decided February 27, 1905.

Section 5219, Rev. Stat., authorizes the taxation by the States of shares of stock of national banks but exacts that the tax when levied shall be at no greater rate than that imposed on other moneyed capital; no conflict necessarily arises between the Federal statute and a state law solely because the latter provides one method for taxation of state banks and another method for national banks if there is no actual discrimination against the shares of the national banks resulting from the difference in method. If, however, irrespective of the face of the law, the system created by the state law in its practical execution produces an actual

and material discrimination against national banks it does conflict with § 5219, Rev. Stat., and is void.

Where the record contains an express admission that a specified instance of taxation showing an undervaluation of the property of a corporation is illustrative of the method by which all other similar institutions are assessed under a statute requiring full valuation, this court cannot disregard the admission and consider that such undervaluation is an isolated instance and that all the property of other similar institutions is assessed at full value in accordance with the provisions of the statute.

As it appears from the agreed statement of facts in this case that under the laws of California, as construed by the highest court of that State, all the elements of value which are embraced in the assessment of shares of stock in national banks are not included in assessing the value of property of state banks and other moneyed corporations, there is a discrimination against the shares of national banks and the state law taxing such shares as so construed violates, and is void under, § 5219, Rev. Stat.

THE facts are stated in the opinion.

Mr. W. S. Wood, with whom *Mr. E. S. Pillsbury* and *Mr. Alfred Sutro* were on the brief, for appellant.

As to constitutional scope of taxation, see *McCulloch* v. *Maryland,* 4 Wheat. 316, 429; § 3, Art. I; § 1, Art. XIII, Const. of California. Property exempt under the laws of the United States is exempt under the state laws; the exemption is obligatory. *Pollock* v. *Farmers' L. & T. Co,* 157. U. S. 429.

National banks are not subject to state taxation. The franchise to be a national bank is not subject to state taxation. *Bank* v. *Owensboro,* 173 U. S. 671; *National Bank* v. *Louisville,* 174 U. S. 438.

The shares may be taxed but only under the provisions of Rev. Stat. § 5219. This is the measure of the power of the State to tax national banks. *First National Bank* v. *San Francisco,* 129 California, 97.

The authority thus given is to tax, not the banks, but the shareholders; and the authority to tax shareholders is upon the express limitations thus declared by Congress.

Whenever, therefore, state legislation assumes to tax shareholders of national banks at a greater rate than other moneyed

capital in the hands of individual citizens of such State, such legislation is unconstitutional and void. *People* v. *Weaver*, 100 U. S. 539; *Pelton* v. *National Bank*, 101 U. S. 146; *Evansville Bank* v. *Britton*, 105 U. S. 322; *McHenry* v. *Downer*, 116 California, 25; *Miller* v. *Heilbron*, 58 California, 133.

As to California legislation authorizing taxation of shares in national bank, see *McHenry* v. *Downer*, 116 California, 25; Stat. March 14, 1899, p. 96; and also see exemptions under § 3608, Political Code.

The constitutionality of this statute as to the exemption of shares in state corporations was affirmed in *Burke* v. *Badlam*, 57 California, 594; *San Francisco* v. *Mackay*, 10 Sawyer, 302; *County Commissioners* v. *Farmers' & Mechanics' Bank*, 48 Maryland, 117; *Germania Trust Co.* v. *San Francisco*, 128 California, 594, and the decisions of the Supreme Court of the State, construing its constitution and statutes, are binding upon the Federal courts. This creates a discrimination against shares of national banks.

Under § 3609 shares in national banks are valued and assessed as other property for taxation. *Supervisors* v. *Stanley*, 105 U. S. 311; *Evansville Bank* v. *Britton*, 105 U. S. 324. The rule of valuation applicable to the property of the stockholder in a state corporation, or in a state bank, is not the equivalent of the rule made applicable to stockholders in national banking associations. *Miller* v. *Heilbron*, 58 California, 133; *McHenry* v. *Downer*, 116 California, 20, and the amendment of 1899 does not cure it. Par. 6, § 3629, Pol. Code, has not been amended as to exemptions to which banks and stockholders are entitled and which are not available under this statute; see *Dutton* v. *Bank*, 53 Kansas, 440, 463; *First Nat. Bank* v. *Ayres*, 160 U. S. 660; *Aberdeen Bank* v. *Chehalis County*, 166 U. S. 440; *Palmer* v. *McMahon*, 133 U. S. 660; *Bank of Commerce* v. *New York*, 2 Black, 620, 628; *Bradley* v. *People*, 4 Wall. 458; *Hills* v. *Exchange Bank*, 105 U. S. 327; *Whitbeck* v. *Mercantile Bank*, 127 U. S. 199; *McMahon* v. *Palmer*, 102 N. Y. 176; *S. C.*, 12 Daly, 364; *Na-*

tional Bank v. *Chapman*, 173 U. S. 205. In matters of taxation the statute must be adhered to. *Merced County* v. *Helm*, 102 California, 159, 165.

As to *Bank of California* v. *State*, 142 California, 276, this court may accept the refusal but is not bound by the reasoning, and see *Hart* v. *Burnett*, 15 California, 530, 599; *Cohens* v. *Virginia*, 6 Wheat. 399. As to methods of valuing franchises of state corporations, see *Water Works* v. *Schottler*, 62 California, 69, 117; *San José Gas Co.* v. *January*, 57 California, 614; *San Francisco* v. *Anderson*, 103 California, 70; *Germania Trust Co.* v. *San Francisco*, 128 California, 595; *People* v. *National Bank*, 123 California, 53, 60; *San Francisco* v. *Fry*, 63 California, 470.

Mr. William I. Brobeck, with whom *Mr. Percy V. Long* was on the brief, for appellee:

The act of March 14, 1899, is constitutional and is not violative of § 5219, Rev. Stat., as to extent of power of taxation. See *State Tax on Foreign Held Bonds*, 15 Wall. 334; *Kirtland* v. *Hotchkiss*, 100 U. S. 491; *Mackay* v. *San Francisco*, 113 California, 392. An assessment will not be declared void for inequality of valuation unless a preconcerted plan of discrimination is disclosed. *Stanley* v. *Supervisors*, 121 U. S. 550; *Supervisors* v. *Stanley*, 105 U. S. 305; *Bank* v. *Kimball*, 103 U. S. 732; *Bank* v. *Perea*, 147 U. S. 67.

As to construction of "other moneyed capital" see *National Bank* v. *Mayor*, 100 Fed. Rep. 29; *Mercantile Bank* v. *New York*, 121 U. S. 154; *Evansville Bank* v. *Britton*, 105 U. S. 322; *National Bank* v. *Chehalis*, 166 U. S. 440. The bank in this case has had the benefit of all possible deductions. *Van Allen* v. *Assessors*, 3 Wall. 573; *Bradley* v. *People*, 4 Wall. 459; *People* v. *Commissioners*, 4 Wall. 244.

There is no discrimination against national banks on the face of the statute. *Davenport Bank* v. *Davenport*, 123 U. S. 83. As to what deductions should be allowed to holders of bank stock and how values should be estimated see cases cited

by appellant and *Bressler* v. *Wayne*, 32 Nebraska, 834; *Chapman* v. *Bank*, 56 Ohio St. 310.

The general rule is that a share of stock is a right to a proportionate part in the dividends and profits of the corporation and to a share of its net assets upon dissolution. *Plumpton* v. *Bigelow*, 93 N. Y. 599; *Field* v. *Pierce*, 102 Massachusetts, 261; *Jones* v. *Davis*, 35 Ohio St. 477; *Tax Collector* v. *Insurance Co.*, 42 La. Ann. 1172; *Farrington* v. *Tennessee*, 95 U. S. 687; *People* v. *Bank*, 123 California, 60.

No solvent credits escape assessment under the constitution and laws of California. Section 1, Art. XIII, of constitution; §§ 3607, 3617, Pol. Code; *People* v. *Hibernia Bank*, 51 California, 247.

The exemption of shares of state banks does not discriminate against national banks. Cases cited by appellant, and see *Stanford* v. *San Francisco*, 131 California, 34; *Ottawa Glass Co.* v. *McCalet*, 81 Illinois, 556; *Nevada National Bank* v. *Dodge*, 119 Fed. Rep. 57. The courts of California have construed the statute as taxing shares of stock only once and while there are two lines of decisions the only decisions involved in this case are those of the California courts whose construction of the statute of the State will be followed by this court. The California decisions are supported by *Rice* v. *National Bank*, 23 Minnesota, 280; *Commissioners* v. *National Bank*, 48 Maryland, 117; *Lackawanna* v. *National Bank*, 94 Pa. St. 221; *Rosenberg* v. *Texas*, 67 Texas, 578; *Gordon* v. *Mayor &c.*, 5 Till. 231; *Blythe* v. *Brannin*, 3 Zabr. 484; *Johnson* v. *Commonwealth*, 7 Dana, 342; *Tax Cases*, 12 G. & Johns. 117; *Smith* v. *Burley*, 9 N. H. 423; *Williams* v. *Weaver*, 75 N. Y. 31; *New Haven* v. *Bank*, 31 Connecticut, 106.

It is evident both by the statutes and decisions of this State, that the system of taxation on its face works no discrimination against the national bank shareholders, and that it was the thought and intent of the legislature that the taxation of the property and the taxation of the shares was one and the same.

The purpose of this method of taxation was to avoid what the Supreme Court of the State had declared to be double taxation. *Nevada National Bank* v. *Dodge,* 119 Fed. Rep. 57; *Hepburn* v. *School Directors,* 23 Wall. 480.

Where a statute is fairly susceptible of two constructions —one leading inevitably to mischief or absurdity, and the other consistent with justice, sound sense and wise policy— the former should be rejected and the latter adopted. *In re Mitchell,* 120 California, 384, 386; *Jacobs* v. *Supervisors,* 100 California, 127; Sedgwick on Stat. and Const. Law, 312.

Mr. Justice White delivered the opinion of the court.

The appellant bank sued to restrain the enforcement of state, county, and city taxes, levied for the year 1900, upon shares of stock of the bank. Adequate averments were made to show equitable jurisdiction. *Cummings* v. *National Bank,* 101 U. S. 153, 157; *Hills* v. *Exchange Bank,* 105 U. S. 319; *Lander* v. *Mercantile Bank,* 186 U. S. 458. The taxes were alleged to be in conflict with the law of the United States. Rev. Stat. § 5219.

The case was submitted upon the pleadings and an agreed statement of facts. A decree of dismissal was affirmed by the Circuit Court of Appeals for the Ninth Circuit. That court deemed that the cause was controlled by the reasoning of an opinion delivered in deciding a previous case, *Nevada National Bank* v. *Dodge, Assessor,* the opinion in which case is reported in 119 Fed. Rep. 57.

Before considering the contentions relied on we quote the text of the constitution of California directly relating to the subject in hand, and briefly advert to the legislation of that State which preceded the act under which the assailed tax was levied.

Section 1 of Article XIII of the constitution of California provides:

"All property in the State, not exempt under the laws of the United States, shall be taxed in proportion to its value,

to be ascertained as provided by law. The word 'property,' as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, franchises and all other matters and things, real, personal and mixed, capable of private ownership. The legislature may provide, except in the case of credits secured by mortgage or trust deed, for a reduction from credits of debts due to *bona fide* residents of this State."

Carrying out the command to provide for the ascertainment of the value of property to be taxed, it was enacted, Political Code, § 3627, that all taxable property shall be assessed "at its full cash value," and, Political Code, § 3617, that "the terms 'value' and 'full cash value' mean the amount at which the property would be taken in payment of a just debt due from a solvent debtor."

Prior to 1881 shares of stock of all corporations were taxed, and section 3640 of the Political Code commanded that the market value of the stock of a corporation should be taken as the value of the shares for assessment. Where the shares of stock were taxed no tax was levied upon the corporate property. This was because the Supreme Court of California had decided that to tax both the stock and the corporate property would be double taxation. *Burke* v. *Badlam*, 57 California, 594.

In the year 1881 the general system of taxing shares of stock was abandoned, and a rule was put in force taxing the corporate property. Section 3608 of the Political Code, which embodied this change, was as follows:

"Shares of stock in corporations possess no intrinsic value over and above the actual value of the property of the corporation which they stand for and represent; and the assessment and taxation of such shares, and also of the corporate property, would be double taxation. Therefore, all property belonging to corporations shall be assessed and taxed, but no assessment shall be made of shares of stock; nor shall any holder thereof be taxed therefor."

The act of 1899, under which the tax in this case was levied, amended the section just quoted, by providing that all property belonging to corporations shall be assessed and taxed "save and except the property of national banking associations, not assessable by Federal statute;" and by adding to the provision commanding that no assessment shall be made of shares of stock in any corporation the following words: "Save and except in national banking associations, whose property, other than real estate, is exempt from assessment by Federal statute." To carry out the change made by the provision just referred to, two sections were added to the Political Code, viz., 3609 and 3610. Section 3608, as amended by the act of 1899, and the two new sections resulting from that act, are in the margin.[1]

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[1] SEC. 3608. Shares of stock in corporations possess no intrinsic value over and above the actual value of the property of the corporation which they stand for and represent; and the assessment and taxation of such shares, and also all the corporate property, would be double taxation. Therefore, all property belonging to corporations, save and except the property of national banking associations, not assessable by Federal statute, shall be assessed and taxed. But no assessment shall be made of shares of stock in any corporation, save and except in national banking associations, whose property, other than real estate, is exempt from assessment by Federal statute.

SEC. 3609. The stockholders in every national banking association doing business in this State, and having its principal place of business located in this State, shall be assessed and taxed on the value of their shares of stock therein; and said shares shall be valued and assessed as is other property for taxation, and shall be included in the valuation of the personal property of such stockholders in the assessment of the taxes at the place, city, town, and county where such national banking association is located, and not elsewhere, whether the said stockholders reside in said place, city, town, or county, or not; but in the assessment of such shares each stockholder shall be allowed all the deductions permitted by law to the holders of moneyed capital in the form of solvent credits, in the same manner as such deductions are allowed by the provision of paragraph six of section thirty-six hundred and twenty-nine of the Political Code of the State of California. In making such assessment to each stockholder there shall be deducted from the value of his shares of stock such sum as is in the same proportion to such value as the total value of its real estate and property exempt by law from taxation bears to the whole value of all the shares of capital stock in said

The first contention is that the law of 1899 is on its face in conflict with section 5219 of the Revised Statutes, because it taxes shares of stock in national banks and does not tax such shares in state banks and other state moneyed corporations. As it is patent that the state banks and corporations are taxed on their property, the proposition reduces itself to this: That the States may not pursue the method permitted by the act of Congress of taxing shares of stock in national banks unless the same method is employed as to the stock of state banks and other state moneyed corporations.

In *Davenport Bank* v. *Davenport*, 123 U. S. 83, it was decided that the provision of section 5219 of the Revised Statutes, authorizing the taxation of shares of stock in national banks, but exacting that the tax when levied should be at no greater rate than that imposed on other moneyed capital, did not require the States, in taxing their own corporations, "to conform to the system of taxing the national banks upon the shares of their stock in the hands of their owners."

True it is in the *Davenport case* it was also decided that the prohibition in the act of Congress of a higher rate of taxation of shares of stock in national banks than on other moneyed capital operated to avoid any method of assessment or taxa-

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national bank. And nothing herein shall be construed to exempt the real estate of such national bank from taxation. And the assessment and taxation of such shares of stock in said national banking associations shall not be at a greater rate than is made or assessed upon other moneyed capital in the hands of individual citizens of this State.

SEC. 3610. The assessor charged by law with the assessment of said shares shall, within ten days after he has made such assessment, give written notice to each national banking association of such assessment of the shares of its respective shareholders; and no personal or other notice to such shareholder of such assessment shall be necessary for the purpose of this act. And in case the tax on any such stock is unsecured by real estate owned by the holder of such stock, then the bank in which said stock is held shall become liable therefor; and the assessor shall collect the same from said bank, which may then charge the amount of the tax so collected to the account of the stockholder owning such stock, and shall have a lien, prior to all other liens, on his said stock, and the dividends and earnings thereof, for the reimbursement to it of such taxes so paid.

tion, the usual or probable effect of which would be to discriminate in favor of state banks and against national banks. True also is it that in the same case it was held that, even where no such discrimination seemingly arose on the face of the statute, nevertheless, if from the record it appeared that the system created by the State in its practical execution produced an actual and material discrimination against national banks, it would be the duty of the court to hold the state statute to be in conflict with the act of Congress, and therefore void.

As, then, no conflict necessarily arises between the act of Congress and the state law, solely because the latter provides one method for taxation of state banks and other moneyed corporations and another method for national banks, it follows that the contention that the state law for that reason is repugnant to the act of Congress is without merit. And this brings us to consider the contention of the appellant, which we think was embraced in the pleadings, which was expressly covered by the stipulated facts, the overruling of which was assigned as error in the Circuit Court of Appeals and in this court, and was elaborately discussed by both parties in the argument at bar, viz., that irrespective of the face of the state law, that law is void because of a discrimination against national banks, within the principles settled in the *Davenport case.*

To determine this latter contention requires an analysis of the two systems which the law of California enforces, in order that the two may be accurately compared.

Under the law the shares of national banks must be valued at their "full cash value," which the statute defines to mean the amount at which they "would be taken for a just debt due from a solvent debtor." These words are but synonymous with the requirement that in assessing shares of stock their market value must be the criterion. This is the case, for, eliminating exceptional and extraordinary conditions, giving an abnormal value for the moment to stock, it is apparent that

the general market value of stock is its true cash and selling value. That such is the meaning of the words in the legislation of California is indisputable, in view of the provision of section 3640 of the Political Code, which made market value the rule for assessing shares of stock during the period when the taxation of shares of stock generally prevailed, and that such requirement was mandatory was in effect held by the Supreme Court of California. *Miller* v. *Heilbron*, 58 California, 133, 138.

What, then, was embraced in the assessment of the shares of stock at their full cash or selling or market value? It embraced not only the book value of all the assets of the corporation, but the good will, the dividend-earning power, the ability with which the corporate affairs were managed, the confidence reposed in the capacity and permanency of tenure of the officers, and all those other indirect and intangible increments of value which enter into the estimate of the worth of stock and help to fix the market value or selling price of the shares. Considering this subject in *Adams Express Company* v. *Ohio*, 166 U. S. 185, 221, the court said:

"The capital stock of a corporation and the shares of a joint-stock company represent not only tangible property, but also the intangible, including therein all corporate franchises and all contracts, privileges and good will of the concern."

And in *Pullman's Car Co.* v. *Transportation Company*, 171 U. S. 138, this was reiterated. The court, after observing that while the franchise was one of the things entering into the computation of market value of shares of stock, said (p. 154):

"The probable prospective capacity for earnings also enters largely into the market value, and future possible earnings again depend to a great extent upon the skill with which the affairs of the company may be managed. These considerations, while they may enhance the value of the shares in the market, yet do not in fact increase the value of the actual property itself. They are matters of opinion upon which

persons selling and buying the stock may have different views."

That this doctrine is the rule in California is clearly shown by *Bank of California* v. *San Francisco*, 142 California, 276, for in that case the court, speaking of such elements of value as "dividend or profit-earning power or good-will," said (p. 289):

"In this connection it will be observed that these elements, so far as they may enter into the value of shares of stock, would be included in an assessment of such shares to the stockholders."

The state banks and other corporations are assessed on their property. Conceding that every species of property is assessed which is specifically enumerated as taxable in the state constitution, it does not follow that the assessment of property as such includes good will, dividend earning power, confidence in the ability of the management, and all those other intangible elements which necessarily enter into the cash or selling value of shares of stock. As said in the passage already quoted from the *Pullman case, supra*, such elements "may enhance the value of the shares of stock in the market, yet they do not in fact increase the value of the actual property itself. They are matters of opinion upon which persons selling and buying the stock may have different views." In the argument at bar no law of the State was referred to requiring that the assessing officers in valuing the property of a corporation should assess as property its good will, its dividend earning power, the confidence reposed in its officers, etc. From this analysis it results that in the one case, that of national banks, not only the value of all the tangible property, but also the value of all the intangible elements above referred to is assessed and taxed, whilst in the other case, that of state banks and other moneyed corporations, their property is taxed, but the intangible elements of value which we have indicated are not assessed and taxed, the consequence being to give rise to the discrimination against national banks

and in favor of state banks and other moneyed corporations forbidden by the act of Congress.

In the argument at bar this conclusion, it is insisted, is avoided because, whilst under the text of the state statutes it may be that all the elements of value which are included in the assessment of shares of stock are not *eo nomine* assessed against state banks and other moneyed corporations as property, they are, nevertheless, assessed against such corporations under the denomination of "franchise," the duty of the assessing officer to do so being imperative, as the result of the interpretation given to the taxing law by the Supreme Court of the State. The proposition is thus stated in the argument of counsel:

"Under the California system, all the property of California corporations is assessed, including their franchises. It is frequently the case that the market value of the stock of the corporation is greatly in excess of the value of its property, other than its franchise. This fact was called to the attention of the state court, which recognized the force of this suggestion, and held the constitution and laws of the State require the assessment and taxation of the franchise of the corporation, and that its value for the purpose of such assessment and taxation was properly ascertained by deducting from the market value of its stock the value of its corporate property and assessing the remainder as franchises."

It may be conceded that if the statutes have been interpreted by the Supreme Court of the State as thus asserted, and that as so interpreted they have been applied by the assessing officers, there would be an end to the discrimination which we have seen arises from the consideration of the result of the statutes when not so interpreted.

The question then is, do the decisions of the Supreme Court of California, as contended, place the positive duty on the assessor of including in an assessment of the franchises of state corporations all the elements of value which form part of the market or selling value of shares of stock?

Three cases are cited to sustain the proposition, viz., *San José Gas Company* v. *January*, 57 California, 614; *Spring Valley Water Works* v. *Schottler*, 62 California, 69, and *Bank of California* v. *San Francisco*, 142 California, 276.

Before coming to consider the last case cited, which is the one principally relied upon, we dispose of the two others by saying that they do not support the proposition. The first simply decided that where a part of a tax was asserted to be illegal and a part was admitted to be valid, the duty existed to pay the confessedly legal part to justify relief concerning the portion claimed to be illegal. The second case but decided that the franchises of corporations were taxable as property, and where a corporation enjoyed other franchises than the right to exist as a corporation, and the board of equalization in assessing such franchises had treated them as equivalent in value to the selling value of the capital stock, the courts had no power to interfere with the discretion lodged in the assessing officers. In the last cited and latest decided case, *Bank of California* v. *San Francisco*, the controversy was this: The Bank of California was assessed on its property. The difference between the value of such property and the cash or selling or market value of the shares of stock of the corporation was $2,943,096.92. The franchise, instead of being assessed for this amount, was valued only at $750,000. This valuation was resisted by the bank, upon the ground that it was so large that it must have included good will, dividend earning capacity, etc., which, it was asserted, could not under the law be embraced in an assessment of franchises. The court elaborately reasoned (there being two dissenting judges) that in view of the power of the assessors to value property it "could not say" that the assessing officers had transcended their authority in making the valuation complained of. Speaking of the duty of the assessing officers, it was said (p. 288):

"'The duty of making the valuation was cast upon the assessor. The method of arriving at the valuation, the process

by which his mind reached the conclusion (in case where, as here, it is not pretended that he acted fraudulently or dishonestly) is matter committed to his determination.' . . . This appears to be determinative of the contention here made. . . (p. 289): Whether or not the whole difference between the aggregate market value of the shares of stock and the value of the tangible property, viz., $2,943,096.92—was the value of the franchise, the assessor certainly had the right to take the value of the shares into consideration in determining the value of the franchise; and were we at liberty to review the judgment of the assessor and of the board of equalization upon those matters, we could not say that an assessment of $750,000 thereon is unjust, or that it includes such elements as dividend or profit-earning power, or good will, which, it is claimed, should not be taken into consideration in determining the value of the property of the corporation."

After pointing out that these elements entered into the assessment of shares of stock at their market value, it was observed (p. 289):

"It is clear that if the laws of the State properly express the intention that everything that gives value to the shares of a corporation shall be assessed as property of the corporation, the true value of those shares is a most important element in determining the value of such property."

In other words, the court simply declared that *if* the law of the State properly expressed the purpose to tax everything of value, the assessor had a discretion to consider what was the selling value of shares of stock in fixing the value of the franchise. Instead of supporting the contention that the law obliged the assessor to attribute to the franchise the value of those intangible elements which it was conceded were embraced in the assessment of shares of stock, the reasoning of the opinion is to the contrary. As the cash, selling or market value of the stock in the case before the court was conceded to have been nearly three million dollars greater than the

tangible property assessed to the corporation, and the assessor had valued the franchise not at that sum, but at only $750,000, it is patent that if the law of California had been what it is now asserted the court held it to be, that the claim that there was an overvaluation of the franchise would have been so frivolous as to require only a statement of the law to decide against the claim of overvaluation.

But the court made no such statement. On the contrary, it stated its inability to judicially declare that an assessment was extravagant and grossly unjust which was more than two millions lower than it should have been if the law imposed the obligation on the assessor of valuing the franchise by the difference between the value of the tangible property assessed and the cash or selling value of the shares of stock. This inability to give relief was placed solely upon the discretion which the law lodged in the assessor. But this interpretation of the statute serves only to further demonstrate the discrimination which has been previously pointed out. The result is made clear by comparing the discretion lodged in the assessor in valuing the franchise of state banks or other moneyed corporations with the duty resting on him as to the valuation of shares of national banks. The wide difference between the *discretion* on the one hand and the *duty* on the other will be additionally demonstrated by a consideration of the discrimination against national banks which has arisen in the practical execution of the statutes.

In the agreed statement of facts it was admitted that there are in the State of California one hundred and seventy-eight commercial (or state) banks, possessing a vast amount of capital, eighteen of which were located in San Francisco. And, to quote from the statement, "that the manner in which franchises of commercial banks and trust companies were assessed for said fiscal year ending June 30, 1901, by the assessor of the city and county of San Francisco, is illustrated by the case of the Bank of California, a banking corporation organized under the laws of the State of California." The

assessment in question, which it is thus declared in the statement of facts is illustrative of the other assessments against state banks, was the one which was involved in the controversy decided in the *Bank of California case, supra.* It is then recited in the agreed statement that the total property resources of the Bank of California, correcting a misprint in the record, were $5,156,903.08; and that the market or selling value of its capital stock was $8,100,000, a difference of $2,943,096.92; and that, deducting from the resources of the bank certain exemptions, the bank was assessed for property at $2,311,774. To this last mentioned sum was added for franchise tax, not the difference between the value of the property and the selling value of the stock, which, as stated, was nearly three millions of dollars, but only $750,000. It is insisted in argument that this statement shows but a single case of undervaluation of a state bank by the assessors, and therefore does not justify the conclusion that in the exercise of their discretion the assessors had not generally, as to state banks and corporations, valued the franchises at less than the difference between the value of the property taxed and the market or selling value of the stock. But this contention disregards the fact that, by the agreed statement, it was expressly admitted that the assessment in question was illustrative of the assessments upon the other state banks and moneyed corporations. In view of the issues in the cause, as to which the facts were agreed, to say that the assessment in question only illustrated the case of the Bank of California would require us to disregard the agreed statement.

Finally, it is contended that, even if the state banks and other state moneyed corporations were assessed as illustrated by the valuation placed on the Bank of California, the complainant national bank has no reason to complain because the assessment put upon its shares of stock was relatively no higher than that put upon the Bank of California, and therefore no discrimination was occasioned. This is predicated upon the fact that the value per share affixed to the stock of

the complainant national bank was not higher, having sole reference to the value of the stock as shown by the book value of the assets, and, considering allowable deductions, than was the assessment put upon the Bank of California, considering alone the same elements. But there is no proof whatever that the stock of the complainant bank had a market or selling value higher than the value affixed to it by the assessor; and the items which were made the basis of the assessment against the stock are declared in the agreed statement to be the entire assets of the bank, and in the argument at bar on behalf of the assessor the value of the shares of stock of the bank in excess of their book value is assumed to have been only nominal. The proposition, therefore, comes to this, although the complainant national bank was assessed at the full value of its stock, there was no discrimination in favor of the state bank, albeit there was a difference in excess of two millions of dollars between the value put upon the property and franchise of the state bank and the sum which should have been levied against it, if all the elements had been assessed which enter into the value of shares of stock. And, thus analyzed, the contention is again reducible to this proposition, that where property of one person worth a given amount is assessed for its full value no discrimination in favor of another results when the latter is assessed for a sum greatly below the value of the property assessed.

What has just been said disposes also of the contention that if the national bank had been assessed under the state law by the rule applied to state banks it would have had affixed to its property a slightly higher valuation than was given as the value of the shares of its capital stock. Without stopping to point out the error in the calculation by which this result is supposed to be demonstrated, it suffices to say that the contention would have merit only in the event that the property and franchise of all state banks had no higher value than the book value of the shares of stock. The fallacy underlying the whole contention cannot better be made clear than by

the mere reiteration of the statement that, under the facts as agreed, it is obvious that the shares of stock of the national bank were assessed for all they were worth under the rule of market or selling value, whilst the state bank was only assessed for $750,000 above the book value of the stock, although the cash, selling or market value would have required an assessment of nearly three millions of dollars.

Many contentions were argued at bar involving the assertion that the state law was invalid because of deductions of debts or exempt property which, it was asserted, the law allows to state banks and other moneyed corporations on an assessment of their property and does not allow holders of shares of stock in national banks. Most of these contentions are in effect disposed of by the consideration which we have given to the proposition that the state law was void simply because it established different methods of taxation as to the two classes of corporations. In so far as the contentions referred to are not in effect disposed of by our conclusions on that subject, we content ourselves with saying that we think all such propositions were rightly decided by the court below to be without merit, for the reasons expressed in the opinion delivered by that court in the *Nevada Bank case*, to which the court referred and upon which it placed its rulings. We decide this case solely upon the record before us. Our conclusion, therefore, does not deny the power of the State of California to assess shares of stock in national banks, provided only the method adopted does not produce the discrimination prohibited by the act of Congress. From this, of course, it would follow that if the statutes of California, either from their text or as construed by the highest court of that State, compelled the assessing officers in the valuation of the property of state banks and other state moneyed corporations to include all those elements of value which are embraced in the assessment of shares of stock in national banks so that there would be an equality of taxation as respects national banks,

the discrimination which we find to exist under the present state of the law of California would disappear.

The decree of the Circuit Court of Appeals is reversed; the decree of the Circuit Court is also reversed, and the cause is remanded to the Circuit Court for further proceedings in conformity with this opinion.

MR. JUSTICE BREWER, with whom the CHIEF JUSTICE, MR. JUSTICE BROWN and MR. JUSTICE PECKHAM concur, dissenting.

I am unable to concur in the foregoing opinion, and, believing that a grevious wrong is done to the State of California, will state the reasons for my dissent. Section 5219, Rev. Stat., prescribes the conditions and limitations of state taxation of national banks. In reference to it we said in *Owensboro National Bank* v. *Owensboro*, 173 U. S. 664, 669:

"This section, then, of the Revised Statutes is the measure of the power of a State to tax national banks, their property or their franchises. By its unambiguous provisions the power is confined to a taxation of the shares of stock in the names of the shareholders and to an assessment of the real estate of the bank."

By the section two restrictions, and two only, are placed on the power of the State to tax the shares of stock: "That the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere."

No uniform rule is prescribed by Congress as to the mode of assessment or the manner in which the State shall impose its burden of taxation on the shares of stock in national banks. Each State is left to determine that according to its own judgment. All that is demanded is that in fact neither the rate of tax nor the assessment shall discriminate against national banks, and that the property subject to taxation shall not be

burdened in excess of the burdens cast upon other moneyed capital. *Davenport Bank* v. *Davenport*, 123 U. S. 83.

The mandate of section 1 of the constitution of California is:

"All property in the State, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law. The word 'property,' as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal and mixed, capable of private ownership."

Thus the constitution requires the taxation of all property and a taxation in proportion to its value, and defines property as including everything capable of private ownership. Certainly, if the mandate of the constitution is expressed in the statute the shares of stock in national banks will be subjected to the same rate of taxation as all other property in the State, including therein moneyed capital. It must, therefore, be held that the legislation respecting the taxation of national bank shares is in defiance of the state constitution before it can be adjudged in conflict with the equality provision of section 5219, Rev. Stat. Or, in other words, that the legislature of California disregarded the requirements of their own constitution in order to subject to taxation property protected by Federal laws.

The legislation of California in this regard is found in section 3608 of the Political Code, as amended in 1899, and two additional sections enacted in that year, numbered 3609 and 3610:

"SEC. 3608. Shares of stock in corporations possess no intrinsic value over and above the actual value of the property of the corporation which they stand for and represent; and the assessment and taxation of such shares, and also all the corporate property, would be double taxation. Therefore, all property belonging to corporations save and except the property of national banking associations not assessable by Federal statute shall be assessed and taxed. But no assessment shall

be made of shares of stock in any corporation, save and except in national banking associations, whose property, other than real estate, is exempt from assessment by Federal statute.

"SEC. 3609. The stockholders in every national banking association doing business in this State, and having its principal place of business located in this State, shall be assessed and taxed on the value of their shares of stock therein; and said shares shall be valued and assessed as is other property for taxation, and shall be included in the valuation of the personal property of such stockholders in the assessment of the taxes at the place, city, town, and county where such national banking association is located, and not elsewhere, whether the said stockholders reside in said place, city, town, or county, or not; but in the assessment of such shares each stockholder shall be allowed all the deductions permitted by law to the holders of moneyed capital in the form of solvent credits, in the same manner as such deductions are allowed by the provisions of paragraph six of section thirty-six hundred and twenty-nine of the Political Code of the State of California. In making such assessment to each stockholder, there shall be deducted from the value of his shares of stock such sum as is in the same proportion to such value as the total value of its real estate and property exempt by law from taxation bears to the whole value of all the shares of capital stock in said national bank. And nothing herein shall be construed to exempt the real estate of such national bank from taxation. And the assessment and taxation of such shares of stock in said national banking associations shall not be at a greater rate than is made or assessed upon other moneyed capital in the hands of individual citizens of this State.

"SEC. 3610. The assessor charged by law with the assessment of said shares shall, within ten days after he has made such assessment, give written notice to each national banking association of such assessment of the shares of its respective shareholders; and no personal or other notice to such shareholders of such assessment shall be necessary for the purpose of this

act. And in case the tax on any such stock is unsecured by real estate owned by the holder of such stock, then the bank in which said stock is held shall become liable therefor; and the assessor shall collect the same from said bank, which may then charge the amount of the tax so collected to the account of the stockholder owning such stock, and shall have a lien, prior to all other liens, on his said stock, and the dividends and earnings thereof, for the reimbursement to it of such taxes so paid."

The rule of valuation is prescribed by the fifth subdivision of section 3617 of the Political Code, which provides that "the terms 'value' and 'full cash value' mean the amount at which the property would be taken in payment of a just debt due from a solvent debtor." It is true that prior to 1881 market value was made the rule of valuation, but the section prescribing that rule was, so far as it applied to national bank shares, adjudged void by the Supreme Court of the State, *Miller* v. *Heilbron*, 58 California, 133, and wholly repealed by the legislature (Stat. 1881, p. 59), and in lieu of that the present rule of valuation established. But the rule of valuation is not so material, and doubtless an established market value would be the amount at which property would be taken in payment of a just debt due from a solvent debtor. The main thing is that the same rule of valuation shall be applied to the assessment and taxation of national bank shares as of other moneyed capital. And the express declaration of section 3609 is that the shares in national banks "shall be valued and assessed as is other property for taxation."

From the sections quoted it appears that the method of reaching the property of state corporations for purposes of taxation is by treating the corporation as owner of all and casting the burden of taxation directly upon it, while on the other hand, in obedience to the requirements of the Federal statute, taxation in respect to national banks is limited to an assessment and taxation of the shares of stock. But there is no discrimination if the same property is reached by each

method and by each subjected to the same rule of valuation. By section 3608 all the property of state corporations must be assessed and taxed, and the word "property" is defined by the constitution to include not merely tangible assets but also "franchises, and all other matters and things, real, personal, and mixed, capable of private ownership." Everything, therefore, which is a part of the property of a state corporation is subject to assessment and taxation. No other or larger burden is cast upon shares of national banks, and surely there can be no discrimination when the entire property in the one instance is taxed as a whole to the corporation and in the other instance subdivided and taxed to the stockholder. The whole is neither less nor more than all its parts. But it is said there is no specific command to include in the property of a state corporation the good will, dividend earning power and the like, and that they are necessarily included in the selling value of the stock of any corporation. It is true, these items are not in terms mentioned, but neither are desks and furniture. The language is general, so general that it includes everything, not excepting good will, dividend earning power and the like, for they are "capable of private ownership." They belong to the corporation. There is no good will in a share of stock over and above the good will which belongs to the corporation, and if the corporation sells and conveys all that it possesses "capable of private ownership," it sells and conveys its good will, and there is nothing left of good will or anything else belonging to the stockholders. This is so plain that he who runs may read. It is hardly necessary in a matter so clear to refer to the decisions of the Supreme Court of California, and yet they are direct upon the proposition. Thus in *Burke* v. *Badlam*, 57 California, 594, the court said (pp. 601, 602):

"Now, what is the stock of a corporation but its property—consisting of its franchise and such other property as the corporation may own? Of what else does its stock consist? If all this is taken away, what remains? Obviously nothing.

When, therefore, all of the property of the corporation is assessed —its franchise and all of its other property of every character— then all of the stock of the corporation is assessed, and the mandate of the constitution is complied with. This property is held by the corporation in trust for the stockholders, who are the beneficial owners of it in certain proportions called shares, and which are usually evidenced by certificates of stock. The share of each stockholder is undoubtedly property, but it is an interest in the very property held by the corporation. It is his right to a proportionate share of the dividends and other property of the corporation—nothing more. When the property of the corporation is assessed to it, and the tax thereon paid, who but the stockholders pay it? It is true that it is paid from the treasury of the corporation before the money therein is divided, but it is substantially the same thing as if paid from the pockets of the individual stockholders. To assess all of the corporate property of the corporation, and also to assess to each of the stockholders the number of shares held by him, would, it is manifest, be assessing the same property twice, once in the aggregate to the corporation, the trustee of all the stockholders, and again separately to the individual stockholders, in proportion to the number of shares held by each. As well might it be contended that the property of a partnership should be assessed to the firm, and in addition, that the interest of each partner in the firm property should be assessed to him individually. If I have an interest in partnership property, my interest therein is property. It is the right I have to share in the profits and property of the firm, in proportion to the interest I own. But my property rights are confined to the property held by the firm, just as the property rights of the stockholder in the corporation are confined to the property held by the corporation. In the case of the partnership, take away all of the property of the firm, and I have no longer any property as a partner. In the case of the corporation, take away all of its property, which, it must be remembered, includes its franchise, and the shareholder no longer

has any property. The cases are parallel. If in the one case it is competent to assess to the corporation all of the property held by it, and to the individual stockholders the respective interest owned by each therein, so must it be competent to assess to every partnership the property held by the firm, and to each individual partner his interest therein. It is clear to our minds that in the one case the partner and in the other the stockholder would be compelled to pay twice on the same property, which is neither required nor permitted by the constitution. *In the case of the corporation to which we have referred the legislature has declared that all of the property held by such corporations shall be assessed to them. It has not attempted to exempt any property from taxation not exempted by the constitution itself, and of course could not do it if it had. It has only said that the property shall be assessed to the corporation, and shall not be again assessed for the same tax. This it had the right to say.*" (Italics in this and succeeding quotations are mine.)

It will be seen from this quotation that the court places partnerships on the same basis as corporations. If the partnership sells out its property, including its good will and its profit earning power, which are part of its property under the constitutional definition of property, there is nothing left to the separate partners. The whole thing has passed to the purchaser, and in the same way when a corporation makes a sale. And to hold that the good will and profit earning power must be specifically mentioned is to hold that the constitutional definition of property is insufficient; that good will and profit earning power are not "capable of private ownership," or do not belong to the corporation. *Burke* v. *Badlam* was reaffirmed in *Bank of California* v. *San Francisco*, 142 California, 276, decided since the decision of this case by the Court of Appeals. This case is very instructive. It was an action brought by the plaintiff, a state bank, to have an assessment of its franchise declared illegal and void, and to recover the amount paid by it under protest as taxes thereon. The contention of the

plaintiff was that it did not own or possess any franchise whatever, that the only franchise in any way connected with it was the corporate franchise, the franchise of being a corporation, which was the property of the stockholders and not assessable or taxable to the corporation. It appears from the opinion that the assessor found that the aggregate value of the tangible property of the bank was $5,156,903.08, that the market value of all the shares of the capital stock was $8,100,000, and the difference between the two was by him ascertained and determined to be the value of the franchise of the bank. The State was not challenging the assessment, and of course no inquiry was made as to the propriety of an increase in the valuation.

In reply to the contention of the plaintiff the court uses this language:

"It was said by the Supreme Court of the United States, in *Society for Savings* v. *Coite*, 6 Wall. 594, 606: 'Corporate franchises are legal entities vested in the corporation itself as soon as it is *in esse*. They are not mere naked powers granted to the corporation, but powers coupled with an interest which vest in the corporation, upon the possession of its franchises, and whatever may be thought of the corporators, it cannot be denied that the corporation itself has a legal interest in such franchises.'

"If this corporate franchise is assessable as property, then, that it must be assessed to the corporation instead of the members or stockholders is clearly settled in this State by the decision in *Burke* v. *Badlam*, 57 California, 594, *where it was held that a stockholder could not be assessed upon his certificate of stock, inasmuch as his shares were simply an interest in the very property held by the corporation, and the assessment of all the property of the corporation covered everything represented by the certificate.* (See also Pol. Code, § 3608.)"

Again, referring to *Burke* v. *Badlam, supra*, the court said (p. 285):

"This case necessarily involved the question as to the con-

stitutionality of section 3608 of the Political Code, prohibiting the assessment of shares of stock to the holders thereof. Such shares being undoubtedly property, unless they were otherwise assessed, the section was clearly unconstitutional, in view of the provision of the constitution requiring *all* property to be taxed. *According to the decision of the court they were under the law to be otherwise assessed*—i. e., *everything represented by the certificates was to be assessed to the corporation.*"

And again, on p. 289:

"Whether or not the whole difference between the aggregate market value of the shares of stock and the value of the tangible property—viz., $2,943,096.92—was the value of the franchise, *the assessor certainly had the right to take the value of the shares into consideration in determining the value of the franchise; and were we at liberty to review the judgment of the assessor and the board of equalization upon those matters, we could not say that an assessment of* $750,000 *thereon is unjust, or that it includes such elements as dividend or profit earning power, or good will, which, it is claimed, should not be taken into consideration in determining the value of the property of the corporation. In this connection, it will be observed that these elements, so far as they may enter into the value of shares of stock, would be included in an assessment of such shares to the stockholders, a method of assessment which the State is at liberty to adopt,—in fact bound to adopt,—unless such shares are otherwise covered by the assessment of the property of the corporation.*

"It is clear that if the laws of this State properly express the intention that everything that gives value to the shares of a corporation shall be assessed as property of the corporation, the true value of those shares is a most important element in determining the value of such property."

I have made these extensive quotations from the opinions of the Supreme Court of California, for in cases like this we follow the construction placed by the highest court of the State upon its statutes. Obviously, that court construes them as including within the corporate property the aggregate value

of all the shares of stock and that while they forbid the assessment and taxation of shares of stock in a state corporation, they require that all the value represented by those shares of stock be assessed and taxed against the corporation; so that when you ascertain the value of a single share of stock and multiply that by the number of shares in the corporation you have the value of the corporate property subject to taxation.

After declaring that the prohibition of the assessment and taxation of shares was clearly unconstitutional, unless they were otherwise assessed, it added, referring to the case of *Burke* v. *Badlam*, "according to the decision of the court they were under the law to be otherwise assessed, *i. e.*, everything represented by the certificates was to be assessed to the corporation." Now, if as claimed, the shares represent not merely the tangible property but the franchise, the dividend earning power, then, as stated, "everything represented by the certificates was to be assessed to the corporation." And this language is followed by the declaration, referring to dividends, profits, earning power, good will, etc.: "In this connection, it will be observed that these elements, so far as they may enter into the value of shares of stock, would be included in an assessment of such shares to the stockholders, a method of assessment which the State is at liberty to adopt,—in fact bound to adopt,—unless such shares are otherwise covered by the assessment of the property of the corporation." Reference is made to the use of the word "if" in the last paragraph of the quotation, as though that implied a doubt as to the meaning of the state statutes. But surely that cannot be, in view of the prior declaration in the same opinion, that "everything represented by the certificates was to be assessed to the corporation." The paragraph is to be read as though it said that provided the laws of the State properly express the intention, as we have already held that they do, then the true value of the shares is an important element in determining the value of the corporate property. The same word "if" is used at the commencement of the second paragraph of the quota-

tion "if this corporate franchise is assessable as property," in like manner, for the word "franchises" is found in the constitutional definition of property, the paragraph preceding "if" declares that "the corporation itself has a legal interest in such franchises," and the very paragraph says that "the assessment of all the property of the corporation covered everything represented by the certificate." Certainly it seems to me there is no justification in torturing this word "if" as overthrowing all the clear declarations of the court, as well as implying a destruction of the plain letter of the statutes.

But great reliance is placed upon the admission in the agreed statement of facts, "that the manner in which franchises of commercial banks and trust companies were assessed for said fiscal year ending June 30, 1901, by the assessor of the city and county of San Francisco, is illustrated by the case of the Bank of California, a banking corporation organized under the laws of the State of California." In the assessment of that bank the assessor did not add to the value of the tangible property the difference between that value and the market value of the capital stock, but a sum very much less. A tabulated statement is also annexed, showing the financial condition during the year of the 178 state banks of California. It might be sufficient to say that the stipulation is satisfied by a conclusion that the assessor in assessing state banks generally added to the value of the tangible property something on account of the franchise—we are not compelled to infer that to the valuation of the tangible property of each bank he added $750,000, or even that he failed to add the full difference between the value of that property and that of the stock. Indeed, it does not appear from the tabular statement that the market value of the shares in a single state bank in California exceeded the value of its tangible property. So that, so far as that evidence goes, the only case in which there was any franchise value to be added was that of the Bank of California. But more significant is this: It appears from the

agreed statement that the assessment complained of in this case was made in the following way:

"The defendant in making his assessment fixed the value of the shares for taxation at $104.35 each, and arrived at that valuation in the following manner: He added to the capital stock of the bank, $500,000, its undivided profits amounting to $77,260, deducted the face value of United States bonds held by it, $50,000, and the value of its furniture, $5,500, leaving $521,760 as the total assessable value, and dividing that by the number of shares made the assessable value of each share the sum above stated."

In other words, the only assessment against the plaintiff's shares was based upon the value of the tangible property. Not a dollar was added to the valuation on account of franchise, good will, or dividend earning power, or anything of that kind. Or, to put it in another form, the assessment of the state bank added to the value of the tangible property something for the value of the franchise, the assessment of the plaintiff stopped with the tangible property, and yet it is held that there was an actual unjust discrimination against the plaintiff. And how is this conclusion reached? By assuming that the shares in the plaintiff bank had no value above the value of the tangible property. But this is a mere assumption. A more rational guess would be that the shares of stock in a bank whose undivided profits were over fifteen per cent of its capital had a value much above the par value of its stock or the value of its tangible property. And can it be that the whole system of the legislation of a State in respect to the taxation of national banks can be stricken down upon an unfounded assumption that the shares of a given national bank were worth more than its tangible property? If the complaint was of an actual discrimination it was a part of the plaintiff's duty to prove it, and show that its shares had no value above that of the tangible property, and would not "be taken in payment of a just debt due from a solvent debtor" at a larger sum. The most elementary rule of judicial pro-

ceedings is that a party to make out his cause of action must prove, not assume, the existence of all essential facts.

But I need not rest upon the omission of proof. There is no allegation of any discrimination based upon such difference of valuation. The eleventh and twelfth paragraphs of the complaint state the wrongs on account of which relief is sought. In order that there may be no misunderstanding of the full scope of the causes of action alleged I quote these paragraphs entire:

"Eleventh.—That the said assessment and taxation, so as aforesaid threatened to be made and levied by the respondent upon the shares of the capital stock of your orator, will be in violation of, and repugnant to, the provisions of sections 5219 and 1977 of the Revised Statutes of the United States, in that the said assessment and taxation will be at a greater rate than is or will be assessed upon other moneyed capital in the hands of individual citizens of the said State of California. And in that behalf your orator shows that under and by virtue of the laws of the said State of California, all shares of stock in corporations organized under the laws of the said State and amounting to more than the sum of two hundred million dollars ($200,000,000), and especially in corporations organized under the laws of the said State for the purpose of banking, all shares of stock thereof amounting to more than the sum of thirty-five million dollars ($35,000,000), are expressly exempt from assessment and taxation, and the same are not subject thereto, and that the respondent has not assessed and will not assess, for the said fiscal year ending June 30th, 1901, and does not intend to assess, to the holders of shares in corporations organized under the laws of the said State of California, the value of the same, or to collect from such shareholders any taxes on said shares or the value thereof.

"And your orator further shows that the said pretended assessment and taxation so as aforesaid threatened to be made and levied by the respondent upon the shares of the capital stock of your orator will be in violation of, and repugnant to,

the provisions of said section 5219 of the Revised Statutes of the United States, in that the said taxation will be at a greater rate than will be assessed upon any other moneyed capital in the hands of individual citizens in the State of California. And in that behalf your orator further shows that in assessing and taxing the said shares of the capital stock of your orator, no deduction will, or can legally, be made from the valuation of said shares, or any of them, of debts unsecured by deed of trust, mortgage or other lien on real or personal property due or owing by the stockholders of your orator, or by any of them, to *bona fide* residents of the State of California; and that in assessing and taxing other moneyed capital in the form of solvent credits unsecured by deed of trust, mortgage or other lien on real or personal property, due or owing to, or in the hands of, individual citizens in said State of California, the respondent does and will make a deduction from said credits, under and by the constitution and laws of the State of California, of the debts unsecured by trust deed, mortgage or other lien on real or personal property as may be owing by such individual citizens, or by any of them, to *bona fide* residents of the State of California, and that said threatened assessment and taxation of the shares of your orator is, and will be unjust, unlawful and illegal, and will discriminate against and upon such shares and against and upon the persons owning and holding the same, and will compel them to sustain and bear more than their just share and burden of the taxes of the said State of California. And in this behalf your orator further avers that it is informed and believes, and upon such information and belief states the fact to be, that the amount of moneyed capital in the city and county of San Francisco in said State of California on the first Monday of March, 1900, to wit, on March 5, 1900, at noon of said day, invested by banks and bankers, having their principal place of business in said city and county, and residents therein, in unsecured solvent credits, and from which, under the constitution and laws of said State, unsecured debts can be de-

ducted, was the sum of $14,074,561; and on the day and year last aforesaid the amount of moneyed capital in the State of California, other than in the said city and county of San Francisco, invested by banks and bankers in unsecured solvent credits, and from which, under the constitution and laws of said State, unsecured debts can be deducted, was the sum of $7,589,302; that on the day and year last aforesaid said banks and bankers at said city and county of San Francisco had debts unsecured by trust deed, mortgage or other lien on real or personal property owing by such banks and bankers in said city and county, amounting to the sum of $36,710,062; and that on said day last aforesaid the amount of debts unsecured by trust deed, mortgage or other lien on real or personal property owing by said banks and bankers in the State of California, other than in the said city and county of San Francisco, was the sum of $32,400,304; that the amount of moneyed capital invested in such solvent credits by such banks and bankers on the day and year last aforesaid, in said city and county of San Francisco and in said State of California, as compared with the amount of moneyed capital invested in the shares of the capital stock of your orator, is so large and substantial that the assessment and taxation of the shares of the capital stock of your orator without deducting therefrom, and without being able to deduct therefrom, debts unsecured by trust deed, mortgage or other lien on real or personal property, as may have been owing by the respective holders of the shares of the capital stock of your orator on the day and year last aforesaid, will be an illegal and unjust discrimination against the owners and holders of the shares of the capital stock of your orator, and will make the taxation of said shares of stock at a greater rate than is imposed upon other moneyed capital in the hands of individual citizens in the State of California, and particularly in the city and county of San Francisco, in said State. And in this behalf your orator further avers that the said solvent credits so held as aforesaid by banks and bankers in the said city and county of San

Francisco and in the said State of California are moneyed capital in the hands of individual citizens of the State of California, which enter into competition for business with your orator.

"Twelfth.—That in the making of the said assessment of the said shares of the capital stock of your orator the respondent will not proceed in the manner directed by the said act of March 14, 1899, in this: That the said respondent, as hereinbefore set out, will ascertain and determine the value of each of the shares of the capital stock of your orator to be the sum of $115.452, and will deduct therefrom the sum of $11.10 per share as the proportionate amount per share of the value of the United States bonds held by your orator to secure its circulation, and of its furniture, and will, as hereinbefore set out, assess to the stockholders the sum of $104.36 per share as the value of each share of said capital stock by the said respondent claimed to be subject to assessment and taxation under the provisions of said act of March 14, 1899, and that the respondent will wholly fail and refuse to make any other or further deductions from such ascertained value of said shares, in order to determine the assessable value thereof, whereas, by the provisions of said section 3609 of the Political Code of the State of California, under and in pursuance whereof the respondent has threatened and intends to make the said assessment and will proceed to demand and will attempt to collect the taxes aforesaid, he was and is required to deduct from the value of each share of the capital stock of your orator, such sum as is in the same proportion to such value as the total value of the real estate and property of your orator exempt by law from taxation bears to the whole value of all the shares of the capital stock of your orator. That on the first Monday of March, 1900, to wit, on March 5, 1900, at twelve o'clock M. of said day, your orator had not, and thence hitherto has not had, nor has it now, any real estate, and as in paragraph 'Eighth' hereof averred, all of the property of your orator consisted on said day and at said time, and has

thence hitherto consisted, and does now consist of its bonds, money on hand, credits, furniture and other personal property, and on said day and at said time the same constituted and were, and thence hitherto have been, and now are, the assets of your orator, and were and are used and employed by it in the conduct and carrying on its business as a national banking association under and by virtue of the provisions of the act of the Congress of the United States known as the National Banking Act, and were and are exempt by law from assessment and taxation. That if deduction of all the property of your orator exempt from assessment and taxation as last aforesaid were made to each stockholder in assessing said stock there would remain nothing of value subject to assessment and taxation, and that the pretended assessment and taxation of said shares at said value of $104.36 per share would be based wholly upon supposed and fictitious property and upon property exempt by the Constitution and laws of the United States from assessment and taxation."

The first of these paragraphs alleges a violation of the Federal statute in the taxation of plaintiff's shares of stock, because under and by virtue of the laws of California all shares of stock in state corporations are exempt from assessment and taxation, and the assessor does not intend to assess to the holders the value of those shares. But, as repeatedly held, a mere difference in the methods of state and national bank taxation is not repugnant to the act of Congress. The balance of the paragraph is substantially a charge of a discrimination by reason of a failure to deduct debts. But that, it is conceded in the opinion of the court, may be put one side—a concession undoubtedly compelled by the facts as agreed upon, for an opportunity was given to each stockholder in the plaintiff bank to have any debts deducted, and no one of them sought to avail of this privilege.

The other paragraph charges a discrimination and that the assessor ascertained the value of the shares of the capital stock of the plaintiff at the sum of $115.452 and deducted therefrom

the sum of $11.10 per share as the proportionate share of the value of United States bonds held by the bank; that he refused to make any further deductions, although the various items of property held by the bank, consisting of bonds, moneys, credits, etc., "were and are used and employed by it in the conduct and carrying on its business as a national banking association, under and by virtue of the provisions of the act of Congress of the United States, known as the National Bank Act, and were and are exempt by law from taxation." The complaint here is that the tangible property of the national bank is wholly exempt from taxation because used for the purpose of carrying on the banking business, and as the only assessment of plaintiff's shares was based upon the value of the tangible property the entire assessment was void. Now it is not pretended in the opinion of the court, nor can it be successfully claimed in view of prior decisions of this court, that shares of stock in a national bank are subject to taxation to only the extent of the excess of their value above that of the tangible property of the corporation and yet that is the burden of plaintiff's complaint. I have made this extensive quotation because it is apparent therefrom that the matter which, in the judgment of the court is sufficient to overthrow the law of California in respect to the taxation of national banks, was not charged or complained of by the plaintiff. If the plaintiff neither alleges nor proves any discrimination in the matter of valuation I cannot understand why this court should assume that there was one, and thereupon upset the tax.

Further, there is no reference in the opinion of the Court of Appeals to any discrimination in fact.

Still further, counsel for plaintiff in error evidently fail to perceive any actual discrimination, as appears by this quotation from their brief:

"The questions involved in the appeal are:

"(1) That the act of 1899, providing for the assessment and taxation of shares of the capital stock of national banks,

is repugnant to the provisions of section 5219 of the Revised Statutes of the United States:

"(*a*) Because shares of stock in the commercial banks of the State are not taxed and are exempt;

"(*b*) Because by reason of the failure to tax shares in the commercial banks of the State, the shares of national banks are subjected to an adverse discrimination, and taxed at a higher rate than such commercial bank shares;

"(*c*) Because the provisions, section 3609, are wholly void, in that it is thereby undertaken to provide that a stockholder may deduct from the value of his shares the amount of his debts due to *bona fide* residents of the State.

"(2) That under the express provision of the Political Code, section 3608 and section 3609, the whole property of the appellant included in the assessment was exempt from taxation."

The only reference to discrimination is the alleged legal one, "by reason of the failure to tax shares in the commercial banks of the State." If the failure to tax shares in the commercial banks of the State does not of itself work a discrimination, as is practically conceded in the opinion of the court, then the whole basis of plaintiff's complaint fails.

Summing the matter up, the state constitution declares that "all property . . . shall be taxed in proportion to its value," and defines "property" as including "franchises, and all other matters and things, real, personal, and mixed, capable of private ownership." Franchises, dividend earning, profit earning power, are capable of private ownership. Indeed, the opinion of the court is based on the contention that they are assessed to the holder of shares in national banks and not assessed upon the state banks. Section 3608 provides that "all property belonging to corporations save and except the property of national banking associations, not assessable by Federal statute shall be assessed and taxed." Section 3609, that the shares in national banking associations "shall be valued and assessed as is other property for taxation." The

Supreme Court of the State holds that a stockholder in a state bank "could not be assessed upon his certificate of stock, inasmuch as his shares were simply an interest in the very property held by the corporation, and the assessment of all the property of the corporation covered everything represented by the certificate." There is neither allegation nor evidence that there was any overvaluation of the plaintiff's shares of stock. The complaint is that there was a discrimination by reason of the failure to deduct from the value of the shares the entire value of the bank's tangible property, because "used and employed by it in the conduct and carrying on its business as a national banking association." And yet in the face of the plain words of the constitution and statutes, the clear language of the Supreme Court of California, and the absence of allegation or proof of actual discrimination, this court, by its opinion, strikes down the whole system of California for the taxation of shares of national banks.

But beyond and aside from the matters which I have considered, and conceding, for the purposes of the following suggestion, that the law of California providing for the taxation of shares of stock in national banks is invalid, still I insist that the decree of the Court of Appeals ought to be affirmed. This is an equitable suit brought in the United States court, where the distinction between law and equity is constantly enforced. Upon the theory of the opinion, the tax upon the shares of stock in the plaintiff bank was illegal. The statute of California imposing that tax was void. Now, there are two propositions which have entered into the jurisprudence of this court so thoroughly that they may be regarded as settled law: First, that equity will not interfere where there is a plain, adequate and complete remedy at law; and, second, that injunction will not issue to restrain the collection of a tax simply on the ground of its illegality. The first is not only the rule of the Court of Chancery in England, but it is the command of the Federal statute. Section 723, Rev. Stat., reads: "Suits in equity shall not be sustained in either of the courts of the

United States in any case where a plain, adequate, and complete remedy may be had at law."

This defense was pleaded by the defendant in his answer, the sixteenth paragraph of which reads as follows:

"And respondent further submits to this honorable court that complainant has a full, complete, speedy and adequate remedy at law against respondent for all causes of action or causes of actions, stated or attempted to be stated in complainant's bill of complaint on file in this action; and he here claims the same benefit of the objection as if he had not demurred to the relief so sought."

Even if it had not been formally pleaded, the matter is one which this court of its own motion would consider and determine. As said in *Wright* v. *Ellison*, 1 Wall. 16, 22:

"But this is a suit in equity. The rules of equity are as fixed as those of law, and this court can no more depart from the former than the latter. Unless the complainant has shown a right to relief in equity, however clear his rights at law, he can have no redress in this proceeding. In such cases, the adverse party has a constitutional right to a trial by jury. The objection is one, which though not raised by the pleadings nor suggested by counsel, this court is bound to recognize and enforce."

It is unnecessary to cite the many cases in this court in which this rule has been recognized, the latest being *Scottish Union Insurance Co.* v. *Bowland*, the opinion in which has just been filed, 196 U. S. 611, though reference may be made to the discussion by Mr. Justice Field in *Whitehead* v. *Shattuck*, 138 U. S. 146, and in *Scott* v. *Neely*, 140 U. S. 106, and by Mr. Justice Brown in *Wehrman* v. *Conklin*, 155 U. S. 314. Now, in California there is a perfectly adequate legal remedy for cases of this nature. Section 3819 of the Political Code provides that "the owner of any property . . . who may claim that the assessment is void in whole or in part, may pay the same to the tax collector under protest, which protest shall be in writing, and shall specify whether the whole

assessment is claimed to be void, or if a part only, what portion, and in either case the grounds upon which such claim is founded; and when so paid under protest the payment shall in no case be regarded as voluntary payment, and such owner may at any time within six months after such payment bring an action against the county in the Superior Court, to recover back the tax so paid under protest." Such a remedy has, in a case of the taxation of national bank shares, been held by this court adequate and complete, and sufficient to exclude the interposition of a court of equity. In *Dows* v. *City of Chicago*, 11 Wall. 108, which was a bill filed by the owner of shares of the capital stock of the Union National Bank of Chicago, to restrain the collection of a tax levied by that city upon his shares, we said (p. 112):

"The equitable powers of the court can only be invoked by the presentation of a case of equitable cognizance. There can be no such case, at least in the Federal courts, where there is a plain and adequate remedy at law. And except where the special circumstances which we have mentioned exist, the party of whom an illegal tax is collected has ordinarily ample remedy, either by action against the officer making the collection or the body to whom the tax is paid. Here such remedy existed. If the tax was illegal, the plaintiff protesting against its enforcement might have had his action, after it was paid, against the officer or the city to recover back the money, or he might have prosecuted either for his damages. No irreparable injury would have followed to him from its collection. Nor would he have been compelled to resort to a multiplicity of suits to determine his rights. His entire claim might have been embraced in a single action."

And this case was reaffirmed by the unanimous opinion of this court in the late case of *Pittsburg &c. Railway* v. *Board of Public Works*, 172 U. S. 32, in which the quotation I have just made is also quoted.

The second proposition to which I have referred has also been often decided. Out of the many decisions I refer to only

two or three. *Dows* v. *City of Chicago, supra,* in which is this language (p. 109):

"Assuming the tax to be illegal and void, we do not think any ground is presented by the bill justifying the interposition of a court of equity to enjoin its collection. The illegality of the tax and the threatened sale of the shares for its payment constitute of themselves alone no ground for such interposition. There must be some special circumstances attending a threatened injury of this kind, distinguishing it from a common trespass, and bringing the case under some recognized head of equity jurisdiction before the preventive remedy of injunction can be invoked."

State Railroad Tax Cases, 92 U. S. 575, in which is this (p. 614):

"We do not propose to lay down in these cases any absolute limitation of the powers of a court of equity in restraining the collection of illegal taxes; but we may say, that, in addition to illegality, hardship, or irregularity, the case must be brought within some of the recognized foundations of equitable jurisdiction, and that mere errors or excess in valuation, or hardship or injustice of the law, or any grievance which can be remedied by a suit at law, either before or after payment of taxes, will not justify a court of equity to interpose by injunction to stay collection of a tax."

And in *Pittsburg &c. Railway* v. *Board of Public Works, supra,* in which the rule is thus stated (p. 37):

"The collection of taxes assessed under the authority of a State is not to be restrained by writ of injunction from a court of the United States, unless it clearly appears, not only that the tax is illegal, but that the owner of the property taxed has no adequate remedy by the ordinary processes of law, and that there are special circumstances bringing the case under some recognized head of equity jurisdiction."

But it may be said that in the following cases this court has laid down an apparently different rule in respect to the taxation of national bank shares: *People* v. *Weaver,* 100 U. S.

539; *Pelton* v. *National Bank*, 101 U. S. 143; *Cummings* v. *National Bank*, 101 U. S. 153; *Hills* v. *Exchange Bank*, 105 U. S. 319, and *Evansville Bank* v. *Britton*, 105 U. S. 322; *Lander* v. *Mercantile Bank*, 186 U. S. 458. The first was a writ of error to the Court of Appeals of the State of New York, and the mode of attack upon the law having been recognized by that court as proper, the question was not discussed here. In *Cummings* v. *National Bank*, *Pelton* v. *National Bank* being decided on its authority, the right to an injunction was asserted. The case came from the Circuit Court of the United States for the Northern District of Ohio, in which district the bank was located. In delivering the opinion of the court Mr. Justice Miller said on page 157:

"*But the statute of the State expressly declares* that suits may be brought to enjoin the illegal levy of taxes and assessments or the collection of them. Section 5848 of the Revised Statutes of Ohio, 1880; vol. 53, Laws of Ohio, 178, secs. 1, 2. And though we have repeatedly decided in this court that the statute of a State cannot control the mode of procedure in equity cases in Federal courts, nor deprive them of their separate equity jurisdiction, we have also held that, *where a statute of a State created a new right or provided a new remedy, the Federal courts will enforce that right either on the common law or equity side of its docket, as the nature of the new right or new remedy requires. Van Norden* v. *Morton*, 99 U. S. 378. Here there can be no doubt that the remedy by injunction against an illegal tax, expressly granted by the statute, is to be enforced, and can only be appropriately enforced on the equity side of the court.

"The statute also answers another objection made to the relief sought in this suit, *namely, that equity will not enjoin the collection of a tax except under some of the well known heads of equity jurisdiction*, among which is not a mere overvaluation, or the illegality of the tax, or in any case where there is an adequate remedy at law. The statute of Ohio expressly provides for an injunction against the collection of a tax illegally

assessed, as well as for an action to recover back such tax when paid, showing clearly an intention to authorize both remedies in such cases.

"Independently of this statute, however, we are of opinion that when a rule or system of valuation is adopted by those whose duty it is to make the assessment, which is *designed* to operate unequally and to violate a fundamental principle of the Constitution, and when this rule is applied not solely to one individual, but to a large class of individuals or corporations, that equity may properly interfere to restrain the operation of this unconstitutional exercise of power."

Two reasons are here stated to justify the exception to the ordinary rule in respect to injunctive relief. First, a state statute, and, second, a design on the part of the state authorities to discriminate. There is no statute of California making such special provision in reference to injunctions, and that reason for a departure from the general rule may be put one side. The other implies an intent on the part of the legislature or assessing officials to discriminate. It does not mean simply that there has resulted a discrimination but that one was intended. It is well known that in the early days of the national banking law there was a strong prejudice against it in different portions of the Union and adverse legislation in the way of burdensome taxation was not uncommon, and it was because of that fact that the court permitted the exercise of the strong powers of equity. That I am right in this and that there has never been an intent to apply a different rule to a national bank from that which has been in force in respect to other property is made clear by the language of Mr. Justice Miller in a subsequent case, *National Bank* v. *Kimball*, 103 U. S. 732, 735. Delivering the opinion of the court, he says:

"An apparent exception to the universality of the rule is admitted in *People* v. *Weaver*, 100 U. S. 539, *Pelton* v. *National Bank*, 101 U. S. 143, and *Cummings* v. *National Bank*, 101 U. S. 153. It is held in these cases that when the inequality

of valuation is *the result of a statute of the State designed to discriminate injuriously* against any class of persons or any species of property, a court of equity will give appropriate relief; and also where, though the law itself is unobjectionable, the officers who are appointed to make assessments *combine together and establish a rule or principle of valuation*, the necessary result of which is to tax one species of property higher than others, and higher than the average rate, the court will also give relief. But the bill before us alleges no such agreement or common action of assessors, and no general rule or discriminating rate adopted by a single assessor, but relies on the numerous instances of partial and unequal valuations which establish no rule on the subject."

This ruling was somewhat like the action of the court in *Stanley* v. *Schwalby*, 162 U. S. 255. That was a case coming from a state court. Ordinarily when the judgment is reversed the order is to remand the case for further proceedings not inconsistent with our opinion, but in view of action theretofore taken by the state court in the case we felt constrained to direct the very judgment which should be entered.

In *Lander* v. *Mercantile Bank*, *supra*, a decree dismissing the bill filed by the bank was affirmed. It is true in the opinion the merits of the bill were discussed, and nothing said about the right to maintain a suit in equity. Evidently the matter passed without consideration, and not unnaturally so, as the bill on its merits was dismissed.

In the case before us, whatever may be the effect of the statute in creating or opening the door to discrimination, no one can read it and say that there was an intent on the part of the legislature of California to discriminate injuriously against national banks. The statute is positive in its language that national bank shares shall be taxed and assessed as is other property, and there was beyond doubt an attempt on the part of the California legislature to cast only an equal burden of taxation on such shares. Of course, there ought not to be imputed to this court an intention to favor national

bank property in the matter of taxation and to lay down a rule for its benefit which is denied to all other property. So were I wrong in my construction of the state statute, beyond any peradventure the decree of the Circuit Court of Appeals ought to be affirmed and the bank remitted to its legal remedy.

I am authorized to say that the CHIEF JUSTICE, MR. JUSTICE BROWN and MR. JUSTICE PECKHAM concur in this dissent.

NATIONAL COTTON OIL COMPANY *v.* TEXAS.

ERROR TO THE COURT OF CIVIL APPEALS IN AND FOR THE THIRD SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

No. 37. Argued November 1, 2, 1904.—Decided February 27, 1905.

The Anti-Trust Acts of Texas of 1889, 1895 and 1899, are all directed to the prohibitions of combinations to restrict trade, to in any way limit competition in the production or sale of articles, or to increase or reduce prices in order to preclude free and unrestricted competition; and, as the legislature of a State may ordain that competition and not combination shall be the law of trade, and may prohibit combinations to control prices, the statutes as they now stand are not in conflict with the Fourteenth Amendment and do not, as against corporations dealing in cotton oil and combining to regulate the price of cotton seed, work a deprivation of property without due process of law, or impair their liberty of contract.

The idea of monopoly is not now confined to a grant of privileges but is understood to include a condition produced by the acts of individuals and the suppression of competition by unification of interest or management or through agreement and concert of action. It is the power to control prices which makes both the inducement to make such combinations and the concern of the law to prohibit them.

The Supreme Court of Texas having construed the act of 1895 as invalid, so far as it was discriminatory by excepting from its operation combinations of agriculturists and organized laborers and fell within the terms of *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, and sustained the act in other respects, and having also held that the act of 1899 although cumulative did not continue the invalid discriminatory provisions of the

act of 1895, this court follows the state court in holding that under the laws of Texas, as they now exist, combinations described in the Anti-Trust Laws are forbidden and penalized whether by agriculturists, organized laborers or others, and there is therefore no discrimination against oil companies, and the latter are not deprived of the equal protection of the laws.

THIS suit was brought under the Anti-Trust Acts of the State of Texas, to forfeit the license of the National Cotton Oil Company to do business in the State of Texas, for violating those acts. The defense is that the acts are repugnant to the Fourteenth Amendment of the Constitution of the United States.

The suit was instituted by the Attorney General of the State and the District Attorney of the Twenty-sixth Judicial District, and the petition alleged the following facts: The National Cotton Oil Company and the Southern Cotton Oil Company are New Jersey corporations, doing and transacting business in the State of Texas by reason of a permit issued to them respectively on the second day of May, 1900, and the third day of June, 1897.

The Taylor Cotton Oil Works is a Texas corporation, doing business in the State under a charter granted August 25, 1898. The said foreign corporations, from the date of their respective permits and the Taylor Cotton Oil Works from the date of its charter have been and are "engaged in the business of the manufacture and sale of cotton seed oil, cotton seed meal and the other by-products of cotton seed; that the business in which each and all of such corporations were engaged necessitated the purchase of cotton seed from which the products which they manufactured and sold were made, and that said cotton seed was an article and commodity of merchandise."

Each of them on or about the first of November, 1901, and on every day prior and subsequent thereto, has been engaged in the business of buying cotton seed in the various counties of the State, and on the first of November, 1901, the National Cotton Oil Company made and entered into a combination with each of the other companies and they with it, and each

of them with various other persons, firms and corporations, whose names are to the defendant in error unknown, and the said corporations "became members of and parties to a pool, trust, agreement, confederation and understanding with each of the other of said corporations, firms and persons, whereby they did each for itself and with each other and all together agree to regulate and fix, and did regulate and fix, the price at which they would buy cotton seed; that they especially regulated and fixed the price of cotton seed throughout the State of Texas at $14.00 per ton, and agreed amongst and with each other that they would not give more than said $14.00 per ton for cotton seed in any of the towns and communities of the State of Texas." Whereby, "and by maintaining the agreement to regulate and fix the price of cotton seed aforesaid, the defendant (the National Cotton Oil Company) was guilty of a violation of the laws of the State of Texas," and in consequence has forfeited its permit to transact business in the State. The cancellation and forfeiture of the permit was prayed, and that the oil company be enjoined from transacting business in the State.

A demurrer was filed to the petition for insufficiency in law to entitle the State to any relief, and alleged against each of the Anti-Trust Acts of the State and the provisions of the Penal Code based thereon, that they violated section 1, Art. XIV, of the Amendments to the Constitution of the United States, in that the act of March 30, 1889, and the code provisions based thereon, deprived the company of the equal protection of the laws, because it was provided by section thirteen of said act and article 988 of the Penal Code that the said statutes "shall not apply to agricultural products or live stock while in the hands of the producer or raiser." And that the act of April 30, 1895, and certain sections of the Revised Statutes of Texas and of the Penal Code were likewise discriminatory because of the same exceptions, and the further exception that said statutes should not be held to "be understood or construed to prevent the organization of laborers for the

purpose of maintaining any standard of wages;" and the act of May 25, 1899, because it was cumulative and a mere supplement to the others, and carried, therefore, the same unconstitutional discriminations.

All of the acts and code provisions are charged with depriving the oil company of its property without due process of law and in violation of the Fourteenth Amendment, in that the penalties are excessive and their provisions so vague and uncertain that the company is denied a resort to the tribunals of the country to defend its rights except on the condition that, if not successful, it shall subject its property to confiscation and forfeit its right to do business in the State.

It is also urged as a ground of demurrer that the act of 1895 violated a provision of the constitution of the State which prohibited a bill to contain more than one subject.

The demurrer was overruled. The company declined to answer further, and judgment was entered forfeiting the license or permit of the company, and enjoining the company from transacting any business in the State "except such business as may be and constitute interstate commerce." The judgment was affirmed by the Court of Civil Appeals. A rehearing was denied and a writ of error from the Supreme Court of the State refused. This writ of error was then granted.

Mr. William V. Rowe and *Mr. R. S. Lovett*, with whom *Mr. Ralph Oakley* and *Mr. James A. Baker* were on the brief, for plaintiff in error in this case and in No. 38 argued simultaneously herewith.[1]

The acts of 1889 and 1895 are in contravention of section 1, Article XIV, of the Amendments of the Constitution of the United States, and therefore void, because of the provisions permitting agriculturists, live stock raisers and laborers to form combinations denounced by the acts when formed by others. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540.

By the acts of 1889 and 1895, which were carried into the

[1] *Southern Cotton Oil Co.* v. *Texas*, p. 134, *post*.

Revised Statutes and Penal Code, the legislature exempted certain classes from punishment for the same offense charged in this case, and, such discriminating provisions being unrepealed and unaffected by the Anti-Trust Act of 1899, the whole system of statutes is, as a consequence, unconstitutional.

The decisions of the Texas Supreme Court and the legislative enactments show that the legislature intended that the exemption of agriculturists, stock raisers and laborers should remain unimpaired by the Anti-Trust Act of 1897. *Texas* v. *Laredo Ice Co.*, 96 Texas, 461; *State* v. *Shippers C. & W. Co.*, 67 S. W. Rep. 1049; *Waters-Pierce Oil Co.* v. *State*, 19 T. C. A. 1; *Houck* v. *Anheuser &c.*, 88 Texas, 184.

Taking all the statutes together the act of 1899 is a mere addition to the previous acts and a part of them. The acts being clearly *in pari materia*, they must of course be read together and treated as parts of one system. Potter's Dwarris, 189; *Alexander* v. *Mayor*, 5 Cranch, 1; *Patterson* v. *Winn*, 11 Wheat. 380; *Ryan* v. *Carter*, 93 U. S. 78, 84; *Pearce* v. *Atwood*, 13 Massachusetts, 324, 344; *Regina* v. *Tonbridge Overseers*, L. R. 13 Q. B. Div. 339; Sutherland Stat. Con. § 288.

The rule has been recognized in Texas. *Cain* v. *State*, 20 Texas, 355, 362; *Shelby* v. *Johnson*, Dallam, 597; *Bryan* v. *Sundberg*, 5 Texas, 418; *Selman* v. *Wolfe*, 27 Texas, 68; *Hanrick* v. *Hanrick*, 54 Texas, 101.

Where the question is merely one of the construction of a state statute, which does not necessarily involve a Federal question the determination of the state court is conclusive upon this court. *Osborne* v. *Florida*, 164 U. S. 650, 656. But this court is not bound by state court decisions construing state statutes, where a Federal question is involved. See as to Federal citizenship: *Boyd* v. *Nebraska*, 143 U. S. 135. As to rights of Federal corporations: *Roberts* v. *Northern Pacific R. R. Co.*, 158 U. S. 1. As to impairing a contract: *Ohio Ins. & Tr. Co.* v. *Debolt*, 16 How. 416; *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116, 145; *Wright* v. *Nagle*, 101 U. S. 791; *Douglas* v. *Kentucky*, 168 U. S. 488, 501; *Bacon* v. *Texas*, 163 U. S. 207;

Louisville Gas Co. v. *Citizens' Gas Co.*, 115 U. S. 683; *McGahey* v. *Virginia*, 135 U. S. 662; *Mobile & Ohio R. R.* v. *Tennessee*, 153 U. S. 486; *Chicago &c. R. R.* v. *Nebraska*, 170 U. S. 57; *McCullough* v. *Virginia*, 172 U. S. 102; *Vicksburg &c. R. R. Co.* v. *Dennis*, 116 U. S. 665; *Bryan* v. *Board of Education*, 151 U. S. 639; *L. & N. R. R.* v. *Palmes*, 109 U. S. 244. As to due process of law: *Scott* v. *McNeal*, 154 U. S. 34, 45. As to full faith and credit: *Huntington* v. *Attrill*, 146 U. S. 657, 683. And generally whether a Federal right is violated: *Yick Wo* v. *Hopkins*, 118 U. S. 356, 366; *Atchison &c. R. R. Co.* v. *Matthews*, 174 U. S. 96; *Gulf, Colo. &c. Ry. Co.* v. *Ellis*, 165 U. S. 150; *Norton* v. *Shelby County*, 118 U. S. 425, 439; *Gormley* v. *Clark*, 134 U. S. 338, 348; *Stutsman County* v. *Wallace*, 142 U. S. 293, 306; *Osborne* v. *Missouri Pacific Ry.*, 147 U. S. 248, 258. *Jefferson Bank* v. *Skelly*, 1 Black, 436, distinguished.

This case comes within the principle of these exceptions. This court cannot accept as conclusive the decision of the state court as to the scope, meaning and effect of this admitted exemption clause, effecting, when construed with the other statutes of the State, *in pari materia*, what is claimed to be an arbitrary classification of persons, in respect to the offense in question, in violation of the rights guaranteed by the Fourteenth Amendment. That, like the questions of due process of law, full faith and credit to which state judgments are entitled, and of the impairment of contract obligations is, essentially and necessarily, a question for the final and independent determination of this court.

Plaintiff in error is really asking this court not to controvert, but rather to lean towards, and follow, the state court on this subject.

Since the Anti-Trust Statutes are in contravention of the Federal Constitution they are absolutely void; and are ineffectual for any purpose against corporations as well as individuals. Cooley's Const. Lim., 5th ed., 224; *Reagan* v. *Trust Co.*, 154 U. S. 362; *West. Un. Tel. Co.* v. *State*, 62 Texas, 630.

The Supreme Court of Texas has refused to follow this court in *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, nor does *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28, support its decision. See *N. Y. Life Ins. Co.* v. *Cravens*, 178 U. S. 389.

The right of the State to forfeit defendant's license depends upon the conditions annexed expressly or by implication to the grant made by the license. If the Anti-Trust Statutes were a part of the contract and have been violated, the forfeiture may be enforced, but if they were not, then they do not enter into the contract at all, but are mere *statutes*, not *contracts*, and their validity may be contested by this defendant, as well as by an individual.

While corporations are not "citizens," within the meaning of § 2, Art. IV, of the Federal Constitution, *Paul* v. *Virginia*, 8 Wall. 168; *Blake* v. *McClung*, 172 U. S. 239, yet they are "persons" within the meaning of the Fourteenth Amendment, and may invoke that provision against the taking of their property without due process of law, and the denial of the equal protection of the laws, *Santa Clara County* v. *Southern Pacific Ry. Co.*, 118 U. S. 394; *Covington Turnpike Co.* v. *Sandford*, 164 U. S. 578, 592; *Smythe* v. *Ames*, 169 U. S. 466, 522; and this is true of a foreign corporation which has obtained a license to transact business in the State.

A state statute which violates the Federal Constitution is not binding upon a corporation nor is it valid in any respect. *Dayton C. & I. Co.* v. *Barton*, 183 U. S. 23; *W. W. Cargill Co.* v. *Minnesota*, 180 U. S. 452; *Cable* v. *U. S. Life Ins. Co.*, 191 U. S. 288; *O'Brien* v. *Wheelock*, 184 U. S. 450; *South Ottawa* v. *Perkins*, 94 U. S. 267; *Doyle* v. *Insurance Co.*, 94 U. S. 535, distinguished, and see *Baron* v. *Burnside*, 121 U. S. 186.

While state legislation has been sustained against foreign corporations none of the cases are based on the ground that the only remedy sought by the State is forfeiture of corporate grants. *Fidelity Mutual Life Assn.* v. *Mettler*, 185 U. S. 308; *Iowa Ins. Co.* v. *Lewis*, 187 U. S. 335; *Farmers &c. Ins. Co.* v. *Dobney*, 189 U. S. 301; *Hale* v. *Lewis*, 181 U. S. 473; *Knox-*

ville Iron Co. v. *Harbison,* 183 U. S. 13; *Dayton Coal & Iron Co.* v. *Barton,* 183 U. S. 23; *Blake* v. *McClung,* 172 U. S. 239; *Ashley* v. *Ryan,* 153 U. S. 436; *Orient Ins. Co.* v. *Daggs,* 172 U. S. 557; *Hooper* v. *California,* 155 U. S. 648; *Hancock Mutual Life Ins. Co.* v. *Warren,* 181 U. S. 73; *Mutual Life Ins. Co.* v. *Spratley,* 172 U. S. 602; *New York Life Ins. Co.* v. *Cravens,* 178 U. S. 389.

While the power of the State to impose terms upon a foreign corporation seeking admission was distinctly recognized yet these cases are clearly distinguished from *Connolly* v. *Union Sewer Pipe Co.,* and other cases in which this court has protected foreign corporations against unconstitutional state legislation.

The contention that a corporation may be bound by a statute which violates the Federal Constitution is unsound, dangerous and contrary to many decisions of this court. *Insurance Company* v. *French,* 18 How. 404; *Home Ins. Co.* v. *Morse,* 20 Wall. 445; *Barron* v. *Burnside,* 121 U. S. 186; *Southern Pacific Co.* v. *Denton,* 146 U. S. 202; *Barrow Steamship Co.* v. *Kane,* 170 U. S. 100, 111. See also *Chicago, M. & St. P. Ry. Co.* v. *Becker,* 32 Fed. Rep. 849; *Chattanooga R. & C. R. Co.* v. *Evans,* 66 Fed. Rep. 809, 814; *Reimers* v. *Seatco Mfg. Co.,* 70 Fed. Rep. 573. While these cases involved statutes which required foreign corporations, as one of the conditions imposed in granting the license, to refrain from removing such suits as might be brought against them, into the courts of the United States, that does not in any wise affect the principle. That provision is no more sacred than any other.

All of the Anti-Trust Laws of Texas are also in contravention of the Fourteenth Amendment for the reason that they necessarily deprive persons of liberty and property without due process of law, in that they deny all persons the right to make any contract, in the ordinary course of business and on ordinary business subjects, which tends to restrict competition or trade, commerce or business, or in any manner to affect prices. 2 Eddy on Comb. §§ 904 *et seq.*

The right of all persons to combine for the purpose of carrying on an ordinary business in the familiar and ordinary methods sanctioned by the continuous commercial usages of the Anglo-Saxon race and by the common law is one of the liberties protected by the Fourteenth Amendment and, as the corporation is in the State without conditions, to impair this liberty and the ability to conduct a merchandising or other business in the ordinary way, through the making of purchases and sales and the fixing of prices, is clearly to work a deprivation of property without due process of law, and to impair the well recognized liberty of contract, involved in the acquiring, using and dealing with property, protected by that amendment to the Federal Constitution. *L. S. & Mich. So. Ry. Co.* v. *Smith*, 173 U. S. 684, 691; *Louisville & Nashville R. R. Co.* v. *Kentucky*, 161 U. S. 677, 695; Freund on Police Power, § 715; *Ballard* v. *Miss. Cot. Oil Co.*, 81 Mississippi, 507, 581; 2 Eddy on Comb. §§ 660 *et seq.;* § 2 of the Texas Act of 1899; Rev. Stat., Texas, art. 5313; Penal Code, Texas, arts. 976, 988*a*. If the law should be enforced it would drive every partnership out of Texas. Parsons, 3d ed., 6; 1 Kent Com. 23; Lindley on Part., 4th ed., 3; *Queen Ins. Co.* v. *Texas*, 86 Texas, 250, 264; *Texas & Pacific Coal Co.* v. *Lawson*, 89 Fed. Rep. 394; *Matthews* v. *Ass'd Press*, 136 N. Y. 333; *Houck* v. *Anheuser-Busch*, 88 Texas, 184; *Welch* v. *Phelps &c. Co.*, 89 Texas, 653.

There is no basis for the assumption that the legislature could not have intended these results or effects, casting a blight over all business associations and combinations. The acts are plain and unambiguous in terms. Art. 9, Penal Code, Texas; *United States* v. *Fisher*, 2 Cranch, 358, 399; *McPherson* v. *Blacker*, 146 U. S. 1, 27.

For other cases on the construction of the Texas Act, see *Gates* v. *Hooper*, 90 Texas, 563; *Texas Brewing Co.* v. *Templeman*, 90 Texas, 277; *Fugua* v. *Pabst Brewing Co.*, 90 Texas, 298; and of similar statutes in other States, see *Commonwealth* v. *Bavarian Brewing Co.*, 66 S. W. Rep. 1016; *Am. Handle*

Co. v. *Standard Handle Co.*, 69 S. W. Rep. 709, 717; *Ertz* v. *Produce Exchange*, 84 N. W. Rep. 743; *Anderson* v. *United States*, 171 U. S. 604. And see where exclusive contracts to sell were held good, *Williams* v. *Montgomery*, 148 N. Y. 519; *Brown* v. *Rounsavell*, 78 Illinois, 589; *Newell* v. *Meyendorf*, 9 Montana, 254. As to liberty of contract see *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589; *Butchers' Union* v. *Crescent City Co.*, 111 U. S. 746, 762.

The liberty of pursuit is one of the privileges of a citizen of the United States. *Bertholf* v. *O'Reilly*, 74 N. Y. 509; *In re Jacobs*, 98 N. Y. 98; *People* v. *Marx*, 99 N. Y. 377; *People* v. *Gillson*, 109 N. Y. 389; *Forster* v. *Scott*, 136 N. Y. 577; *Purdy* v. *Erie R. R. Co.*, 162 N. Y. 42, 49; *Printing Co.* v. *Sampson*, L. R. 19 Eq. 462; *Godcharles* v. *Wigeman*, 113 Pa. St. 431; *Palmer* v. *Tingle*, 45 N. E. Rep. 313.

As to the so called truck store act, the coal weighing act, and other similar legislation held unconstitutional in Illinois, see *Frorer* v. *People*, 141 Illinois, 171; *Ramsey* v. *People*, 142 Illinois, 380; *Harding* v. *People*, 160 Illinois, 459; *Ritchie* v. *People*, 155 Illinois, 98; *Braceville Coal Co.* v. *People*, 147 Illinois, 66.

And in other States similar legislation has been pronounced unconstitutional because violating this fundamental constitutional right of freedom of contract. *Kuhn* v. *Detroit*, 70 Michigan, 534; *Spry Lumber Co.* v. *Trust Co.*, 77 Michigan, 199; *State* v. *Loomis*, 115 Missouri, 307; *State* v. *Julow*, 129 Missouri, 163; *State* v. *Goodwill*, 33 W. Va. 179; *Ex parte Kuback*, 85 California, 274; *Low* v. *Rees' Printing Co.*, 41 Nebraska, 127; *In re Eight Hour Law*, 21 Colorado, 29; *Commonwealth* v. *Perry*, 155 Massachusetts, 117; 2 Eddy on Comb. §§ 660–673.

The legislature cannot under pretense of exercising its police power prohibit harmless acts not immediately concerning the health and welfare of the people, and all such acts are subject to judicial examination and possible condemnation. 22 Am. & Eng. Ency. of Law, 936; *People* v. *Gillson*, 109 N. Y.

389, 400; 2 Tiedeman, Police Powers, § 1, and pp. 197, 233; *Colon* v. *Lisk*, 153 N. Y. 188, and cases cited; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 558; *Opinions of Justices*, 163 Massachusetts, 596; *Anderson* v. *United States*, 171 U. S. 604.

As to history of anti-monopoly laws, see Thorold Roger's Economical Interpretation of History, referring to statutes of 37 Edw. III, fixing prices; also as to wages, 23 Edw. III, 1349; 34 Edw. III, 1360; also statutes of 3 Hen. IV, C. 1; 15 Hen. IV, C. 6; 5 Eliz., C. 4; 5 & 6 Edw. VI, C. 14. See also instances in Pickering's Statutes; see also Albert Stickney on State Control of Trade and Commerce, citing Stat. of 7 & 8 Vict., C. 24; Law of Criminal Conspiracies and Agreements, by R. S. Wright, p. 12, n. 6. As to the right to form partnerships, see *Mitchel* v. *Reynolds*, 1 Smith L. C. 511, and as to early cases under the Buttle Act against joint-stock companies, see Lindley on Partnership, 6. For American cases in regard to restriction of commerce and right of persons to associate for business purposes, see *Hooker* v. *Vandewater*, 4 Denio, 349; *People* v. *Fisher*, 14 Wend. 9; *Stanton* v. *Allen*, 5 Denio, 434; *Commonwealth* v. *Carlisle*, Brightly, 36; *Central Ohio Salt Co.* v. *Guthrie*, 35 Ohio St. 666.

As to cases of contracts between competing companies which did not unite their capital, skill or acts, but only agreed as to prices and production and the pooling of their receipts, see *United States* v. *Trans-Missouri Freight Association*, 58 Fed. Rep. 58, 70; *Emery* v. *The Ohio Candle Co.*, 47 Ohio St. 320; *Morris Run Coal Co.* v. *Barclay Coal Co.*, 68 Pa. St. 173; *India Bagging Association* v. *Kock & Co.*, 14 La. Ann. 168; *United States* v. *Jellico Coal Co.*, 46 Fed. Rep. 432; *Lumber Co.* v. *Hayes*, 76 California, 387; *Craft* v. *McConoughy*, 79 Illinois, 346; *Gibbs* v. *Gas Co.*, 130 U. S. 396.

As to distinctions between legal and illegal contracts in restraint of competition, see *Marsh* v. *Russell*, 66 N. Y. 288; *Phippen* v. *Stickney*, 3 Met. 384; *Lorillard* v. *Clyde*, 86 N. Y. 384; *Shade Co.* v. *Cushman*, 143 Massachusetts, 353; *Craft* v.

McConoughy, 79 Illinois, 346; *Diamond Match Co.* v. *Roeber*, 106 N. Y. 473; *Leslie* v. *Lorrilland*, 110 N. Y. 519, 534; *Matthews* v. *Associated Press*, 136 N. Y. 333; *Jones* v. *Fell*, 5 Florida, 510; *Railroad Tax Cases*, 13 Fed. Rep. 722, 743; *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. Rep. 271, 290. The cases decided by this court under the Federal Anti-Trust Act show that the liberty to contract is guaranteed by the Constitution and yields only to the paramount power of Congress over interstate commerce. *United States* v. *Joint Traffic Assn.*, 171 U. S. 505, 559; *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211; *Northern Securities Co.* v. *United States*, 193 U. S. 197, 351.

Mr. C. K. Bell, Attorney General for the State of Texas, for defendant in error in this case and in No. 38:

It has been held by the Supreme Court of the State of Texas that the laws of 1889 and 1895 were valid and constitutional enactments. But after *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, the decisions theretofore rendered by the appellate courts of Texas, upholding the laws mentioned so far as it was sought under them to collect penalties, were overruled and the laws held to be nugatory when penalties were sought to be collected for a violation of their provisions. The law of 1899 contained no exemption in favor of any class, and this law has been held by the Supreme Court of Texas, in *State* v. *Laredo Ice Co.*, 96 Texas, 461, to be a valid and constitutional enactment.

The questions in this case are, first, is the Anti-Trust Act of Texas of 1899 constitutional; and, second, conceding that the acts of 1889 and 1895 are not constitutional to the extent of warranting the collection of penalties for a violation of their provisions, is it within the power of the courts to forfeit the permit which authorizes a foreign corporation to transact business in the State of Texas for committing the acts which by such statutes they are prohibited from committing under penalty of forfeiting such permits?

The first question has been answered by the Supreme Court of Texas in *State* v. *Laredo Ice Co.*, 96 Texas, 461, in the affirmative, and nothing can be added to the strength of the opinion in that case, and this court will follow the interpretation placed upon a statute of a State by its highest court.

As to the second question, the identical proposition has been decided in *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28; *Waters-Pierce Oil Co.* v. *State*, 19 Civ. App. 1; *State* v. *Shippers' Compress and Warehouse Co.*, 95 Texas, 603.

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

The charges made against the statutes of Texas are that they deny the oil company the equal protection of the law and take its property without due process of law. The answer to the first depends upon the effect of the statutes. The answer to the second involves their validity and broader considerations. We will deal with it first.

The specification in the demurrer of wherein the statutes deprive the oil company of its property without due process of law is indefinite and peculiar. It may be different from an attack on the validity of the statutes, but counsel have treated it as tantamount to such attack, and we will so treat it.

Defendant in error contends that it is not open to the oil company to attack the constitutionality of the statutes, either as discriminating against it or as depriving it of property without due process of law, and cites *Waters-Pierce Oil Company* v. *Texas*, 177 U. S. 28. Counsel for the company contests the application of that case; and we will assume (not decide) with them that it is not determinative of their contention.

The acts of 1889 and 1895 are set out at length in the *Waters-Pierce Oil Company case*. The act of 1899, so far as the present question is concerned, is substantially the same as those acts. All of the acts are directed to the prohibition of combinations to restrict trade, or in any way limit competition in the pro-

duction or sale of articles, or to increase or reduce their price in order to preclude a free and unrestricted competition in them. The various ways in which these purposes can be accomplished are enumerated and forbidden. Penalties are affixed to the violation of the acts, offending domestic corporations forfeit their charters, and offending foreign corporations forfeit their privileges to do business in the State.

There was also an act passed in 1903, which repealed all laws or parts of laws in conflict with it, and expressly repealed certain provisions of the Penal Code of the State, and the acts of 1895 and 1899. The right to recover penalties or to forfeit charters of domestic, or the permits of foreign, corporations, for acts committed before the going into effect of the statutes, was reserved.

The argument, which is directed against the validity of the statutes, is drawn from extremes. It is difficult to present its elements in a concise way. Its ultimate foundation is the right of individuals and corporations as well, under the Constitution of the United States, to make contracts and combine in business enterprises; and, it is argued, to prohibit them from so doing "in the ordinary way through the making of purchases and sales and the fixing of prices, is clearly to work a deprivation of property without due process of law and to impair the well recognized liberty of contract, involved in the acquiring, using and dealing with property," assured by the Federal Constitution.

To support the argument the usages and necessity of business are adduced, and partnerships and their effect are brought forward as illustrations. There are some things which counsel easily demonstrate. They easily demonstrate that some combination of "capital, skill or acts" is necessary to any business development, and that the result must inevitably be a cessation of competition. But this does not prove that all combinations are inviolable or that no restriction upon competition can be forbidden. To contend for these extremes is to overlook the difference in the effect of actions, and to limit too

much the function and power of government. By arguing from extremes almost every exercise of government can be shown to be a deprivation of individual liberty. It is commonplace to say that it is the purpose, and indeed duty, of government, to get all it can of good out of the activities of men, and limit or forbid them when they become or tend to evil. Of course, what is evil may not be always clear; but to be able to dispute the policy of a law is not to establish its invalidity. It is certainly the conception of a large body of public opinion that the control of prices through combinations tends to restraint of trade and to monopoly, and is evil. The foundations of the belief we are not called upon to discuss, nor does our purpose require us to distinguish between the kinds of combinations or the degrees of monopoly. It is enough to say that the idea of monopoly is not now confined to a grant of privileges. It is understood to include a "condition produced by the acts of mere individuals." Its dominant thought now is, to quote another, "the notion of exclusiveness or unity;" in other words, the suppression of competition by the unification of interest or management, or it may be through agreement and concert of action. And the purpose is so definitely the control of prices that monopoly has been defined to be "unified tactics with regard to prices." It is the power to control prices which makes the inducement of combinations and their profit. It is such power that makes it the concern of the law to prohibit or limit them. And this concern and the policy based upon it has not only expression in the Texas statutes; it has expression in the statutes of other States and in a well known national enactment. According to them, competition not combination, should be the law of trade. If there is evil in this it is accepted as less than that which may result from the unification of interest, and the power such unification gives. And that legislatures may so ordain this court has decided. *United States* v. *E. C. Knight Co.*, 156 U. S. 1; *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290; *United States* v. *Joint Traffic Association*, 171

U. S. 505; *Northern Securities Co.* v. *United States*, 193 U. S. 197; *Swift & Co.* v. *United States*, 196 U. S. 375.

In *Smiley* v. *Kansas*, decided at this term, 196 U. S. 447, a statute of Kansas is passed on which is identical in effect, and even in words, in all that concerns the present controversy, with the Texas statutes. The statute was assailed as "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 right which Smiley claimed was to combine with certain grain dealers, persons, companies and corporations, who were competitors, to pool and fix the price of grain in the town of Bison, and to prevent competition in the purchase and sale of grain at that place. We followed the ruling of the Supreme Court of the State in holding that the combination was within the prohibition of the statute; we concurred with that court in deciding that the prohibition was a valid exercise of the police power of the State.

It follows that the statutes of Texas do not deprive the oil company of its property without due process of law.

Next, as to the effect of the statutes.

The act of May 25, 1899, omits the discriminatory provisions of the prior acts, but, it is contended, that as the latter act is declared to be cumulative of the prior acts their discriminations are preserved and continued, and that under the Code provisions the company may be criminally prosecuted, and that the excepted classes of the acts of 1889 and 1895 are exempt from prosecution. It is further urged whether such discrimination results from the statutes is for us to determine independently of what views the courts of the State may entertain of them and their relations.

Upon the last contention depends the mode of approaching the other, and we will dispose of it first. We cannot assent to it. There are cases in which we determine for ourselves the meaning of a state law, but this is not one of them. The contention of the company is that the statutes of the State discriminate against it; in other words, deny it the equal protec-

tion of the law, by forbidding it from doing what they permit others to do in similar circumstances—punish its acts and exempt from punishment the same acts when done by others. But the courts of the State are the tribunals appointed to administer the statutes and impose their penalties, and to do so they must necessarily interpret them. In other words, they are the tribunals to declare the meaning of the statutes, and if in declaring it they make the statutes discriminatory then may the statutes become unconstitutional. *Olsen* v. *Smith*, 195 U. S. 332.

What has the Supreme Court of Texas said of the statutes? The Court of Civil Appeals in the case at bar expressed the following view:

"The trial court did not err in overruling appellant's demurrers. While it has been correctly held that certain provisions of the anti-trust statutes are unconstitutional, the Supreme Court, in the case of *The State of Texas* v. *The Shippers' Compress & Warehouse Co.*, 69 S. W. Rep. 61, relying upon the case of *The Waters-Pierce Oil Co.* v. *The State of Texas*, 177 U. S. 28, holds that so much of these statutes that authorize the canceling and forfeiture of a charter or permit to do business within the State of Texas are valid, and are not in violation of the constitution."

The Supreme Court refused a writ of error, and thereby, as we understand the local rule to be, approved the views of the Court of Civil Appeals. Subsequently the Supreme Court expressed itself explicitly in *State of Texas* v. *Shippers' Compress and Warehouse Company*, 95 Texas, 603, and *State of Texas* v. *Laredo Ice Company*, 96 Texas, 461.

The object in *State of Texas* v. *Shippers' Compress and Warehouse Company* was to forfeit the charter of the compress company for violating the Anti-Trust Law of 1895, in that the incorporators combined "to restrict aids to commerce." The law was attacked as unconstitutional. To the contention the court said:

"The defendant insists that the law is unconstitutional,

therefore void in whole, and will not support the action to forfeit the charter. Upon the same objection we held the Anti-Trust Law of 1889 to be constitutional, and there is no such difference between the two laws as would affect the decision of this question. We believe that our decision is correct; that the law is not in contravention of the constitution of the State nor of the United States. *Honck* v. *Brewing Assn.*, 88 Texas, 189."

The court then referred to *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, and in submission to its authority held the law of 1895, so far as it came within the terms of that case, invalid, and would not support an action by the State to recover a penalty for a violation of the law, nor would it, in suits between corporations and individuals, support a defense based upon the fact that the right of action originated in violation of the Anti-Trust Law. "But," the court remarked, "to the extent that the statute of this State is not embraced in the decision of the Supreme Court of the United States, we shall adhere to our former decision that it is constitutional and valid, and therefore enforcible by the State."

That is, the court decided the act of 1895 was valid to the extent that it authorized the State to revoke the license of a foreign corporation and to forfeit the charter of a domestic corporation. The other provisions of the act were held invalid, and the right to make this distinction was based on *Waters-Pierce Oil Co.* v. *Texas*.

State of Texas v. *Laredo Ice Co.* was instituted to recover penalties for the violation of the Anti-Trust Law of 1899. The ice company was a domestic corporation, and it was proceeded against for having formed a combination to regulate and fix prices. In defense, the company asserted the unconstitutionality of the act.

It is provided in section 14 of the act of 1899 that the provisions of preceding sections and the fines and penalties provided for violations of the act shall be held and construed to be cumulative of all laws now in force in the State. It was

contended, as it is contended here, that this provision made one law of the act and the act of 1895, and that the exemptions of the latter became part of the former and made it unconstitutional. In other words, the effect was (we quote from the opinion of the court) "thereby to give exemption from prosecution under the law of 1899 to those persons who are exempted by the provisions of the law of 1895." The Supreme Court of Texas rejected the contention. Its reasoning was not very direct or circumstantial, but it in effect held that the act of 1899 did not continue the provisions of the prior acts, whether constitutional or unconstitutional, merely because it was declared to be cumulative. And the court decided the law of 1899 to be constitutional, because it did not contain the discriminating features of the prior laws. Under the laws of Texas, therefore, combinations of the kind described in the various anti-trust laws, whether by agriculturalists or organized laborers or others, are forbidden and penalized, and the oil company is not discriminated against.

But it may be said that if the inequalities of prior anti-trust acts have been removed by the act of 1899, they still remain in the Revised Statutes of the State and in the Penal Code, and by those Statutes and that Code the excepted classes are exempted from indictment and punishment, while the oil company is subject to both. We need not consider the Statutes referred to or consider how far this discrimination can exist, in view of the decision of the Supreme Court of the State in *State of Texas* v. *Laredo Ice Company*. Granting it can exist, the case at bar is not a criminal prosecution. It involves only the anti-trust laws and their prohibitions, and penalties. And in them, we have seen, by the effect of the act of 1899 there is no inequality of operation. It is the effect of that decision also that the laws of the State against combinations and trusts are formed into a harmonious system, of which the criminal provisions in other statutes and the Code are a part, and that their provisions can be adjusted and reconciled so as to have constitutional operation.

Judgment affirmed.

SOUTHERN COTTON OIL COMPANY *v.* TEXAS.

ERROR TO THE COURT OF CIVIL APPEALS IN AND FOR THE THIRD SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

No. 38. Argued November 1, 2, 1904.—Decided February 27, 1905.

Decided on the authority of *National Cotton Oil Company* v. *Texas*, *ante*, p. 115.

THE facts are stated in the opinion.

Mr. William V. Rowe and *Mr. R. S. Lovett*, with whom *Mr. Ralph Oakley* and *Mr. James A. Baker* were on the brief, for plaintiff in error.[1]

Mr. C. K. Bell, Attorney General of the State of Texas, for defendant in error.[1]

MR. JUSTICE MCKENNA delivered the opinion of the court.

The Southern Cotton Oil Company is a New Jersey corporation doing business in the State of Texas by virtue of a permit issued June 3, 1897, under the laws of the State. The object of this suit is to forfeit the permit of the company for the violation of the Anti-Trust Statutes of the State. The violation of the statutes alleged against it is the same as that alleged against the National Cotton Oil Company, the preceding case. The defenses are the same, and were presented by demurrer. The demurrer was overruled, and, the Southern Cotton Oil Company declining to plead further, judgment was entered forfeiting its permit to do business in the State, except such as might be and constitute interstate commerce. The judgment was affirmed by the Court of Civil Appeals. A

[1] See abstracts of arguments in *National Cotton Oil Co.* v. *Texas*, argued simultaneously with this case, pp. 118–127, *ante*.

rehearing was denied, and a writ of error from the Supreme Court of the State refused. This writ of error was then sued out.

The questions are identical with those presented in the preceding case, and on its authority the judgment of the Court of Civil Appeals is

Affirmed.

UNITED STATES *v.* WHITRIDGE.

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

No. 413. Argued January 27, 30, 1905.—Decided February 27, 1905.

Under the proviso of § 25 of the act of Congress of August 27, 1898, 28 Stat. 509, 552, the Secretary of the Treasury is authorized, when he has satisfactory evidence that the rupee price of imported goods stated in the invoice does not mean rupees at bullion value, but as a certain fraction of a pound sterling, to order a reliquidation so as to make the value in United States currency correspond with the actual value of the goods.

In determining when the Secretary of the Treasury exceeded his powers under a statute, this court may consider public facts that were known to Congress when enacting the statute and must have been before the Secretary's mind when acting thereunder, even though such facts were not proved on the trial.

THE facts are stated in the opinion.

Mr. Assistant Attorney General McReynolds, with whom the *Solicitor General* was on the brief for the United States:

As to the facts and history of this case which arose because of the material difference between the gold value of the silver in a rupee—the current coin of India—and its commercial value see § 25, act of 1894, 28 Stat. 552; table compiled by Director of the Mint, April 1, 1900; § 5, Tariff Adm. Act, 1789, 1 Stat. 29, and acts of Congress prescribing values of foreign coins. 1790, § 40, 1 Stat. 167; 1799, § 61, 1 Stat. 673; 1801, 2 Stat. 121; 1834, 4 Stat. 700; 1842, 5 Stat. 496; 1843,

5 Stat. 625; 1846, 9 Stat. 14; 1873, requiring annual valuation of foreign coins by the Director of the Mint and proclamation of the same by the Secretary of the Treasury; 17 Stat. 602; Rev. Stat., § 3564; 1890, 26 Stat. 567, 624; 1894, 28 Stat. 349, 509, 552; Rev. Stat. § 2903; Customs Reg., 1899, art. 409. The policy of the Government as to *ad valorem* duties is to assess at actual cost or market value and to effect this invoices in currency of the exporting country are required. Acts of 1789, 1 Stat. 41; 1790, 1 Stat. 167; 1799, 1 Stat. 673; 1801, 2 Stat. 121; 1890, 26 Stat. 131.

Reliquidation of any entry may be made within a year after the original entry. Sec. 21, act of 1874, 18 Stat. 190, Comp. Stat. 1986; § 24, act of 1890, 26 Stat. 140, Comp. Stat. 1987; *Beard* v. *Porter*, 124 U. S. 437, 441; *Neresheimer* v. *United States*, 131 Fed. Rep. 977; § 2652, Rev. Stat. A collector is merely a subordinate of the Secretary of the Treasury. 21 Op. 203; § 249, Rev. Stat.; *United States* v. *Ballin*, 144 U. S. 1, 10.

As to coinage in India see Act XXIII of 1870, of Indian Government, and Act XX of 1882, making silver legal tender; Act VIII of 1893; Report Director of Mint of 1893, p. 235; of 1900, p. 383; Act XXVI of September 15, 1899, making the sovereign legal tender at rate of 15 rupees. The bullion value of the rupee was greatly affected by the depreciation of silver owing to the closing of the Indian mints. See Lord Herschell's Report of Currency Committee, printed August 18, 1893, by Congress of United States.

Silver rupees since September, 1899, have been in fact only token coins like the silver dollars of the United States, or, in the language of the Financial Statement of India for 1900-1901, "our notes printed on silver, as we may really regard our rupees." Sess. Papers, House of Commons, 1900, vol. 57.

For history of the proviso in § 25, act of 1894, see Cong. Rec., vol. 26, 53d Cong., 2d Sess., 6576.

That part of the amendment which preceded the word "provided" was not new legislation. It in substance expressed the effect of the acts of 1873 and 1890, as expounded

in *Collector* v. *Richards*, 23 Wall. 246; *Cramer* v. *Arthur*, 102 U. S. 612; *Hadden* v. *Merritt*, 115 U. S. 25; *United States* v. *Klingenberg*, 153 U. S. 93. The proviso contained in the amendment was new legislation.

For history of litigation touching the value of the rupee see *United States* v. *Newhall*, 91 Fed. Rep. 525; *S. C.*, 106 Fed. Rep. 75; *United States* v. *Beebe*, 103 Fed. Rep. 785; *S. C.*, 180 U. S. 640; *S. C.*, 117 Fed. Rep. 670; *S. C.*, 122 Fed. Rep. 762.

The action of the Secretary of the Treasury in declaring the value of the rupee of the invoice, when he ordered reliquidation of the entry, in June, 1901, was final and conclusive, and could not be reviewed or the facts upon which the same was based inquired into by appraisers or courts.

Section 25 of the act of 1894 has two important parts: First, the provisions for valuing foreign coins taken from the act of 1873 requiring an annual estimate, as modified by the act of 1890 requiring quarterly estimates; and, second, the proviso relating to reliquidation, which was entirely new legislation. As to the first part see cases cited *supra*. As to the second part see *Muser* v. *Magone*, 155 U. S. 240, 251; *United States* v. *Passavant*, 169 U. S. 16.

Since September 15, 1899, the monetary standard of India has been gold, the standard coin the British sovereign (worth $4.8665) and the rupee, a token coin, current as the one-fifteenth part thereof—$0.324+. The Secretary, therefore, committed no error of which the importers can complain when he reliquidated the entry in question, valuing the rupee at $0.32. He erred when he proclaimed on April, 1900, that India was on a silver standard and the rupee was worth $0.207.

The proviso in § 25, act of 1894, gave the Secretary the right to direct reliquidation of an entry at the exchange value of the money specified in the invoice whenever that was 10 per cent more or less than the metallic value proclaimed at the beginning of the quarter, and such right did not depend on a change in the market value of the metal in the coin.

The construction of the act of 1894 by the lower courts renders it ineffective. A statute should be construed by considering the reasons and spirit of it and the cause for its enactment, and where particular construction would occasion great inconvenience or produce inequality and injustice, that view is to be avoided if another and more reasonable interpretation is present in the statute. Blackstone's Com., vol. 1, p. 61; *Knowlton* v. *Moore*, 178 U. S. 41, 77.

Both rules justify the construction asked by the Government of the proviso in section 25, act 1894.

The construction contended for by the importers would defeat the beneficial ends above specified and cause great inequality, injustice and loss by reason of past transactions, and possibly still worse consequences from future ones.

Other governments contemplate changes from gold to silver basis. Report Director of Mint, 1904, 99. For rules of construction of statute applicable see *Smythe* v. *Fiske*, 23 Wall. 374, 380; *Church Holy Trinity* v. *United States*, 143 U. S. 457; *Platt* v. *Un. Pac. R. R. Co.*, 99 U. S. 48; 59; *Lau Ow Bew* v. *United States*, 144 U. S. 47, 59; *Durosseau* v. *United States*, 6 Cranch, 307, 313; *Heydenfeldt* v. *Daney Mining Co.*, 93 U. S. 634; *Hawaii* v. *Mankichi*, 190 U. S. 197, 212; *United States* v. *43 Gallons of Whiskey*, 108 U. S. 491; *Georgia R. R. & Banking Co.* v. *Smith*, 128 U. S. 174, 181.

Mr. Albert Comstock, with whom *Mr. William R. Sears*, *Mr. Aldis B. Browne* and *Mr. Howard T. Walden* were on the brief, for respondents:

As to functions of the proviso in the act of 1894, see Am. & Eng. Ency. of Law, 2d ed., 678; *Savings Bank* v. *United States*, 19 Wall. 227; *Minis* v. *United States*, 15 Pet. 423; *United States* v. *Dixon*, 15 Pet. 141; *De Forrest* v. *Redfield*, 4 Blatch. 478.

There was, elsewhere in the statutes, a provision on precisely this matter of divergence between bullion and exchange

values of currencies. It covered only depreciations, and the manifest way to accomplish what the Government thinks was intended, would have been to amend it. Section 2903, Rev. Stat.; T. D. 17,107, May 12, 1896; T. D. 17,766, February 3, 1897.

Analysis of the very terms of the proviso shows that the construction for which respondents contend, is the correct one. T. D. 22,747, is manifestly absurd.

Conditions prevailing at and shortly prior to the enactment in question, compel the conclusion that bullion fluctuations, and not those of exchange, were in the minds of the lawmakers.

Section 2903 continued to afford the only means of taking up the fluctuations of exchange. T. D. 15,606, February 8, 1895; T. D. 24,318, 24,531, 1903.

It cannot be contended that the action of the Secretary, because it followed the language of the proviso to section 25, was final and conclusive and cannot be scrutinized even to see what it really was. *The Second Bebee Case,* 117 Fed. Rep. 670; T. D. 22,511, September 26, 1900; T. D. 18,327, September 4, 1897; T. D. 23,059, May 18, 1901.

The general law with reference to the legal effect of the act of an official entirely supports the claim that the Secretary's action is reviewable. *Am. School of Healing* v. *McAnnulty,* 187 U. S. 94; *Robertson* v. *Frank Brothers,* 132 U. S. 17, 24; *United States* v. *Passavant,* 169 U. S. 16; *Muser* v. *Magone,* 155 U. S. 240, 247; *Shepley* v. *Cowan,* 91 U. S. 330, 340; *Morrill* v. *Jones,* 106 U. S. 466; *Merritt* v. *Welsh,* 104 U. S. 694; *Am. Sugar Ref. Co.* v. *United States,* 181 U. S. 610; *Downes* v. *United States,* 187 U. S. 496.

Executive officials have a dangerous tendency to assume power and to exceed their powers. Congress has not favored it, and the courts have repeatedly corrected and rebuked it. *Christy* v. *Unwin,* 3 Per. Dav. 208; *Galpin* v. *Page,* 18 Wall. 350; *Marriott* v. *Brune,* 9 How. 634; *Greeley* v. *Thompson,* 10 How. 225.

The Secretary had no power to repudiate the duly ascertained and proclaimed pure metal value of the rupee, outside the terms of the proviso to section 25.

Mr. Justice Holmes delivered the opinion of the court.

Whitridge, White & Co., the respondents, on June 18, 1900, imported from India certain gunnies, invoiced in rupees. The invoice contained a certificate from the American consul, dated April 19, 1900, that the exchange value of the rupee at that date was thirty-two cents estimated in United States gold dollars. For the purpose of ascertaining the *ad valorem* duties under the act of July 24, 1897, c. 11, 30 Stat. 151, Schedule J., cl. 341, in July, 1900, the collector of the port of Baltimore estimated the value of the merchandise at the date of the consular certificate by converting the invoice value into dollars, taking the rupees at thirty-two cents. The importers entered protest and the collector reliquidated the entry, taking the rupee at 20.7 cents. The Secretary of the Treasury, on June 6, 1901, wrote that satisfactory evidence had been produced to him that the value of the rupee was thirty-two cents at the date of the consul's certificate, and directed a reliquidation at that rate. The collector of the port reliquidated accordingly on June 12, 1901. The importers (respondents) protested, and the matter was submitted to the Board of General Appraisers in New York. Act of June 10, 1890, c. 407, § 14. 26 Stat. 131, 137. The Board found that the exchange value of the rupee at the date of certification was thirty-two cents, but that the metal value was 20.7 cents, as estimated by the Director of the Mint and proclaimed by the Secretary of the Treasury for the quarter year beginning April 1, 1900, ruled that the latter rate should have been taken, and directed a reliquidation on that footing. The collector appealed to the Circuit Court and then to the Circuit Court of Appeals, both of which sustained the Board of Appraisers. 129 Fed. Rep. 33. The United States then obtained a writ of

certiorari from this court. The question is whether the Secretary of the Treasury had power to order reliquidation at the rate of thirty-two cents.

There is, to be sure, a preliminary question as to the conclusiveness of the Secretary's action under the statute. Technically it does not appear that his decision was not based on a finding as to the metal value of the rupee; that is to say, as to the value on April 19, 1900, in fractions of a gold dollar, of the silver contained in the coin. If the decision were based on such a finding we may assume that it would not be open to review. *United States* v. *Klingenberg*, 153 U. S. 93. But the greater part, at least, of the argument was made on a different assumption, which, in view of our conclusion, we shall adopt. We do so the more readily, because upon the public and well known facts it is not to be supposed that the imagined finding as to the value of silver was made, and the policy of the Treasury Department to adopt the exchange value of rupees was well known and publicly declared. It would not be consistent with the honor of the Government to take the exchange value and then to cover itself from correction, if it was wrong, by suggesting that it had gone upon a different ground, when that ground could not have been taken by any one knowing the prices of the time. There is another argument for the conclusiveness of the Secretary's action which is so closely connected with the merits that we shall not separate it from our general discussion of the act.

The power of the Secretary depends on the construction of the act of August 27, 1894, c. 349, § 25. 28 Stat. 509, 552.[1]

[1] "That the value of foreign coin as expressed in the money of account of the United States shall be that of the pure metal of such coin of standard value; and the values of the standard coins in circulation of the various nations of the world shall be estimated quarterly by the Director of the Mint, and be proclaimed by the Secretary of the Treasury immediately after the passage of this act and thereafter quarterly on the first day of January, April, July, and October in each year. And the values so proclaimed shall be followed in estimating the value of all foreign merchandise exported to the United States during the quarter for which the value is

It is argued for the respondents that the Secretary must derive his power from the proviso if from anything, that the value dealt with in this section is the same thing throughout, and being declared to be that of the pure metal of the coin in the body of the section, must be the same in the proviso, and that therefore the Secretary is not authorized to order a reliquidation unless it appears to him that the pure metal in the invoice coin was worth ten per cent more or less in American gold than the value proclaimed. This argument is thought to derive some support from the history of legislation and from the history of the times, which latter is thought to show that fluctuations of silver bullion, not fluctuations of exchange values, were what Congress was likely to have had in mind. It is suggested further that the Government reading makes the proviso revolutionize the body of the section and the practice of a hundred years.

On the other side we start with the consideration that to an *ad valorem* tax it must be an object to ascertain the true value of the thing taxed at the time as of which it is taxed, and that the invoice price is referred to only to that end. The history of the statutes shows a series of continually closer approximations to it, and to our mind helps the contention of the Government, not that of the other side. The statutes began by fixing the rates for specified coins absolutely. Then, in 1873, they provided in the language of the first part of § 25, quoted above, for an annual estimate by the Director of the Mint and a proclamation. Act of March 3, 1873, c. 268, 17 Stat. 602. Rev. Stat. § 3564. In 1890 the estimate was required to be quarterly, instead of for the year. Act of October 1, 1890,

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proclaimed, and the date of the consular certification of any invoice shall, for the purposes of this section, be considered the date of exportation: *Provided*, That the Secretary of the Treasury may order the reliquidation of any entry at a different value, whenever satisfactory evidence shall be produced to him showing that the value in United States currency of the foreign money specified in the invoice was, at the date of certification, at least ten per centum more or less than the value proclaimed during the quarter in which the consular certification occurred."

c. 1244, § 52. 26 Stat. 567, 624. Finally, on August 27, 1894, the statute received its present form, with the proviso from which the Secretary derives his clearest grant of power. The general purpose of this proviso undeniably is to secure a closer approximation still. In construing it we must bear this obvious purpose in mind. While no doubt the grammatical and logical scope of a proviso is confined to the subject matter of the principal clause, we cannot forget that in practice no such limit is observed, and when, as here, we are dealing with an addition made in new circumstances to a form of words adopted many years before, the general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down. *Georgia Railroad & Banking Co.* v. *Smith*, 128 U. S. 174, 181.

If the proviso were a separate subsequent act we should note that the case in which the Secretary is authorized to order a reliquidation is not confined in terms to a difference in the value of standard coins in circulation, but exists whenever there is such a difference in the value of the foreign money specified in the invoice. The invoice is required to be made out in the currency of the country of export or the currency actually paid, which may not be coin at all. Act of June 10, 1890, c. 407, § 2. 26 Stat. 131. It is true that the difference referred to in the proviso is a difference from the proclaimed value, and that the proclaimed value has reference to standard coins. Whether, in view of this fact and of Rev. Stat. § 2903, the words would cover a difference in value between paper expressed in terms of current coin and current coin, if paper were the currency shown by the invoice or the consul's certificate to be the currency to which the invoice referred, need not be considered. That question did not arise in *Cramer* v. *Arthur*, 102 U. S. 612. However that may be, suppose that the currency mentioned in the invoice, although coined, was a token currency having by legislative fiat the value of a fraction of some current coin of universal worth, but itself having no such worth derived from the metal it contained. Such a

token might vary in value much below or above the fraction of the coin by which it purported to be measured. Suppose that the value of the latter coin only had been proclaimed. It would be going far to say that the Secretary could not order a reliquidation upon a variance of more than ten per cent between the value of the token currency in the invoice and the proclaimed value of the governing coin.

The case last put is the case at bar, except that it is not admitted that the rupee was technically a mere token, and that the value of the rupee itself had been proclaimed, subject to a note—"value of the rupee to be determined by consular certificate." At that time, although it was not noted until a little later in the year by the Director of the Mint, India was on a gold basis. As the rupee had a legally fixed ratio to another coin also valued by the Director, the gold pound, it is plain that the value of the rupee as so much silver and its value as a fraction of a pound might fall apart and yet both be given by the Director's tables. It would be giving a very literal construction to the body of § 25 to say that it forbade the Secretary to take the fraction of the pound rather than the silver bullion as the measure of the value of goods, if the former represented the unit of actual cost. But, supposing that the fraction of the pound was the unit of cost, it seems to us that at least under the proviso, if not under the body of the section, the Secretary could order a reliquidation on the basis of the units actually used. It would be simply a correction in conformity with the truth and the actual meaning of the words of the invoice. The other argument for the conclusiveness of the Secretary's action, to which we referred at the outset, was that, for all that appears, this may have been what happened. The gold which the rupee represents is one shilling and four pence, or about thirty-two cents. But, as in this case the exchange value and the value as a fraction of a pound were the same, it does not matter to our decision whether we say that in such circumstances the action of the Secretary was conclusive or say that it was right.

We have shown that in our opinion the proviso, if not the body of § 25, would have warranted the action of the Secretary if it had been a later independent statute. We are of opinion that it is not to be construed differently because of its form. In addition to the considerations which we have mentioned, we are confirmed in our view by the facts which were known at the time. It is true that the most conspicuous recent event was the fluctuation in the value of silver. But the movement of silver, especially after the repeal of the Sherman Act, on November 1, 1893, 28 Stat. 4, had been downward, and the proviso contemplated at least equally a possible rise in the foreign money with which it dealt. On the other hand there was before Congress the Herschell report on the coinage of silver in India, of which six thousand copies had been ordered to be printed by a resolve of the Senate, concurred in by the House, 28 Stat. App. p. 5, and which had been printed in 1893. This report recommended the closing of the mints against the free coinage of silver, and predicted as a consequence the divergence between the intrinsic value of the rupee and the value of its ratio to the pound as fixed, taken hypothetically as one shilling and four pence. It contemplated even a raising of the ratio as possible. The report was followed by the closing of the mints in the same year, and the result predicted came to pass. However small may have been the imports from India in 1894, the fact predicted by the Herschell report was one of the most striking incidents in the recent financial history of the world, and we cannot suppose that it was not considered when the proviso was passed. Before the date of this export gold was adopted as the standard, and the ratio of the rupee fixed at fifteen to one, or one shilling and four pence, in 1899. The exchange value did not change very much, remaining at near the conventional ratio, but the decline in bullion made the divergence referred to more marked. It was objected that some of the facts which we have mentioned were not proved in the case, but they are public facts, and when we are asked to declare that the Secretary

exceeded his power we have to consider what might have been before his mind.

As we have said, it would be only by a very literal construction of the earlier part of § 25, that the collectors would be bound to estimate the value of a cargo invoiced in rupees by the bullion of the rupee when in the invoice rupee meant a certain fraction of a pound. But, however that may be, we are of opinion that when the Secretary has satisfactory evidence of that state of facts, under the proviso he is authorized to order a reliquidation in order to make the value in United States currency correspond with the actual value of the goods. It is not necessary to consider any wider problems as to the power of the Secretary. We confine our decision to the particular case.

Decree reversed.

DISTRICT OF COLUMBIA *v.* BARNES.

APPEAL FROM THE COURT OF CLAIMS.

No. 143. Argued January 23, 1905.—Decided February 27, 1905.

Findings of fact made by the Court of Claims are conclusive here, and the jurisdiction of this court is limited to determination of questions of law.

The intent of the District of Columbia Act of June 16, 1880, 21 Stat. 284, was to enable parties to submit the justice of their claims against the United States for work done in the District prior to March 14, 1876, to adjudication in a competent court, and for that purpose the jurisdiction conferred was equitable as well as legal; under the equitable jurisdiction so conferred the Court of Claims has power to reform a written contract between the District of Columbia and a claimant to supply therein what was omitted by mutual mistake of the parties, and to award money relief to the claimant on the contract as so reformed.

It was also the intention of the act of June 16, 1880, to permit the Court of Claims to adjudicate claims for all work done by order and direction of the Commissioners and accepted by them for the use and benefit of the District of Columbia; for this purpose the statute is remedial, and a claimant, if the facts support his claim, can recover for work so done and

accepted notwithstanding it was under verbal directions of the Commissioners and not under written contract as required by prior acts of Congress.

The main purpose of the Court of Claims is to arrive at and adjudicate the justice of alleged claims against the United States, and the court is not bound by special rules of pleading.

THE action now appealed was brought under the act of June 16, 1880, known as the District of Columbia Claims Act. 21 Stat. 284. The original petition was filed August 4, 1880. At subsequent stages of the case amended petitions were filed. On October 1, 1887, the Court of Claims decided the case in favor of the District of Columbia, giving judgment against the claimant for the sum of $11,074.11. 22 C. Cl. 366. On November 18, 1887, the claimant filed a motion for a new trial, which was submitted on March 28, 1895, and allowed on April 1, 1895. The case was then referred, as provided in the act, and upon report and hearing judgment was rendered on November 11, 1895, against the District for the claimant in the sum of $31,754.57; being rendered for Barnes in the sum of $22,350.54, and for Ritchie, assignee, in the sum of $9,404.03, both sums due and payable as of January 1, 1876. On April 20, 1896, the defendant filed its motion for a new trial, which was granted on May 18, 1896. On March 31, 1902, the court rendered a judgment in favor of the claimant, and his assignee, in the sum of $23,694.47, due and payable as of March 1, 1876. 37 C. Cl. 342. On April 22, 1902, an appeal was taken by the District from the judgment of March 31, 1902, to this court. This appeal was dismissed for want of jurisdiction. *Barnes* v. *District of Columbia*, 187 U. S. 638.

Under the act of March 3, 1903, 32 Stat. 1031, 1070, this appeal from the judgment of March 31, 1902, was taken by the District, bringing the case in review before this court.

Mr. Robert A. Howard, Special Assistant United States Attorney, with whom *Mr. Assistant Attorney General Pradt* was on the brief, for appellant.

No general equity jurisdiction was conferred on the Court

of Claims by the original organic acts. *Klein's Case,* 13 Wall. 128; *De Groot* v. *United States,* 5 Wall. 419, 431; act of 1855, 10 Stat. 612; 1863, 12 Stat. 765; *United States* v. *Alire,* 6 Wall. 573; *Case* v. *Terrell,* 11 Wall. 199; *Bonner* v. *United States,* 9 Wall. 156.

No equity jurisdiction was conferred by the act of 1887, 24 Stat. 505; *Briggs* v. *Boat,* 11 Allen, 157; *United States* v. *Carrie Jones,* 131 U. S. 1, 19. Nor was any general equity jurisdiction conferred by the act of 1880, extending jurisdiction to claims against the District of Columbia. 21 Stat. 284.

For construction of similar grants of jurisdiction see *United States* v. *Arredondo,* 6 Pet. 691, 709; *United States* v. *Lynde's Heirs,* 11 Wall. 632; *Gaines* v. *Miller,* 111 U. S. 395; *Wallis* v. *Shelly,* 30 Fed. Rep. 747. A claim against the District is to the extent of one half thereof, a claim against the United States. 18 Stat. 120, 332; 19 Stat. 211; 20 Stat. 102; *Dist. of Col.* v. *Johnson,* 165 U. S. 330.

If any equity jurisdiction was conferred upon the court under the statute of 1880, that jurisdiction can be exercised only in the manner prescribed for ascertaining equitable rights and administering equitable remedies in the courts of the United States. *Fenn* v. *Holme,* 21 How. 481; *Krippendorf* v. *Hyde,* 110 U. S. 276, 284; *Van Norden* v. *Morton,* 99 U. S. 378; *Thompson* v. *Railroad Co.,* 6 Wall. 134.

The reformation of written contracts is peculiarly a ground for equitable jurisdiction. That this power exists is too well settled to be disputed; but it is a power in courts of equity alone. Story, Eq. Jur. § 164*d; Walden* v. *Skinner,* 101 U. S. 577, 583; *Life Ins. Co.* v. *Mowry,* 96 U. S. 544.

There was no authority in the Board of Public Works or the Commissioners of the District, by memoranda on their journals or by verbal agreements, to change the contracts made under existing law. See act of 1871, 16 Stat. 427; *Barnard* v. *District of Columbia,* 20 C. Cl. 257; *S. C.,* 127 U. S. 409; *S. C.,* 22 C. Cl. 384, and cases cited.

The new contracts under which additional work is claimed

would be *ultra vires*. *Clark* v. *United States*, 95 U. S. 539; *The Harrisburg*, 119 U. S. 199, 214; *Union Pac. Ry. Co.* v. *Wyler*, 158 U. S. 285.

Mr. John C. Fay for appellee:

The facts found are conclusive. *United States* v. *Smith*, 94 U. S. 218. The court is not bound by any special rules of pleading. *United States* v. *Burns*, 12 Wall. 246; *Clark* v. *United States*, 95 U. S. 539; *United States* v. *Benham*, 110 U. S. 338.

The purpose of that court is not to hold claimants down to any special and technical rules of pleading, but if upon the whole case there appears to be a just and equitable demand, the court will allow it, although it had not been technically and critically stated in the petition. *Burk* v. *United States*, 13 C. Cl. 231; *Mfg. Co.* v. *United States*, 16 C. Cl. 296; *Brown* v. *District of Columbia*, 17 C. Cl. 303.

As to equitable jurisdiction of the Court of Claims in this case see *O'Hare* v. *District of Columbia*, 18 C. Cl. 646; *Cullinane* v. *District of Columbia*, 18 C. Cl. 577; *Shipman* v. *District of Columbia*, 18 C. Cl. 291; *S. C.*, aff'd 119 U. S. 148; *Harvey* v. *United States*, 105 U. S. 671; *United States* v. *Jones*, 131 U. S. 18; *South Boston Inv. Co.* v. *United States*, 34 C. Cl. 175; *Milliken* v. *United States*, C. Cl. present term.

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

We deem it unnecessary, in the view taken of this case, to set forth the voluminous findings of fact made upon the trial in the Court of Claims. So much of the findings will be commented on as is necessary to a determination of the legal questions involved, which are within a narrow compass. Nor do we find it necessary to consider the alleged discrepancies between the judgment of the Court of Claims, when the judgment was in favor of the District, 22 C. Cl. 366, and the find-

ings and conclusions when the judgment was rendered which is now appealed to this court. 37 C. Cl. 342.

This court does not sit to review findings of fact made in the Court of Claims. They are regarded as conclusive here, and our jurisdiction is limited to a determination of such questions of law as are properly brought to our attention upon the record. *United States* v. *Smith*, 94 U. S. 214, 218.

The original action was brought in part on two contracts, which were in writing, duly executed by the claimant and in behalf of the District of Columbia, and known as Nos. 264 and 413, and were for certain street improvements in the city of Washington. These contracts were entered into on April 29 and July 23, 1872, respectively, under authority of the act of February 21, 1871. 16 Stat. 419, 427. Certain verbal agreements are also set up as having been entered into between the claimant and the Commissioners of the District.

The Court of Claims, under the proofs, heard the parties upon the question as to the right to reform the two written contracts. It refused to reform contract No. 413, and decreed in favor of the District in the sum of $13,039.79 for over payments made upon that contract. The court did reform contract No. 264, finding that, by mistake in the drafting of the contract, "the rate of 40 cents for grading old gravel streets to a depth of two feet" was omitted therefrom by mutual mistake of the parties, and that the written contract was executed without observing the omission. Upon the contract as reformed the claimant was permitted to recover for work done. Much of the discussion in the oral argument and the brief of the learned counsel for the Government is directed to the authority of the Court of Claims to reform a written contract in the exercise of the jurisdiction of a court of equity for that purpose, and much discussion was had as to the various acts conferring jurisdiction upon that court. But we think a construction of the act under cover of which this suit was prosecuted is all that is necessary to determine the question. The act of June 16, 1880, as appears by its title, was intended

to confer on the Court of Claims jurisdiction to hear and determine all outstanding claims against the District of Columbia. For that purpose it was recited in the first section of the act that the jurisdiction of the court should extend to and it should have original legal and equitable jurisdiction of claims arising out of the contracts made by the Board of Public Works and extensions made thereof by the Commissioners of the District of Columbia, and also of the claims arising out of the contracts made by the Commissioners since the act of June 20, 1874, and broadly for all claims for work done by order or direction of the Commissioners, and accepted by them for the use, purposes or benefit of the District of Columbia, and prior to the fourteenth day of March, 1876.

The language used is of the most comprehensive character, and confers, for the purposes stated, original legal and equitable jurisdiction.

It is true that the purpose of the various acts conferring jurisdiction upon the Court of Claims has been held to be to permit the adjudication of money demands against the United States, and it may be that under this act, as under others, there was no intention to confer equity jurisdiction beyond that which is required to enable a court to determine whether money relief should be granted. The intent of the act was to enable parties to submit the justice of their claims against the United States to adjudication in a competent court. For that purpose the act conferred in terms, equitable as well as legal jurisdiction.

The province of the Court of Claims is to pass upon the justice of the claim and adjudge accordingly. And it is obviously intended that, when necessary to adjudicate claims against the District, the court shall be unhampered in the exercise of jurisdiction, and as in many courts of this country having a civil code, there has been conferred upon the same tribunal the power to grant the necessary legal and equitable relief. One who has the right to money relief upon a contract mistakenly omitted to be reduced to writing, in accordance

with the true agreement of the parties, has a claim of equitable cognizance, for the contract must be reformed to meet the intention of the parties, and when corrected may be adjudged a valid claim.

For the purpose of adjudicating such claims this statute gives to the court equitable jurisdiction in order that it may determine what the District ought to pay to the claimant. Although unable to grant a decree for specific performance or exercise the peculiar powers of a court of equity, the Court of Claims may determine the money relief to which the claimant is entitled, whether arising out of an equitable or legal demand. This principle was recognized in *United States* v. *Jones*, 131 U. S. 1, 18. The Court of Claims in other cases has exercised the equitable jurisdiction conferred in the act of June 16, 1880, *Cullinane* v. *District of Columbia*, 18 C. Cl. 577, 594, and like jurisdiction to reform contracts under the act of March 3, 1887, 24 Stat. 505, *South Boston Iron Works* v. *United States*, 34 C. Cl. 174.

We think that the court had jurisdiction to reform the contract upon the facts found.

It is objected that the Court of Claims awarded relief for certain "stiff clay" excavated under claimant's contract. The findings show that this work was not specifically covered by the original agreement, and that the work was accepted by the Commissioners, and the District received the benefit thereof; and the court finds that the excavation of the stiff clay was done under a verbal agreement with the Commissioners after the performance of the original contract, and that the claimant was entitled to the rate established therefor, as paid to other contractors for like work.

The act of June 16, 1880, permits a recovery for work done by order and direction of the Commissioners and accepted by them for the benefit of the District. While it has been held that this would not authorize a recovery for work done under the original contract, at higher prices than had been agreed upon, yet where there was a revival of the contract for distinct

work there might be a recovery at higher rates, which entered into the terms of renewal as understood by the parties, notwithstanding the preëxisting contract. *Campbell and Eslin* v. *District of Columbia*, 18 C. Cl. 193.

The act of 1874 gave limited power to the Commissioners, and in the act of February 21, 1871, 16 Stat. 419, providing for contracts of the Board of Public Works, it was distinctly provided that all contracts should be in writing and signed by the parties making the same. And it was held that this statute requires contracts to be actually signed and that mere entries on the journals of the board would not satisfy the statute. *Barnard* v. *District of Columbia*, 127 U. S. 409, 411.

But under the statute, June 16, 1880, now under consideration, the intention is manifest to permit the Court of Claims to adjudicate claims for all work done by the order and direction of the Commissioners, and accepted by them for the use, purpose and benefit of the District. For this purpose this is a remedial statute, and it is intended to permit parties to have an adjudication upon their demands where the District had been benefited by work actually done under the order and direction of the Commissioners and duly accepted. And the findings of fact show that the claimant was only permitted to recover for work so performed and accepted. As we have said, this right of recovery might not revive claims for work completed under former contracts, but here the finding is that the new agreement applied to a distinct subject matter and not to work covered by and performed under the original agreement. We find no error in the judgment of the Court of Claims in this regard. And so as to various sums awarded under findings of fact, establishing that more work was made necessary by reason of the change of grade on North Carolina avenue by the Commissioners in 1874, the change of grade making it necessary to further grade Third street, and to do work for that purpose. The findings show that this was done by the direction of the Commissioners and upon terms mutually agreed upon. Under Finding XIV, where the work is found not to

have been done under the original contract, it is found that it was admitted by the defendant to be correct, and is work of which the District has received the full benefit. So as to other findings to which exceptions are made, there is no dispute that the work was actually done to the satisfaction of the Commissioners upon terms agreed upon and the work duly accepted.

As we construe the statute, we think it affords ample authority to grant relief upon the facts found, which findings are conclusive upon us.

It is further urged by counsel for the Government that the pleadings are not sufficient to authorize the judgment, but we think that under the original petition and various amendments thereto the court was authorized to grant the relief adjudged.

The Court of Claims is not bound by special rules of pleading. The main purpose is to arrive at and adjudicate the justice of alleged claims against the United States. *United States* v. *Burns*, 12 Wall. 246, 254; *United States* v. *Behan*, 110 U. S. 338, 347.

On the whole record we find no error of law to the prejudice of the District.

Judgment affirmed.

McCLAINE *v.* RANKIN.

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

No. 58. Argued November 10, 1904.—Decided March 6, 1905.

In the absence of any provision of the act of Congress creating the liability of stockholders of national banks, fixing a limitation of time for commencing actions to enforce it, the statute of limitations of the particular State is applicable.

Although a statutory liability may be contractual, or *quasi*-contractual

in its nature, an action given by statute is not necessarily to be regarded as brought on simple contract, or breach of simple contract.

The liability of stockholders of national banks is conditional, and the right to sue does not obtain until the Comptroller of the Currency has acted; his order is the basis of the suit, and the statute of limitations does not commence to run until assessment made, and then it runs as against an action to enforce the statutory liability and not an action for breach of contract.

As the statute of limitations of Washington has been construed by the courts of that State the time within which such an action must be brought is two years under § 4805, Ballinger's Code, and not within three years under subd. 3 of § 4800.

THE First National Bank of South Bend, Washington, became insolvent and was closed August 10, 1895, and on the seventeenth day of the same month one Heim was appointed receiver, who was succeeded by Aldrich, and Aldrich by George C. Rankin.

August 17, 1896, the acting Comptroller of the Currency levied an assessment against the shareholders of the bank in enforcement of their statutory liability. Adolphus F. McClaine, one of the stockholders, was notified of the levy, and demand was duly made of him to pay the assessment on or before September 17, 1896, and shortly thereafter an action was commenced against him by the receiver to recover the same. Pending the action, efforts to settle the claim were made. Subsequently, the action was dismissed. Thereupon the receiver brought an action against McClaine upon an alleged contract of compromise, which went to trial, and the receiver took a non-suit. The present action was then brought on the assessment, August 15, 1899, and McClaine set up the statute of limitations by demurrer, which the Circuit Court sustained, and dismissed the action. 98 Fed. Rep. 378. The cause was taken to the Circuit Court of Appeals, and the judgment of the Circuit Court reversed. 106 Fed. Rep. 791.

The case having been remanded, the Circuit Court overruled the demurrer, McClaine answered, and a trial was had, resulting in judgment for the receiver, which was affirmed by

the Circuit Court of Appeals. 119 Fed. Rep. 110. This writ of error was then brought.

The following are sections of the statutes of Washington in relation to limitations, as found in Ballinger's Codes:

"SEC. 4796. Actions can only be commenced within the periods herein prescribed after the cause of action shall have accrued, except when in special cases a different limitation is prescribed by statute; but the objection that the action was not commenced within the time limited can only be taken by answer or demurrer.

"SEC. 4797. The period prescribed in the preceding section for the commencement of actions shall be as follows: . . .

"SEC. 4798. Within six years: 1. An action upon a judgment or decree of any court of the United States, or of any State or Territory within the United States;

"2. An action upon a contract in writing, or liability express or implied arising out of a written agreement;

"3. An action for the rents and profits or for the use and occupation of real estate."

"SEC. 4800. Within three years: 1. An action for waste or trespass upon real property;

"2. An action for taking, detaining, or injuring personal property, including an action for the specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated;

"3. An action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument;

"4. An action for relief upon the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud;

"5. An action against a sheriff, coroner, or constable upon a liability incurred by the doing of an act in his official capacity and by virtue of his office, or by the omission of an official duty, including the non-payment of money collected upon

an execution; but this subdivision shall not apply to action for an escape;

"6. An action upon a statute for penalty or forfeiture, where an action is given to the party aggrieved, or to such party and the State, except when the statute imposing it prescribed a different penalty [limitation];

"7. An action for seduction and breach of promise of marriage."

"SEC. 4805. An action for relief not hereinbefore provided for shall be commenced within two years after the cause of action shall have accrued."

Mr. T. O. Abbott for plaintiff in error:

The action is barred by the Washington statute of limitations. Ballinger's Codes, §§ 4796, 4800, 4805.

In Washington there is no statute relating in express language to a liability created by statute, "except for a forfeiture or penalty." An action to enforce such a liability therefore comes within the provision of § 4805, above quoted, because it is an action upon a liability for which no relief is "hereinbefore provided for." *Spokane* v. *Stevens*, 12 Washington, 667; *Ballard* v. *West Coast Co.*, 15 Washington, 572; *State* v. *Ballard*, 16 Washington, 418; *Seattle* v. *De Wolfe*, 17 Washington, 349.

The court below failed to distinguish the rule and relied on *Bank* v. *Hawkins*, 174 U. S. 364; but see *contra*, *McDonald* v. *Thompson*, 184 U. S. 71. *Howarth* v. *Angle*, 56 N. E. Rep. 489, and *Howarth* v. *Lombard*, 56 N. E. Rep. 888, can be distinguished, see *Chapman* v. *Morrell*, 20 California, 137; *Bliss* v. *Sneath*, 119 California, 530; *Wilson* v. *Brook*, 13 Washington, 676; Thompson on Corp. § 1991; Wood Stat. of Lim., 3d ed., § 36; *Robertson* v. *Blaine County*, 90 Fed. Rep. 63; *Bullard* v. *Bell*, 1 Mason, 243; *S. C.*, Fed. Cas. No. 2121; *Shaw* v. *Nor. Pac. R. R. Co.*, 101 U. S. 557; *Johnson* v. *Southern Pacific Ry. Co.*, 117 Fed. Rep. 462.

Mr. F. F. Oldham for defendant in error, contended that

the action is not barred by the two-year provision of the statute of limitations of the State but falls under the three-year provisions. *Bank* v. *Hawkins*, 174 U. S. 364, and cases cited in opinion in this case below, 106 Fed. Rep. 791.

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

It is conceded that, in the absence of any provision of the act of Congress creating the liability, fixing a limitation of time for commencing actions to enforce it, the statute of limitations of the particular State is applicable. Rev. Stat. § 721; *Campbell* v. *Haverhill*, 155 U. S. 610. If, then, this action was barred by the statute of limitations of the State of Washington, that ended it, and both judgments below must be reversed and the cause remanded to the Circuit Court with a direction that judgment be entered for defendant.

Reference to the state statutes shows that subdivision 2 of § 4798 relates to "an action upon a contract in writing, or liability express or implied arising out of a written agreement," while subdivision 3 of § 4800 relates to "an action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument." The one relates to contracts or liabilities growing out of contracts in writing, and the other to contracts or liabilities growing out of contracts not in writing. The receiver's contention is that the case falls within subdivision 3 of § 4800, imposing the limitation of three years. If it does not, it is not otherwise provided for, and falls within § 4805, which fixes the limitation at two years.

And as this action was commenced within three years, but not within two years, after the assessment became due and payable, the question is whether subdivision 3 of § 4800 applies.

It is contended that the meaning of the word "liability" as used in that subdivision is not restricted to contract liabilities, but reading it with subdivision 2 of § 4798, and in

view of the enumeration of other actions to enforce liabilities, we think that this cannot be so, and, indeed, the subdivision has been construed by the Supreme Court of Washington as applicable only to contracts. *Suter* v. *Wenatchee Water Power Company*, 35 Washington, 1; *Sargent* v. *Tacoma*, 10 Washington, 212. The Circuit Court was of that opinion when the case was originally disposed of, and held that the cause of action arose by force of the statute and did not spring from contract. 98 Fed. Rep. 378. But that judgment was reversed by the Circuit Court of Appeals on the ground that the liability was not only statutory but contractual as well, and that the limitation of three years applied in the latter aspect. 106 Fed. Rep. 791. Conceding that a statutory liability may be contractual in its nature, or more accurately, *quasi*-contractual, does it follow that an action given by statute should be regarded as brought on simple contract, or for breach of a simple contract, and, therefore, as coming within the provision in question?

The national bank act provides that "the shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares." Rev. Stat. § 5151.

And under other sections the duty is imposed on the Comptroller of the Currency to give the creditors of an insolvent national bank the benefit of the enforcement of this personal liability, and to decide whether the whole, or a part, and, if only a part, how much, shall be collected, he being also authorized to make more than one assessment, as circumstances may require. *Kennedy* v. *Gibson*, 8 Wall. 498; *Studebaker* v. *Perry*, 184 U. S. 258, and cases cited. But even his decision does not determine the liability except as to contracts, debts, and engagements of the bank lawfully incurred. *Schrader* v. *Manufacturers' National Bank*, 133 U. S. 67.

The liability is conditional, the statutes of limitation do not commence to run until after assessment has been made. *McDonald* v. *Thompson,* 184 U. S. 71.

In the latter case the statute of Nebraska provided (§ 10) that actions must be commenced within five years, "upon a specialty, or any agreement, contract or promise in writing, or foreign judgment;" and (§ 11) within four years "upon a contract not in writing, express or implied; an action upon a liability created by statute other than a forfeiture or penalty."

The action was brought on an assessment upon the stockholders of a national bank to the amount of the par value of the shares, and not to recover an amount unpaid on the original subscription, and it was held that the five-year limitation did not apply, because the cause of action was not upon a written contract, but that the four-year limitation applied, "whether the promise raised by the statute was an implied contract not in writing or a liability created by statute," no distinction between them as to the limitation being made by the state statute. And Mr. Justice Brown, speaking for the court, said: "Whether the promise raised by the statute was an implied contract not in writing or a liability created by statute, it is immaterial to inquire. For the purposes of this case it may have been both. The statute was the origin of both the right and the remedy, but the contract was the origin of the personal responsibility of the defendant. Did the statute make a distinction between them with reference to the time within which an action must be brought it might be necessary to make a more exact definition; but as the action must be brought in any case within four years, it is unnecessary to go further than to declare what seems entirely clear to us, that it is not a contract in writing within the meaning of section 10 of the Nebraska act." And it was also said: "Granting there was a contract with the creditors to pay a sum equal to the value of the stock taken, in addition to the sum invested in the shares, this was a contract created by the statute, and obligatory upon the stockholders by reason of

the statute existing at the time of their subscription; but it was not a contract in writing within the meaning of the Nebraska act, since the writing—that is, the subscription—contained no reference whatever to the statutory obligation and no promise to respond beyond the amount of the subscription. In none of the numerous cases upon the subject in this court is this obligation treated as an express contract, but as one created by the statute and implied from the express contract of the stockholders to take and pay for shares in the association."

In the present case the limitation imposed on an action upon a statute for penalty or forfeiture, where an action was given, was three years (sub. 6, § 4800), and on any other action to enforce a statutory liability was two years, because not otherwise provided for, and, therefore, the question must be met whether this is an action brought on a contract or not. But it is an action to recover on an assessment levied by the Comptroller of the Currency by virtue of the act of Congress, and although the shareholder in taking his shares subjected himself to the liability prescribed by the statute, the question still remains whether that liability constituted a contract within the meaning of the statute of limitations of the State of Washington.

Some statutes imposing individual liability are merely in affirmation of the common law, while others impose an individual liability other than that at common law. If § 5151 had provided that subscribing to stock or taking shares of stock amounted to a promise directly to every creditor, then that liability would have been a liability by contract. But the words of § 5151 do not mean that the stockholder promises the creditor as surety for the debts of the corporation, but merely impose a liability on him as secondary to those debts, which debts remain distinct, and to which the stockholder is not a party. The liability is a consequence of the breach by the corporation of its contract to pay, and is collateral and statutory. *Brown* v. *Eastern Slate Company*, 134 Massa-

chusetts, 590; *Platt* v. *Wilmot*, 193 U. S. 602. In *Matteson* v. *Dent*, 176 U. S. 521, the stock still stood in the name of the decedent, and it was decided that the statutory liability was a debt within the state law, but not that it was a true contract.

It is true that in particular cases the liability has been held to be in its nature contractual, yet it is nevertheless conditional, and enforcible only according to the Federal statute, independent of which the cause of action does not exist, so that the remedy at law in effect given by that statute is subject to the limitations imposed by the state statute on such actions.

Cases such as *Carrol* v. *Green*, 92 U. S. 509, and *Metropolitan Railroad Company* v. *District of Columbia*, 132 U. S. 1, are not controlling, for in them the right to recover was direct and immediate and not secondary and contingent. In *Metropolitan Railroad Company* v. *District of Columbia*, the charter of the company provided "that the said corporation hereby created shall be bound to keep said tracks, and for the space of two feet beyond the outer rail thereof, and also the space between the tracks, at all times well paved and in good order, without expense to the United States or to the city of Washington." The declaration set out a large amount of paving done by the city, which it was averred should have been done by the company. The action was based on the implied obligation on the part of defendant to reimburse plaintiff for moneys expended in performing the duty, which the statute imposed on defendant. In *Carrol* v. *Green* it was said: "According to the statute, the liability of 'each stockholder' arose upon 'the failure of the bank.' The liability gave at once the right to sue; and, by necessary consequence, the period of limitation began at the same time."

But here the right to sue did not obtain until the Comptroller of the Currency had acted, and his order was the basis of the suit. The statute of limitations did not commence to run until assessment made, and then it ran as against an action

to enforce the statutory liability and not an action for breach of contract.

We think that subdivision 3 of § 4800 did not apply, and that § 4805 did.

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 a direction to sustain the demurrer and enter judgment for defendant.

MR. JUSTICE WHITE, with whom concur MR. JUSTICE BROWN and MR. JUSTICE MCKENNA, dissenting.

The statutes of the State of Washington limit to three years the right to bring "an action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument." The cause of action here involved is now held not to be embraced within this statute, and therefore barred by the following provision: "An action for relief, not hereinbefore provided for, shall be commenced within two years after the cause of action shall have accrued."

The liability sought to be enforced is the obligation of a shareholder of a national bank to pay an amount equal to the par of his shares of stock. The Circuit Court held the action not to be one upon contract, but to enforce a conditional liability imposed by the law as an incident to ownership of bank stock, and therefore barred by two years. 98 Fed. Rep. 378. The Circuit Court of Appeals reversed this judgment, and decided that the period of limitation was three years, because the liability was contractual. 106 Fed. Rep. 791.

In *Suter* v. *Wenatchee Water Power Company*, decided April 18, 1904, 35 Washington, 1, the Supreme Court of Washington construed the provision of the statutes of limitation here involved, providing that an action might be brought within three years "upon a contract or liability, express or implied, which is not in writing," and held that it did not embrace torts, "but was evidently intended to refer to a con-

tractual liability." The court in its opinion, among other authorities, referred to this case as decided below, saying:

"Such, in effect, was the decision in *Sargent* v. *Tacoma,* 10 Washington, 212, 215. The same statute was so construed by the United States Circuit Court, District of Washington, in *Aldrich* v. *Skinner,* 98 Fed. Rep. 375, and also in *Aldrich* v. *McClaine,* 98 Fed. Rep. 378. The last-named case was, on appeal to the United States Circuit Court of Appeals, reversed. *Aldrich* v. *McClaine,* 106 Fed. Rep. 791. The reversal was, however, upon the ground that the liability involved was a contractual one, the lower court having held otherwise. The appellate court construed the statute itself as did the lower court."

It might well be considered that the Supreme Court of Washington regarded the interpretation of the Court of Appeals as harmonizing with its own views of the meaning of the provision in question. But be this as it may, the prior decisions of this court to me seem conclusive, since, in deciding various questions concerning the liability of stockholders in national banks to pay the double liability, this court has expressly held that such liability is contractual. *Matteson* v. *Dent,* 176 U. S. 521, 525, 526; *Concord First National Bank* v. *Hawkins,* 174 U. S. 364, 372; *Richmond* v. *Irons,* 121 U. S. 27, 55, 56. In *Richmond* v. *Irons* the court said (pp. 55, 56):

"Under that act the individual liability of the stockholders is an essential element in the contract by which the stockholders became members of the corporation. It is voluntarily entered into by subscribing for and accepting shares of stock. Its obligation becomes a part of every contract, debt, and engagement of the bank itself, as much so as if they were made directly by the stockholder instead of by the corporation. There is nothing in the statute to indicate that the obligation arising upon these undertakings and promises should not have the same force and effect, and be as binding in all respects, as any other contracts of the individual stockholder. We hold, therefore, that the obligation of the stockholder survives as

against his personal representatives. *Flash* v. *Conn*, 109 U. S. 371; *Hobart* v. *Johnson*, 19 Blatchford, 359. In Massachusetts it was held, in *Grew* v. *Breed*, 10 Met. 569, that administrators of deceased stockholders were chargeable in equity, as for other debts of their intestate, in their representative capacity."

In *Matteson* v. *Dent* the evidence showed that at the time of the death of Matteson he was the owner of ten shares of stock in a national bank, a going concern. His widow and heirs, by the decree of a probate court of Minnesota, became the joint and undivided owners of the stock, which continued, however, to stand in the name of Matteson. Thereafter the bank failed, and, on the ground that they had received assets of the estate, a suit was brought against the widow and heirs for the amount of an assessment made by the Comptroller against the stock. The suit was defended on two grounds, first, that the assessment was not binding, because the bank had not failed at the time of Matteson's death and at the time when, by the decree of the probate court, the widow and heirs had become the owners in indivision of the stock; and, second, that under the national banking law they could only be made liable in any event, each in proportion to his or her interest in the stock. In considering the first ground the court, approvingly citing the passage from *Richmond v. Irons* above quoted, said (p. 524):

"Because the insolvency of the bank took place after the death of Matteson, did it result that the assessment, which was predicated upon the insolvency, was not a debt of his estate? To so decide the statute must be construed as imposing the liability on the shareholder for the amount of his subscription when necessary to pay debts, only in case insolvency arises during the lifetime of the shareholder. In other words, that all liability of shareholders, to contribute to pay debts, ceases by death. This construction, however, would be manifestly unsound. The obligation of a subscriber to stock, to contribute to the amount of his subscrip-

tion for the purpose of the payment of debts, is contractual, and arises from the subscription to the stock. True, whether there is to be a call for the performance of this obligation depends on whether it becomes necessary to do so in consequence of the happening of insolvency. But the obligation to respond is engendered by and relates to the contract from which it arises. This contract obligation, existing during life, is not extinguished by death, but like other contract obligations survives and is enforceable against the estate of the stockholder."

And the same principle has been applied to similar liabilities imposed upon stockholders in state corporations, the court uniformly holding that the liability, although statutory in its origin, was contractual in its nature, and therefore the cause of action was transitory. *Whitman* v. *Oxford National Bank*, 176 U. S. 559; *Flash* v. *Conn*, 109 U. S. 371.

In *Whitman* v. *Bank*, discussing a statute of the State of Kansas, the court, through Mr. Justice Brewer, said (p. 563):

"The liability which by the constitution and statutes is thus declared to rest upon the stockholder, though statutory in its origin, is contractual in its nature. It would not be doubted that if the stockholders in this corporation had formed a partnership, the obligations of each partner to the others and to creditors would be contractual, and determined by the general common law in respect to partnerships. If Kansas had provided for partnerships with limited liability, and these parties, complying with the provisions of the statute, had formed such a partnership, it would also be true that their obligations to one another and to creditors would be contractual, although only in the statute was to be found the authority for the creation of such obligations. And it is none the less so when these same stockholders organized a corporation under a law of Kansas, which prescribed the nature of the obligations which each thereby assumed to the others and to the creditors. While the statute of Kansas permitted the forming of the corporation under certain conditions, the action

of these parties was purely voluntary. In other words, they entered into a contract authorized by statute."

And the principle sustained by the previous decisions of this court is also supported by the decisions of state courts of last resort. Thus, the Supreme Judicial Court of Maine in *Pulsifer* v. *Greene*, 96 Maine, 438, held the doctrine to be consonant with reason and natural justice and sustained by the weight of authority, the court citing not only the decisions of this court previously referred to, but also decisions of the courts of California, Connecticut, Illinois, Kansas, Massachusetts and Michigan. And the decisions of the state courts of last resort thus referred to were in many cases in part rested upon the previous adjudications of this court to which I have referred, those decisions being considered as conclusive on the subject of the contract nature of the liability. My mind sees no reason for saying that the doctrine thus settled is not applicable to a statute of limitations, for if the liability of the stockholder be contractual, for the purpose of enforcing the obligation, it is not by me perceived upon what principle it can be held that it is not contractual but purely statutory for the purpose of determining whether an action to enforce the liability is barred by a statute of limitations. But the unsoundness of the distinction as an original question in my opinion does not require to be demonstrated, since it is absolutely foreclosed by previous decisions of this court. Thus, in *Carrol* v. *Green*, 92 U. S. 509, an action against stockholders of a South Carolina bank to enforce a double liability provided for in the act of incorporation, it was expressly held that as the liability was contractual it was barred by a statute of limitations applicable to simple contract indebtedness. Reference was made to decisions of the courts of New York and Massachusetts, holding the same doctrine in analogous cases (pp. 514, 515), and, in concluding the opinion, the court expressly noticed and overruled the contention "that the liability here in question being created by a statute is to be regarded as a debt by specialty."

Carroll v. *Green* was subsequently approved and followed in *Metropolitan Railroad* v. *District of Columbia*, 132 U. S. 1. The action was to recover the cost of certain street paving, the liability being recited in the act of incorporation. The trial court overruled demurrers to pleas of the statute of limitations, among other reasons, upon the ground that the action was founded on a statute, and that the statute of limitations did not apply to actions founded on statutes or other records or specialties. This ruling was held to be erroneous, the court saying (p. 12):

"It is an action on the case upon an implied assumpsit arising out of the defendant's breach of a duty imposed by statute, and the required performance of that duty by the plaintiff in consequence. This raised an implied obligation on the part of the defendant to reimburse and pay to the plaintiff the moneys expended in that behalf. The action is founded on this implied obligation, and not on the statute, and is really an action of assumpsit. The fact that the duty which the defendant failed to perform was a statutory one, does not make the action one upon the statute. The action is clearly one of those described in the statute of limitations."

To avoid the controlling effect of these rulings upon this case, on the theory that by virtue of the statutes which were considered in *Carrol* v. *Green*, and the *Metropolitan Railroad case*, the right to recover was direct and immediate, whilst in the case at bar, in consequence of provisions of the national banking act, the right to recover is secondary and contingent, is in effect, in my opinion, to overrule the cases in this court determining that the liability of a stockholder in a national bank is contractual. This becomes apparent when the ground of the alleged distinction is considered. That ground is this, that as the national banking act empowers the Comptroller to determine the necessity for an assessment on the stockholders of national banks and to make a call for such assessment, thereby the obligation of the stockholder becomes secondary and contingent, and hence statutory and not con-

tractual. To me it seems that this interpretation, whilst overruling the previous cases also originally considered, gives to the national banking act an erroneous construction. The mere fact that the act gives to the Comptroller the power of making a call on stockholders for the purpose of enforcing their contract liability, in my judgment lends no support to the proposition that the ministerial duty created to better enforce the contract must be considered as destroying the contract itself. The consequences which must arise from the new construction now placed upon the national banking act, it seems to me, will be of the most serious nature, and being unable to agree with such construction I cannot concur in the opinion and judgment of the court.

I am authorized to say that MR. JUSTICE BROWN and MR. JUSTICE MCKENNA join this dissent.

DALLEMAGNE *v.* MOISAN.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

No. 104. Submitted December 15, 1904.—Decided March 13, 1905.

Power may be conferred upon a state officer, as such, to execute a duty imposed under an act of Congress, and the officer may execute the same, unless its execution is prohibited by the constitution or legislation of the State.

There is no constitutional or statutory provision of California prohibiting the arrest of a seaman on the request of a French consul under the treaty with France of 1853, and such arrest, being for temporary detention of a sailor whose contract is an exceptional one, does not deprive him of his liberty without due process of law, and if the chief of police voluntarily performs the request of the consul the arrest is not illegal on that ground.

The only method of enforcing treaty provisions for arrest of seamen on requisition of foreign consuls is pursuant to the act of June 11, 1864, 13 Stat. 121, now §§ 4079, 4080, 4081, Rev. Stat., and thereunder the requisition must be made to the District Court or judge and the arrest made by the marshal, and an arrest by a local chief of police is not authorized; but if after a seaman so arrested has been produced before the District Court on *habeas corpus* and the court finds that his case

comes under the treaty and he should be held, the mere fact that he was arrested by a person not authorized to do so does not entitle him to his discharge.

After a seaman has been properly arrested on the request of the French consul under the treaty of 1853 with France, he can he held in prison at the disposal of the consul for sixty days, as provided for in § 4081, Rev. Stat., and the court cannot discharge him within that period against the protest of the consul because the vessel to which he belonged has left the port at which he was arrested.

THIS is an appeal on the part of the consul general of the Republic of France from the judgment of the District Court of the United States for the Northern District of California, discharging the defendant Moisan from imprisonment.

The proceeding arises on *habeas corpus*, to inquire into the validity of the detention of defendant in the city prison of San Francisco, in the State of California. His application for the writ was addressed to the District Court of the United States for the Northern District of California, and it showed that he was a citizen of France and was imprisoned by virtue of a requisition in writing, signed by the French consul general residing in San Francisco, and addressed to the chief of police of San Francisco, California, requiring his arrest as one of the crew of the French ship Jacques, then in that port, on account of his insubordinate conduct as one of such crew. (The requisition contained all the averments of facts which would warrant the arrest of the petitioner under the provisions of the treaty of 1853 between the United States and France.) The petitioner also averred that at the time of the making of his application for the writ the ship was not in the port of San Francisco, but had departed therefrom some time before. The petitioner was arrested by the chief of police, under such requisition, on the first day of May, 1903, and since that time had been confined in the city prison of San Francisco. He asserted that his imprisonment was illegal, because the facts set forth did not confer jurisdiction upon the consul or the chief of police, or either of them, to restrain complainant from his liberty, or to imprison him.

The petition was dated the twenty-sixth day of May, 1903, and the writ was issued, returnable before the District Court on the twenty-eighth day of May, 1903. The chief of police produced the body of the defendant, pursuant to the command of the writ, and justified the imprisonment, under the requisition referred to.

The District Court, after hearing counsel, made an order discharging the defendant from arrest, on the ground that it appeared to the court that the bark Jacques, of the crew of which the defendant was a member, had departed from the port of San Francisco, and was no longer in that port. It was further ordered that the execution of the order should be stayed for the term of one day. Immediately thereon the consul general filed with the District Court his petition for appeal to the Supreme Court of the United States from the judgment discharging the defendant from imprisonment, which appeal was duly allowed, and thereupon the petitioner was admitted to bail by the District Court.

Mr. Walter V. R. Berry and *Mr. Benjamin S. Minor* for appellant:

The requisition on the chief of police was made in pursuance of the treaty of 1853. The sole reason for the discharge was that the vessel had left the port. The word "their" in the expression "whole time of their stay in port" does not refer to the vessels but to the persons arrested. The construction given by the court below is extraordinary and would render the provision useless. The contract of a sailor is an exceptional one. *Robertson* v. *Baldwin*, 165 U. S. 275, and treaty provisions such as this are usual between civilized nations. *Wildenhus's case*, 120 U. S. 1, 12. The wording of Art. VIII of the treaty is so definite and precise that there is no room for interpretation and the construction put upon it by the court below could be regarded as indicating a purpose to change the law by judicial action. As to interpretation of a plain unambiguous sentence see Am. & Eng. Ency. of Law,

vol. 17, p. 4; vol. 26, p. 598; vol. 28, p. 489; 2 Phillinore, § 70; 1 Halleck Int. Law, ch. VIII, § 39, p. 297; 2 Vattel Droit des Gens, § 263; Calvo, § 1650; *Bale Refrigerating Co.* v. *Sulzberger*, 157 U. S. 1; *Tucker* v. *Alexandroff*, 183 U. S. 424, 437.

A treaty should be carried out in a spirit of *uberrima fides* and construed so as to give effect to the objects designed. *In re Ross*, 140 U. S. 453, 475. Courts will not, if it can be avoided, find any interpretation violating the pledged faith of the Government. *Ropes* v. *Clinch*, 8 Blatch. 304.

Mr. William Denman for appellee:

A Federal treaty cannot impose on a state officer a function violating the constitution of the State which he represents in his official character. Const. California, Art. I, §§ 7, 8, 13, 15.

As neither information nor indictment had been filed against Moisan nor was he held pending the preferment of any charges leading to an information or indictment, or any prosecution under California law, Moisan was held in violation of the state constitution. Sec. 1977, Rev. Stat.; *Yick Wo* v. *Hopkins*, 118 U. S. 356.

The same principle of the inviolability of the machinery of a State from Federal interference has been laid down where national stamp duties were attempted to be imposed upon the process of state courts and taxation of salaries. *Warren* v. *Paul*, 22 Indiana, 279; *Jones* v. *Estate of Kesp*, 19 Wisconsin, 390; *Fifield* v. *Close*, 15 Michigan, 505; *Smith* v. *Short*, 40 Alabama, 385.

A Federal treaty cannot compel a State to enforce the penal laws of a foreign country by assisting in extradition or otherwise. The process attempted is in the nature of an extradition of an alleged offender against French law. The State cannot lend its assistance to this. The general rule that a State cannot enforce the criminal laws of a foreign government finds no exception in the state or Federal Constitution. *The Antelope*, 10 Wheat. 66, 123; *Huntington* v. *Attrill*, 146 U. S. 657. Extradition, as a part of the criminal procedure of a foreign

nation, is no exception to the general rule. *Holmes* v. *Jennison*, 14 Peters, 540; *Ex parte Holmes*, 12 Vermont, 631; *People* v. *Curtis*, 50 N. Y. 321.

Congress has construed the treaty to apply to Federal authorities only and has enacted legislation to carry the treaty into effect with which the appellant has not complied. Rev. Stat. §§ 4079, 4080, 4081.

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

This case involves the construction of certain language in the eighth article of the consular convention between the United States and France, concluded on the twenty-third day of February, 1853, and proclaimed by the President of the United States on the twelfth day of August, 1853, the whole convention being still in full force and effect. 10 Stat. 992, 996. The article is reproduced in the margin.[1]

The first objection made by the defendant is to the validity of the requisition of the consul general, because it was directed to the chief of police of San Francisco, he being an officer of the State as distinguished from a Federal officer, the defendant contending that a Federal treaty cannot impose on a state officer, as such, a function violating the constitution of the

[1] Article VIII. The respective consuls general, consuls, vice consuls, or consular agents, shall have exclusive charge of the internal order of the merchant vessels of their nation, and shall alone take cognizance of differences which may arise, either at sea or in port, between the captain, officers, and crew, without exception, particularly in reference to the adjustment of wages and the execution of contracts. The local authorities shall not, on any pretext, interfere in these differences, but shall lend forcible aid to the consuls, when they may ask it, to arrest and imprison all persons composing the crew whom they may deem it necessary to confine. Those persons shall be arrested at the sole request of the consuls, addressed in writing to the local authority, and supported by an official extract from the register of the ship or the list of the crew, and shall be held, during the whole time of their stay in the port, at the disposal of the consuls. Their release shall be granted at the mere request of the consuls made in writing. The expenses of the arrest and detention of those persons shall be paid by the consuls.

State which he represents in his official character. It has long been held that power may be conferred upon a state officer, as such, to execute a duty imposed under an act of Congress, and the officer may execute the same, unless its execution is prohibited by the constitution or legislation of the State. *Prigg* v. *Pennsylvania*, 16 Pet. 539, 622; *Robertson* v. *Baldwin*, 165 U. S. 275. As to the objection that there was any statute or any constitutional provision of the State, prohibiting the execution of the power conferred by the treaty upon the state officer, we think it unfounded. We find nothing in the constitution or in the statutes of California which forbids or would prevent the execution of the power by a state officer, in case he were willing to execute it. The provisions in the constitution of the State, cited by counsel for defendant, relate in substance only to the general proposition that no person should be deprived of his liberty without due process of law. The execution of a treaty between the United States and a foreign government, such as the one in question, would not violate any provision of the California constitution; the imprisonment is not pursuant to a conviction of crime but is simply a temporary detention of a sailor, whose contract of service is an exceptional one, *Robertson* v. *Baldwin*, *supra*, for the purpose of securing his person during the time and under the circumstances provided for in the treaty, as concerning the internal order and discipline of the vessel. The murder on a foreign vessel, while in one of the ports of this country, of one of the crew of such vessel by another member of that crew has been held not to come within the terms of a somewhat similar treaty with Belgium, because the crime charged concerned more than the internal order or discipline of the foreign vessel. *Wildenhus's case*, 120 U. S. 1.

The chief of police voluntarily performed the request of the consul as contained in the written requisition, and the arrest was, therefore, not illegal so far as this ground is concerned.

There is another difficulty, however, and that is founded upon the provisions of the statutes of the United States. By

the act of Congress, approved June 11, 1864, 13 Stat. 121, entitled "An act to provide for the execution of treaties between the United States and foreign nations respecting consular jurisdiction over the crews of vessels of such foreign nations in the waters and ports of the United States," full provision was made for the execution of such treaties. It was therein provided (section second) that application for the arrest might be made "to any court of record of the United States, or any judge thereof, or to any commissioner appointed under the laws of the United States." The act then provided for the issuing of a warrant for the arrest of the individual complained of, directed to the marshal of the United States, and requiring him to arrest the individual and bring him before the court or person issuing the warrant, for examination, and if, on such examination, it appeared that the matter complained of concerned only the internal order or discipline of the foreign ship, the court should then issue a warrant committing such person to prison, etc. It was further provided that no person should be detained more than two months after his arrest, but at the end of that time he should be allowed to depart and should not again be arrested for the same cause. The act was carried forward, in substance, into the Revised Statutes of the United States as sections 4079, 4080, 4081. See also 2 Comp. Stat. page 2776. This statute having been passed by the United States for the purpose of executing the treaties it had entered into with foreign governments, must be regarded as the only means proper to be adopted for that purpose. Consequently, the requisition of the consul general should have been presented to the District Court or judge, etc., pursuant to the act of Congress, and the arrest should have been made by the marshal as therein provided for. Therefore the arrest of the seaman by the chief of police was unauthorized. When, however, the defendant was brought before the District Court of the United States upon the writ of *habeas corpus*, that court being mentioned in the statute as one of the authorities to issue warrants for the arrest of the

individual complained of, and having power under the statute to examine into the question and to commit the person thus arrested to prison according to the provisions of the act, it would have been the duty of the court, under such circumstances, upon the production of the defendant under the writ, and upon the request of the consul, to have made an examination, and to have committed the defendant to prison if he were found to come under the terms of the treaty. It was, therefore, but a formal objection to the regularity of the arrest, which would have been obviated by the action of the court in examining into the case, and the defendant would not have been entitled to discharge merely because the person executing the warrant was not authorized so to do.

The important question remains as to the true construction of the eighth article of the treaty, with reference to the limitation of the imprisonment of the person coming within its terms. The District Court has held that the imprisonment must end with the departure of the vessel from the port at which the seaman was taken from the vessel. This we regard as an erroneous construction of the terms of the article.

The provisions of that article seem to us plain, and they refer to the imprisonment of the seaman and his detention during the time of his stay in port, and the language does not refer in that respect to the stay of the ship in port. The treaty provides that the local authorities shall lend forcible aid to the consuls when they may ask for the arrest and imprisonment of persons composing the crew, whom they may deem it necessary to confine. The language has no reference whatever to the ship, and they (the persons arrested) are held during their stay in the port "at the disposal of the consul." Surely the ship is not held at the disposal of the consul. It is the persons arrested who are held, and they are to be released at the mere request of the consul, made in writing, and the expenses of the arrest and detention of the persons arrested are to be paid by the consul. From the language of the treaty the departure of the ship from the port need have no effect

whatever upon the imprisonment of the persons arrested. The statute (sec. 4081 of the Rev. Stat.) provides that the imprisonment shall in no case last longer than two months, and at the end of that time the person arrested is to be set at liberty, and shall not again be arrested for the same cause. The statute makes no reference to the stay of the vessel in port, and the legislative construction of the treaty is that the imprisonment is not limited by the departure of the ship. Therefore the statute provides that such imprisonment shall not last, in any event, longer than two months. That term might end while the vessel was still in port. This construction not only carries out the plain language of the treaty, but, it seems to us, it is its reasonable interpretation. A vessel may arrive in port with a mutinous sailor, whose arrest is asked for under the treaty. When imprisoned pursuant to the terms of the treaty he ought not to be discharged without the request of the consul while within the limit of the term of imprisonment provided by the statute, simply because the vessel from which he was taken has left the port. If that were so the result would be either that the sailor would be discharged as soon as the ship left the port, or, in order to prevent such discharge, he would be taken on board the ship again, and probably be placed in irons. The ship might then continue a voyage which would not bring it back to France for months. During this time the sailor might be kept in irons and in close confinement on board ship, or else the discipline and safety of the ship might be placed in peril. By the other construction, although the ship had left the port without the mutinous sailor, he would not be entitled to his discharge from imprisonment within the two months provided for by the statute, and this would give an opportunity to the consul to send the sailor back to France at the earliest opportunity and at the expense of the French Government, by a vessel which was going directly to that country.

The District Court erred in discharging the defendant before the expiration of the two months provided for in the act of

Congress, and against the protest of the French consul. Less than one of the two months of imprisonment permitted by the statute had expired when the defendant was discharged. The order discharging him must be reversed and the defendant remanded to imprisonment in a prison where prisoners under sentence of a court of the United States may be lawfully committed, Rev. Stat. § 4081, subject to the jurisdiction of the French consular authority of the port of San Francisco, but such imprisonment must not exceed, when taken with the former imprisonment of the defendant, the term of two months in the aggregate.

Reversed, and remanded for further proceedings consistent with this opinion.

MR. JUSTICE HARLAN dissented.

CITY OF DAWSON *v.* COLUMBIA AVENUE SAVING FUND, SAFE DEPOSIT, TITLE AND TRUST COMPANY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

No. 154. Argued January 26, 27, 1905.—Decided March 27, 1905.

An arrangement of parties which is merely a contrivance between friends to found jurisdiction on diverse citizenship in the Circuit Court will not avail, and when it is obvious that a party who is really on complainant's side has been made a defendant for jurisdictional reasons, and for the purpose of reopening in the United States courts a controversy already decided in the state courts, the court will look beyond the pleadings and arrange the parties according to their actual sides in the dispute.

The wrongful repudiation of, and refusal to pay, a contract debt by a city may amount merely to a naked breach of contract, and in the absence of any legislative authority affecting the contract or on which the refusal to pay is based, the mere fact that the city is a municipal corporation does not give to its refusal the character of a law impairing the obliga-

tion of contracts or depriving a citizen of property without due process of law, and give rise to a suit under the Constitution of the United States within the jurisdiction of the Circuit Court.

THE facts are stated in the opinion.

Mr. Charles A. Douglass and *Mr. Dupont Guerry*, with whom *Mr. Homer Guerry* was on the brief, for appellant.

Mr. Olin J. Wimberly, with whom *Mr. John I. Hall* was on the brief, for appellee.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity brought in the Circuit Court by the appellee, the Trust Company, as mortgagee of the Dawson Water Works Company, to restrain the city of Dawson from taking measures to build a new set of water works, and to compel it specifically to perform a contract made with the Water Works Company in 1890 to pay that company or its mortgagee a certain sum for the use of its water for twenty years. The Trust Company is a Pennsylvania corporation, and the only ground of jurisdiction for the bill as originally filed was diversity of citizenship. The bill, after stating the contract, set up a formal repudiation of the same by the city on June 27, 1894, refusals to pay for the water from that time, and attempts to collect taxes which by the contract were to be satisfied by the furnishing of water, but alleged a continued use of the water by the city. It further stated the calling of an election for December 12, 1894, to see if the city should issue bonds to erect or buy water works or electric lights, a vote in favor of the issue, an issue of ten thousand dollars for the erection of an electric light plant, and a present intent to sell the residue for the purpose of erecting new water works. It also alleged that the Water Works Company, recognizing the plaintiff's right to be paid the rentals for the water in the events which had happened, which had made the Water Works

Company unable to pay the interest on the mortgage, had yielded to the plaintiff's demand that it should collect the rentals, and that the plaintiff had notified the city and had made demand, but that the city refused to pay. Other details are immaterial. The Water Works Company was made a party defendant and was served with process. An answer was served, although not filed, by the defendants other than the Water Works Company, setting up among other things that the Water Works Company was the real plaintiff, and was made defendant solely to avoid the effect of a decision by the Supreme Court of the State in a suit by the Water Works Company against the city to the effect that the contract relied on was void. 106 Georgia, 696. The answer on this ground denied the jurisdiction of the court. After service of this answer the bill was amended so as to allege that the acts of the city impaired the obligation of its contract, and deprived the plaintiff of its property without due process of law, contrary to the Constitution of the United States. A prayer was added also that the Water Works Company be decreed to perform its contract with the city, that thereby the rights of bondholders might be saved. The further proceedings do not need mention. They ended in a decree in accordance with the prayer, and the city appealed to this court. *Davis & Farnum Mfg. Co.* v. *Los Angeles*, 189 U. S. 207, 216.

We are of opinion that the bill should have been dismissed for want of jurisdiction. The Water Works Company is admitted to have been a necessary party, and it, like the defendant city, was a Georgia corporation. It was made a defendant, but the court will look beyond the pleadings and arrange the parties according to their sides in the dispute. When that is done it is obvious that the Water Works Company is on the plaintiff's side and was made a defendant solely for the purpose of reopening in the United States Court a controversy which had been decided against it in the courts of the State. There was a pretense of asking relief against it, as we have stated, but no foundation for the prayer was laid in the allegations

of the bill. On the contrary, it appears from those allegations that the Water Works Company insisted on its contract with the city, and did everything in its power to carry the contract out. It also recognized the plaintiff's right to receive the rentals and yielded to its demand. No difference or collision of interest or action is alleged or even suggested. If we assume that the plaintiff is more than an assignee of the city's contract to pay, which we do not intimate, still, when the arrangement of the parties is merely a contrivance between friends for the purpose of founding a jurisdiction which otherwise would not exist, the device cannot be allowed to succeed. See *Removal Cases*, 100 U. S. 457, 469; *Hawes* v. *Oakland*, 104 U. S. 450, 453; *Detroit* v. *Dean*, 106 U. S. 537, 541; *Doctor* v. *Harrington*, 196 U. S. 579. Act of March 3, 1875, c. 137, § 5. 18 Stat. 470.

The attempt by an afterthought to give jurisdiction by setting up constitutional rights must fail also. The bill presents a naked case of breach of contract. The first step of the city was to repudiate the contract and to refuse to pay. Whatever it may have done subsequently, its wrong, if, contrary to the decision of the Supreme Court of the State, there was a wrong, was complete then. The repudiation and refusal were kept up until the bill was filed and the other acts were subsequent, subordinate to and in aid of them. The mere fact that the city was a municipal corporation does not give to its refusal the character of a law impairing the obligation of contracts or deprive a citizen of property without due process of law. That point was decided in *St. Paul Gas Light Co.* v. *St. Paul*, 181 U. S. 142, 150.

Undoubtedly the decisions on the two sides of the lines are very near to each other. But the case at bar is governed by the one which we have cited and not by *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1, which is cited and distinguished in *St. Paul Gas Light Co.* v. *St. Paul*. In *Vicksburg Water-Works Co.* v. *Vicksburg*, 185 U. S. 65, the city had made a contract with the water works company, and afterwards a

law was passed authorizing the city to build new works. The city, acting under this law, denied liability, and took steps to build the works, whereupon the water works company filed its bill, alleging the law to be unconstitutional. The bill was held to present a case under the Constitution. In the case before us there was no legislation subsequent to the contract, and it is not even shown that there is color of previous legislation for the city's acts. Those acts are alleged to be unlawful, and the allegation would be maintained by showing that they were not warranted by the laws of the State. See *Hamilton Gas Light Co.* v. *Hamilton City*, 146 U. S. 258, 266; *Lehigh Water Co.* v. *Easton*, 121 U. S. 388, 392. We repeat that something more than a mere refusal of a municipal corporation to perform its contract is necessary to make a law impairing the obligation of contracts or otherwise to give rise to a suit under the Constitution of the United States. The decree of the Circuit Court must be reversed and the cause remanded with instructions to dismiss the bill. *Newburyport Water Co.* v. *Newburyport*, 193 U. S. 561, 576.

Decree reversed.

MR. JUSTICE BREWER and MR. JUSTICE MCKENNA dissented.

MR. JUSTICE WHITE, not having been present at the argument, took no part in the decision.

GREGG *v.* METROPOLITAN TRUST COMPANY.

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

No. 141. Argued January 20, 23, 1905.—Decided March 6, 1905.

Claims for supplies furnished to a railroad company within six months before the appointment of a receiver are not entitled under any general rule to precedence over a lien expressly created by a mortgage recorded before the contracts for such supplies were made.

Under the orders authorizing receiver's certificates involved in this case one furnishing ties within six months prior to the appointment of the receiver, and some of which were not used until after such appointment, *held* not entitled to payment therefor out of the proceeds of the certificates.

THE facts are stated in the opinion.

Mr. Harlan Cleveland for petitioner:

The diversion of current earnings for the benefit of the first mortgage bondholders was not a condition precedent to the payment of Gregg as a supply claimant out of the proceeds of the sale of the mortgaged property. *Central Trust Co.* v. *East Tenn., V. & G. R. Co.*, 80 Fed. Rep. 624; *Miltenberger* v. *Railway Co.*, 106 U. S. 286, 311; *Burnham* v. *Bowen*, 111 U. S. 776, 781; *Kneeland* v. *Trust Co.*, 136 U. S. 89, 97; *Thomas* v. *Car Co.*, 149 U. S. 94, 117, see *contra*, however, *International Trust Co.* v. *Townsend Brick Co.*, 95 Fed. Rep. 850, 860; and see also *Rhode Island Locomotive Works* v. *Trust Co.*, 108 Fed. Rep. 5; *New England R. R. Co.* v. *Carnegie Steel Co.*, 75 Fed. Rep. 54; *Wood* v. *N. Y. & New Eng. R. R. Co.*, 70 Fed. Rep. 741; *Finance Co.* v. *Charleston &c. R. R. Co.*, 62 Fed. Rep. 205; *St. Louis Trust Co.* v. *Riley*, 70 Fed. Rep. 32; *Central Trust Co.* v. *Clark*, 81 Fed. Rep. 269; *N. Y. Guaranty I. Co.* v. *Tacoma Ry. Co.*, 83 Fed. Rep. 365; *Trust Co.* v. *Illinois Midland Co.*, 117 U. S. 434; *V. & A. Coal Co.* v. *Cent. Railroad Co.*, 170 U. S. 355, 365.

This court has never refused to pay supply claimants out of the *corpus*, on the ground that there has been no diversion of earnings; and has never formulated any such doctrine; nor have its decisions been construed as formulating any such doctrine except by the Circuit Court of Appeals for the Sixth Circuit. Four other courts of equal jurisdiction have interpreted its decisions as being quite the contrary.

The only cases in this court in which a charge against the *corpus* of the property has been denied are the following: *Fosdick* v. *Schall*, 99 U. S. 235; *Huidekoper* v. *Locomotive Works*, 99 U. S. 258; *Penn* v. *Calhoun*, 121 U. S. 251; *St. Louis &c. R. R.* v. *Cleveland &c. R. R.*, 125 U. S. 658; *Kneeland* v. *Amer. Loan Co.*, 136 U. S. 89; *Morgan's Co.* v. *Texas Central Ry.*, 137 U. S. 171; *Louisville &c. R. R. Co.* v. *Wilson*, 138 U. S. 501; *Thomas* v. *Western Car Co.*, 149 U. S. 95. In none of these cases were claims for supplies furnished or labor rendered to a railroad company necessary to maintain the railroad from day to day as a going concern.

All the six months' claimants are entitled to the same treatment, especially in this case. The order is broad enough to cover this claim. Cases cited *supra*.

The suggestion that the petitioner had a claim against another fund, namely, the surplus earnings of the receivership, is without weight.

There is a special equity in the claim for ties delivered before the receivership and used by the receiver.

The purchase of these ties by the company when it was, as it knew, hopelessly insolvent and had no reasonable expectation of paying therefor, and after it had defaulted on the interest due upon its bonds, was a fraudulent purchase which would have entitled petitioner, had the ties not been in the possession of the court, to have retaken them, and which would have entitled and justified the court to order their redelivery to him, or in default thereof, payment therefor. *Donaldson, Assignee*, v. *Farwell*, 93 U. S. 631; *Wimot* v. *Lyon*, 49 Ohio St. 296; *Talcott* v. *Henderson*, 31 Ohio St. 162; *Morrow* v. *New*

England Stove Co., 57 Fed. Rep. 693; *Davis* v. *Stewart*, 8 Fed. Rep. 803; *Jaffray* v. *Brown*, 29 Fed. Rep. 476.

This court has recognized special equities entirely apart from any question of diversion. *St. L. &c. R. R.* v. *Cleveland, &c. Ry.*, 125 U. S. 658, 673; *Union Trust Co.* v. *Souther*, 107 U. S. 598; *Morgan's Co.* v. *Tex. Cent. R. Co.*, 137 U. S. 171, 197.

Mr. Herbert Parsons and *Mr. Lawrence Maxwell, Jr.*, for respondents:

Petitioner's claim is not against the *corpus* but the receiver's earnings. *V. & A. Coal Co.* v. *Cent. R. R. &c. Co.*, 170 U. S. 355, 365. This is not a labor claim. It could only be paid out of the *corpus* if it were a claim paid because of diversion or earnings to the bondholders, or because it was necessary to pay it in order to keep the road a going concern. It does not fall within either class. As to the position of different Circuit Courts of Appeals on this question see cases in Federal Reporter cited on petitioner's brief, and *Cutting* v. *T., O. & A. Ry. Co.*, 61 Fed. Rep. 150, 156; *Niles Tool Works* v. *Louisville &c. Ry. Co.*, 112 Fed. Rep. 561; *Illinois Trust Co.* v. *Dowd*, 105 Fed. Rep. 123; *Kansas L. & T. Co.* v. *Electric L. & P. Co.*, 108 Fed. Rep. 702.

While this court sometimes may have permitted the payment of a current claim out of the proceeds of sale without proof of diversion, those were exceptional instances. The claim of the petitioners is not such an one. There is no reason why this court should overrule the discretion of the court below in omitting to give a preference to this claim. Cases cited on petitioner's brief can be distinguished.

In order to entitle his claim to payment, the petitioner must prove that current earnings were diverted for the benefit of the mortgage creditors and that there has been no restoration of the diverted fund. See the cases cited on petitioner's brief.

There is no special equity in the $3,200 claim for ties used by the receiver except as a claim against the receiver but not under the orders authorizing certificates.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a petition against a receiver appointed in proceedings for the foreclosure of two railroad mortgages. The petitioner, in pursuance of a contract made on December 1, 1896, with the Columbus, Sandusky and Hocking Railroad Company, the mortgagor, delivered railroad ties to the value of $4,709.53 in May and on June 1, 2 and 3, 1897. The receiver was appointed on June 1, 1897. After his appointment there was found on hand a part of the above ties, to the value of $3,200, and these ties were used in the maintenance of the railroad as a going concern. The petitioner makes a claim on the body of the fund in the receiver's hands, for these and other necessary supplies furnished within six months, amounting in all to $6,804.49. The claim for the ties, at least, is admitted to have been "a necessary operating expense in keeping and using said railroad and preserving said property in a fit and safe condition as such." The petitioner waives a special claim against the receiver for $863.39 for the ties received June 2 and 3, but does claim a lien for $3,200 for ties on hand and not returned to him after the receiver's appointment, in case his whole claim is not allowed. The Circuit Court of Appeals affirmed a decree of the Circuit Court establishing this claim as a six months' claim, but denying the right to go against the body of the fund, whereupon a certiorari was allowed by this court. 109 Fed. Rep. 220. 124 Fed. Rep. 721.

The case stands as one in which there has been no diversion of income by which the mortgagees have profited, or otherwise, and the main question is the general one, whether in such a case a claim for necessary supplies furnished within six months before the receiver was appointed, should be charged on the *corpus* of the fund. There are no special circumstances affecting the claim as a whole, and if it is charged on the *corpus* it can be only by laying down a general rule that such claims for supplies are entitled to precedence over a lien

expressly created by a mortgage recorded before the contracts for supplies were made. An impression that such a general rule was to be deduced from the decisions of this court led to an evidently unwilling application of it in *New England R. Co.* v. *Carnegie Steel Co.*, 75 Fed. Rep. 54, 58, and perhaps in other cases. But we are of opinion, for reasons that need no further statement, *Kneeland* v. *American Loan & Trust Co.*, 136 U. S. 89, 97, that the general rule is the other way, and has been recognized as being the other way by this court.

The case principally relied on for giving priority to the claim for supplies is *Miltenberger* v. *Logansport &c. Railway Co.*, 106 U. S. 286. But while the payment of some pre-existing claims was sanctioned in that case, it was expressly stated that "the payment of such debts stands, *prima facie*, on a different basis from the payment of claims arising under the receivership." The ground of such allowance as was made was not merely that the supplies were necessary for the preservation of the road, but that the payment was necessary to the business of the road—a very different proposition. In the later cases the wholly exceptional character of the allowance is observed and marked. *Kneeland* v. *American Loan & Trust Co.*, 136 U. S. 89, 97, 98. *Thomas* v. *Western Car Co.*, 149 U. S. 95, 110, 111; *Virginia & Alabama Coal Co.* v. *Central Railroad & Banking Co.*, 170 U. S. 355, 370. In *Union Trust Co.* v. *Illinois Midland Ry.*, 117 U. S. 434, 465, labor claims accruing within six months before the appointment of the receiver were allowed without special discussion, but the principles laid down in the *Miltenberger case* had been repeated in the judgment of the court, and the allowance was said to be in accordance with them. It would seem from *St. Louis, Alton &c. R. R.* v. *Cleveland, Columbus &c. Ry.*, 125 U. S. 658, 673, 674, that in both those cases there was a diversion of earnings. But the payment of the employés of the road is more certain to be necessary in order to keep it running than the payment of any other class of previously incurred debts.

Cases like *Union Trust Co.* v. *Souther*, 107 U. S. 591, where

the order appointing the receiver authorized him to pay debts for labor or supplies furnished within six months out of income, stand on the special theory which has been developed with regard to income, and afford no authority for a charge on the body of the fund. *Fosdick* v. *Schall*, 99 U. S. 235; *Burnham* v. *Bowen*, 111 U. S. 776; *Morgan's Louisiana & Texas Railroad & Steamship Co.* v. *Texas Central Ry.*, 137 U. S. 171; *Virginia & Alabama Coal Co.* v. *Central Railroad & Banking Co.*, 170 U. S. 355; *Southern Ry. Co.* v. *Carnegie Steel Co.*, 176 U. S. 257. It is agreed that the petitioner may have a claim against surplus earnings, if any, in the hands of the receiver, but that question is not before us here.

The order appointing the receiver did not go beyond the distinction which we have mentioned, and gave the petitioner no new or higher right than he had before. After directing him to do certain things, it gave him authority, but did not direct him, to make various payments. It gave him authority, among other things, "to pay the employés, officials and other persons having claims for wages, services, materials and supplies due and to become due and unpaid growing out of the operation of the railroad of the defendant, including current and unpaid vouchers; to settle accounts incurred in the operation of the railroad of the defendant company; to pay any and all obligations accrued or accruing upon any equipment trust made by the defendant railroad company; and for such purpose, as well as for the purpose of meeting the obligations of the pay rolls," he was authorized, "in his discretion, to borrow such sums of money as may be necessary for such purpose, not exceeding thirty-five thousand dollars. But said receiver will pay no claims against the said railway company which have accrued due more than six months prior to the date of this order." It is questionable whether the purposes for which the $35,000 might be borrowed were other than paying equipment trust debts and pay rolls. But even if any words in the order authorized a charge on the *corpus* in order to pay claims like that of the petitioner, or a payment of them

except from income, certainly there are none requiring it or going beyond giving authority to the receiver, if, for instance, he thought payments of previous debts necessary to the continued operation of the road. A strict construction of the decree is warranted by the previous decision of the same Circuit Court of Appeals in *International Trust Co.* v. *T. B. Townsend Brick & Contracting Co.*, 95 Fed. Rep. 850.

A few days later, on June 7, 1897, the receiver applied for and received leave to issue certificates up to $200,000, "for the purpose of paying car trusts, maturing and matured, pay rolls, interest on terminal property, traffic balances, taxes and sundry other obligations created in and about the maintenance and operation of said railroad within six months next preceding and following the appointment of a receiver herein." By a further decree on July 7, $30,000 of these certificates were applied to payment for land bought by the company, $135,000 to car trust obligations, current pay rolls, necessary repairs and expenses of operating the road, and $35,000 to the pay rolls for the previous April and May. The petitioner suggested that the latter decree was a diversion of funds in which, by the terms of the order authorizing the certificates, he was entitled to share, and that the payment of the $35,000 for the April and May labor entitles him to come in on principles of equality. It is not necessary to answer this contention at length. The original order gave the petitioner no such rights as he asserts. It would have been a stretch of authority for the receiver in his discretion to apply the borrowed money to this debt. At least he was not bound to do so. The petition on which the original order was made stated that the money was wanted to pay certain obligations, "or so much thereof as may be necessary," embodying the distinction which we have drawn from the cases. We already have intimated that the payment of railroad hands might stand on stronger grounds than the payment for past supplies—and if the payment was wrong it would not be righted by making another, less obviously within the scope of the decree.

We are of opinion, finally, that there is no special equity with regard to the $3,200 worth of ties on hand and used by the receiver after his appointment. It is said that the purchase by the railroad company after it had defaulted, as it had, in the interest of its bonds, was fraudulent, and that the petitioner would have been entitled to take back the ties but for the appointment of the receiver. The answers to this contention again are numerous. It does not appear that the purchase of the ties was fraudulent. *Donaldson* v. *Farwell*, 93 U. S. 631. It does not appear, and is not likely that the company bought with the intention not to pay the price. It does not appear that it concealed its insolvency. The default in the interest of the bonds was a public fact. Again, it is a mere speculation whether the petitioner, if he had had the right, would have demanded back the ties. He did not demand them of the receiver. It is quite as likely that if he had known the whole truth he would have taken his chances. The thing that he is least likely to have known is the form of the appointment of the receiver, and, therefore, it is probably a fiction that that encouraged him to wait. It should not have encouraged him, because, as we have said, it gave him no rights. The fact that the receiver used the ties is of no importance. They already were the property of the road, and it was his business to use them. The material point is not the time when they were used, but the time when they were acquired.

Decree affirmed.

Mr. Justice McKenna, with whom concur Mr. Justice Harlan and Mr. Justice White, dissenting.

I am unable to concur in the opinion of the court, and the importance of the questions involved justifies an expression of the ground of my dissent.

The controversy arises from a claim, to quote from the Circuit Court of Appeals, "for cross ties essential to the replacement of ties decayed in current operation of the rail-

road. A large proportion were on hand when the receiver was appointed, and were used by him in the maintenance of the roadway. They were all purchased within six months before the receivership, and under circumstances indicating an expectation that they would be paid for out of current income. The claim is in every respect a highly meritorious one."

This description is supplemented by stipulation of counsel that the claim is for "necessary operating expenses in keeping and using said railroad and preserving said property in a fit and safe condition." The claim is denied, affirming the judgment of the lower court, payment out of the body of the fund in the hands of the receiver; and why? That the decisions of this court may be construed as extending the equity of claims for supplies so far is conceded. It is said: "An impression that such a general rule was to be deduced from the decisions of this court led to an evidently unwilling application of it in *New England R. R. Co.* v. *Carnegie Steel Co.*, 75 Fed. Rep. 54, 58, and perhaps in other cases."

The concession hardly exhibits the strength of the sanction which the rule has received at circuit, and, apparently, neither willingly nor unwillingly, but in the desire only to ascertain what this court has decided and to follow it. I may refer to *St. Louis Trust Co.* v. *Riley*, decided by the Circuit Court of Appeals of the Eighth Circuit, 16 C. C. A. 610; *Finance Company* v. *Charleston &c. R. Co.*, in Circuit Court of Appeals of the Fourth Circuit, 10 C. C. A. 323; *New York Guaranty & Indemnity Co.* v. *Tacoma Railway & M. Co.*, in the Circuit Court of Appeals of the Ninth Circuit, 83 Fed. Rep. 365. See also *Thomas* v. *Peoria &c. Ry.*, 36 Fed. Rep. 808; *Farmers' Loan & Trust Co.* v. *Kansas &c. Railroad Co.*, 53 Fed. Rep. 182; *Farmers' Loan & Trust Co.* v. *Northern Pacific R. R. Co.*, 68 Fed. Rep. 36; *Atlantic Trust Co.* v. *Woodbridge Canal & Irrigation Co.*, 79 Fed. Rep. 39. And even the Sixth Circuit, from whence the pending case now comes. *Central Trust Company* v. *East Tennessee, V. & G. R. Co.*, 80 Fed. Rep. 624.

There is strength in this agreement at circuit, and much that was said could be quoted with advantage, but, as my ultimate reliance must be the decisions of this court, I shall proceed immediately to an examination of them.

Miltenberger v. *Logansport &c. Railway Co.*, 106 U. S. 286, is one of the most important of the cases. Indeed it is the leading case, and is carried into and approved in a number of subsequent cases. The decisions which precede it, including *Fosdick* v. *Schall*, 99 U. S. 235, I assume, are understood. *Wallace* v. *Loomis*, 97 U. S. 146, may, however, be noticed. It was a suit to foreclose a mortgage on a railroad, in which suit a receiver was appointed. The receivers were authorized to raise money by loan upon certificates to be issued by them, "to put the road and property in repair, and to complete any uncompleted portions thereof, and to procure rolling stock, and to manage and operate the road to the best advantage, so as to prevent the property from further *deteriorating*, and to *save* and *preserve* the same for the benefit and interest of the first mortgage bondholders, and all others having an interest therein." The receivers obeyed the order, and the decree of the court "declared the amount due on the receiver's certificates to be a lien on the property in their hands prior to that of the first mortgage bonds." This court sustained the decree as follows:

"The power of a court of equity to appoint managing receivers of such property as a railroad, when taken under its charge as a trust fund for the payment of encumbrances, and to authorize such receivers to raise money necessary for the preservation and management of the property, and make the same chargeable as a lien thereon for its repayment, cannot, at this day, be seriously disputed. It is a part of that jurisdiction, always exercised by the court, by which it is its duty to protect and preserve the trust funds in its hands. It is, undoubtedly, a power to be exercised with great caution; and if possible, with the consent or acquiescence of the parties interested in the fund."

The principle expressed was applied in the *Miltenberger case*. The receiver appointed in that case was empowered by the court to purchase four engines, four passenger cars, and one hundred new coal cars; also to adjust certain indebtedness of connecting lines, not exceeding $10,000, and to expend $30,000 to complete five miles of road and build a bridge, and to enter into the contracts required therefor. With the expenditure, the earnings of the road were charged "as with a first lien prior to all encumbrances upon said road." The legality of this was contested. Speaking of the order this court said: The authority conferred by it "was intended to benefit the *res* in the hands of the court, which was the entire mortgaged property, as covered by both mortgages, and not merely the equity of redemption of the mortgagor as against the second mortgagee." And the power to make it was decided, the court quoting from *Wallace* v. *Loomis* as above, and observing "the principle thus recognized covers most of the objections here urged." The payment of $10,000 due to connecting lines of road for materials and repairs, etc., was also sustained. It thus appears that not only expenditures made after the appointment of the receiver, but debts incurred prior to the appointment, were directed to be paid out of the *corpus* of the property. Justifying its decision, the court said:

"It cannot be affirmed that no items which accrued before the appointment of a receiver can be allowed in any case. *Many circumstances may exist which may make it necessary and indispensable to the business of the road and the preservation of the property, for the receiver to pay preëxisting debts of certain classes, out of the earnings of the receivership, or even the corpus of the property, under the order of the court, with a priority of lien. Yet the discretion to do so should be exercised with very great care. The payment of such debts stands, prima facie, on a different basis from the payment of claims arising under the receivership, while it may be brought within the principle of the latter by special circumstances.* It is easy to see that the pay-

ment of unpaid debts for operating expenses, accrued within ninety days, due by a railroad company suddenly deprived of the control of its property, due to operatives in its employ, whose cessation from work simultaneously is to be deprecated, in the interests both of the property and of the public, and the payment of the limited amounts due to other and connecting lines of road for materials and repairs and for unpaid ticket and freight balances, the outcome of indispensable business relations, where a stoppage of the continuance of such business relations would be a probable result, in case of non-payment, the general consequence involving largely, also, the interests and accommodation of travel and traffic, may well place such payments in the category of payments to preserve the mortgaged property in a large sense, by maintaining the good-will and integrity of the enterprise, and entitle them to be made a first lien. This view of the public interest in such a highway for public use as a railroad is, as bearing on the maintenance and use of its franchises and property in the hands of a receiver, with a view to public convenience, was the subject of approval by this court, speaking through Mr. Justice Woods, in *Barton* v. *Barbour*, 104 U. S. 126. The appellants furnish no basis for questioning any specific amounts allowed in respect to the arrears referred to, but object to the allowance of anything out of the sale of the *corpus* for such expenditures. Under all the circumstances of this case, we see no valid objection to the provisions of the orders complained of."

The case is not overruled; it is distinguished, and the distinction seems to be based upon the difference between supplies for *preservation* of the road and payments necessary to the *business* of the road. Is not the distinction questionable? Can anything be done for the preservation of a road that is not done for its business? If a distinction can be made, how immediate to the business must the supplies be? Is not a bridge across a stream as indispensable to the "accommodation of travel and traffic" as "unpaid ticket and freight bal-

ances?" Or (as in the case at bar) is not "the replacement of ties decayed in current operation" as indispensable as the payment of laborers? It is conceded that labor claims were decreed to be paid in *Union Trust Co.* v. *Illinois Midland Ry.*, 117 U. S. 434. Then why not the other? What distinction in principle can there be in expenditures for any of the many things which are necessary to keep a railroad a going concern? Let all expenditures be declared subordinate which are subsequent to the mortgage, and it can be understood. But how can a distinction be made in value and preferential payment between equally indispensable things?

It is said, however, that the later cases have observed and marked "the wholly exceptional character of the allowance" made in the *Miltenberger case*. The *Kneeland case*, 136 U. S. 89; *Thomas case*, 149 U. S. 95, and *Virginia & Alabama Coal Co.* v. *Central Railroad & Banking Co.*, 170 U. S. 355, are cited. Two deductions may be made. If it is meant that the instances were exceptional, I am not at present concerned with it. If it is meant that the principle was, I cannot assent. Admonition to care in the application of a principle is one thing, its overthrow another; and the principle of the *Miltenberger case* has never been overthrown. *Virginia & Alabama Coal Co.* v. *Central Railroad & Banking Co.* explains the other two cases. It involved the payment for coal supplied before the appointment of a receiver. There was surplus income during the receivership, and the point under discussion in the case at bar was not directly presented. But there were some observations made which are of value. They remove diversion of income as an element of decision or confusion. It was declared to be immaterial to the equity invoked for the claim whether there had been diversion of income by the company before the appointment of the receiver or afterwards by the receiver, and it is only necessary to consider whether the equity was confined to surplus earnings. I think that it was not so confined. There were surplus earnings, and the principle which established an equity in them was alone contested

and was alone necessary to be decided. The decision was carefully made upon a review and an estimate of prior cases. The admonitions of the *Kneeland case* and the *Thomas case* were not overlooked. Regarding them, and in connection with them, the *Miltenberger case* was quoted from, and not only left undisturbed, but approved, and from it, as well as from other cases, was deduced the principle which was applied in the judgment. And that principle has its foundation in the public interests. A railroad, from its nature and public responsibilities, must be kept a going concern. This is the supreme necessity, and affords the test of the equity invoked for the claims for supplies. It cannot depend upon diversion of income or upon the existence of income. It cannot be confined to debts contracted during the receivership. It may extend to debts contracted before the appointment of the receiver. But recognizing that there must be some limitation of time, the courts have fixed six months as the period within which preferential claims may accrue. And there is no infringement of the rights of mortgagees. Their interests are served, as those of the public are, by keeping the railroad in operation. The limitations of the rule dependent upon the conditions under which supplies are furnished are expressed in *Virginia & Alabama Coal Co.* v. *Central Railroad & Banking Co.*, *supra*, and in *Southern Ry. Co.* v. *Carnegie Steel Co.*, 176 U. S. 257.

The claim in controversy is manifestly within the rule. It is, as we have seen, "for cross ties essential to the replacement of ties decayed in current operation." In other words, used in and necessary for the business of the road, and comes even within the limitation which the court implies may be put on the *Miltenberger case*. There is another consideration which may be urged in addition to or independently of the general rule. Ties of the value of $3,200 were used by the receiver after his appointment. This circumstance is too summarily dismissed from consideration. "The material point is," it is said, "not the time when they were used, but the time when

they were acquired." A broad declaration, and seems to make all claims accruing before the receivership non-preferential. This probably is not intended, and not extending the remark so far, is not the time of use important if we regard the substance of things? It must not be overlooked that we are dealing with equitable considerations. What would be said of an expenditure by the receiver for ties to displace decaying ones if those furnished by petitioner had not been at hand? Was it not, at least, competent for a court of equity to have restored the ties upon the application of the petitioner? It is said, however, "It is mere speculation if he would have demanded back the ties." He was not given an opportunity. But suppose "he would have taken his chance?" Of what and upon what assurance? Certainly upon the assurance, in addition to his general equity, that a court of equity would not deliberately use his property through its officer, the receiver, in the interest of the business of the road, whose affairs it was administering, and not find in its powers the means and right to order payment for the property so used.

CARO *v.* DAVIDSON.

ERROR TO THE SUPREME COURT OF THE STATE OF FLORIDA.

No. 196. Submitted January 23, 1905.—Decided March 13, 1905.

Where the record discloses no title, right, privilege or immunity, specially set up or claimed under the Constitution, or any law of the United States, which was denied by the decision, nor any assertion of an infraction of any provision of the Constitution, and the right of review by this court is based on the contention that the validity under the Constitution of a state statute is necessarily drawn in question and sustained, the writ will be dismissed unless a definite issue as to the validity of such statute is distinctly deducible from the record and it appears that the judgment could not have rested on grounds not involving its validity.

THE facts are stated in the opinion.

Mr. Hilary A. Herbert, Mr. Benjamin Micou, Mr. E. T. Davis and *Mr. Simeon S. Belden* for plaintiff in error:

That by a necessary intendment there was drawn into question an act of the general assembly of Florida, approved May 30, 1901, repugnant to Sec. 10, Art. I of the Constitution of the United States, by reason of its being an *ex post facto* law, as applicable to the judgments of the judge. *Powell* v. *Brunswick County*, 150 U. S. 440, distinguished. See *Satterlee* v. *Matthewson*, 2 Pet. 409; *McCullough* v. *Virginia*, 172 U. S. 116; *Bridge Proprietors* v. *Hoboken L. & I. Co.*, 1 Wall. 142; *Furman* v. *Nichol*, 8 Wall. 56.

Mr. William A. Blount and *Mr. A. C. Blount, Jr.*, for defendants in error:

The record fails to show jurisdiction under § 709, Rev. Stat. No question which this court is entitled to review was presented to or decided by the state court.

The act of 1901 is not to be found adverted to in the record, and cannot for the purposes of the jurisdiction of this court be imported into it. No definite issue as to the validity of the statute is distinctly deducible from the record so as to present a Federal question. *Powell* v. *Brunswick County*, 150 U. S. 640.

If the decision of the state court could have been made without deciding upon the validity of the statute, this court has no jurisdiction. *McQuade* v. *Trenton*, 172 U. S. 640; *Hammond* v. *Johnson*, 142 U. S. 73.

No decision of the state court in favor of the validity of the statute is on the record. *Dibble* v. *Bellingham*, 163 U. S. 71.

The necessity for the assertion of the claim on the record and the principles which govern the court in requiring that the record shall show jurisdiction, are well settled.

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

Plaintiffs in error filed their petition in the Circuit Court

of Escambia County, Florida, in April, 1901, for the vacation of certain interlocutory and final decrees rendered March 5, 1887; April 4, 1887, and January 17, 1889, in favor of complainants, in a certain cause thereinbefore pending, on the ground that the said orders and decrees were null and void, because the judge by whom they were entered was the husband of the sister of one of the complainants, having at the time living children, the issue of their marriage; it being also averred that the relationship was not known until February, 1901.

Defendants in error set up by answer two defenses: (1) That the original cause was carried to the Supreme Court of Florida and there examined upon its merits, and a decree rendered affirming the decree below. (2) That the wife of the Circuit Judge had died ten years prior to the bringing of that suit.

The petition to vacate the decree was denied July 13, 1901, by the Circuit Court, and its decree to that effect was affirmed by the Supreme Court, November 17, 1903 (the case having been submitted March 31, 1902), whereupon this writ of error was allowed, and comes before us on a motion to dismiss for want of jurisdiction.

The state Supreme Court delivered no opinion in affirming the decree denying the petition to vacate, and the record discloses no title, right, privilege or immunity specially set up or claimed under the Constitution or any law of the United States, which was denied by the decision; nor any assertion of an infraction of the Fourteenth Amendment, or any provision of the Constitution. But it is said that by necessary intendment the validity of an act of the general assembly of Florida of May 30, 1901, was drawn in question as repugnant to the Constitution of the United States, and its validity sustained. The act referred to provided that section 970 of the Revised Statutes of Florida was thereby amended so as to read: "Any and all judgments, decrees and orders heretofore or hereafter rendered in causes where the disqualifications appear of record in the cause, shall be void, but where the dis-

qualification does not so appear, they shall not be subject to collateral attack." Session Laws, Florida, 1901, p. 39.

The contention is that the judgment of the Supreme Court proceeded upon this act, which was invalid, if so applied, because *ex post facto*, and that, therefore, this court has jurisdiction, inasmuch as the validity of the act was thus drawn in question and its validity sustained. Yet no definite issue as to the validity of that statute was distinctly deducible from the record, no decision in favor of its validity appeared therefrom, and the judgment might have rested on grounds not involving its validity.

Whether the Supreme Court of Florida, if it sustained the decree of the Circuit Court in denying the petition on either of the grounds set up in defense, committed error cognizable here, or whether the act referred to was applied as asserted in contravention of the Constitution of the United States, we are not called on to consider, since we do not find that any Federal question was so raised, on the petition or in the proceedings thereunder, at the proper time and in the proper way, as to give us jurisdiction under section 709 of the Revised Statutes. *Mutual Life Insurance Company* v. *McGrew*, 188 U. S. 291, 307, 308; *Powell* v. *Brunswick County*, 150 U. S. 433; *Sayward* v. *Denny*, 158 U. S. 180.

Writ of error dismissed.

UNITED STATES *v.* STINSON.

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

No. 153. Argued January 25, 26, 1905.—Decided March 13, 1905.

The Government, like an individual, may maintain any appropriate action to set aside its grants and recover property of which it has been defrauded; and while laches or limitations do not of themselves constitute a distinct defense as against the Government, yet the respect due to a patent, the presumption that all preceding steps were observed before its issue,

and the necessity of the stability of titles depending on official instruments demand that suits to set aside or annul them should be sustained only when the allegations are clearly stated and fully sustained by proof. In such a suit the Government is subjected to the same rules as an individual, respecting the burden of proof, quantity and character of evidence, presumptions of law and fact, and it is a good defense that the title has passed to a *bona fide* purchaser for value without notice. Generally speaking, equity will not simply consider whether the title was fraudulently obtained from the Government but will also protect the rights of innocent parties.

This suit was commenced in the Circuit Court of the United States for the Western District of Wisconsin on February 25, 1895, to set aside the patents for fourteen quarter sections of land, charged to have been fraudulently acquired by the defendant James Stinson. The lands were entered under the preëmption laws in 1854, 1855, by different individuals, and immediately thereafter conveyed by them to James Stinson. The Government, as admitted, received one dollar and twenty-five cents per acre, the statutory price for lands so entered. The frauds charged are that the entryman did not occupy and improve the lands as required by law, and did not enter them for their own benefit, but were employed by James Stinson to make the entries; that he paid the purchase price to the Government, and also paid the entrymen for their services, and thus, in defiance of the provisions of the statutes, obtained title to the lands. James Stinson in his answer, under oath, denied specifically the alleged frauds. Quite a volume of testimony was taken. Upon this the Circuit Court found that it was not true as alleged that James Stinson had been guilty of fraud in obtaining the title to the lands, and dismissed the bill. This dismissal was affirmed by the Circuit Court of Appeals, 125 Fed. Rep. 907; 60 C. C. A. 615, from whose decree the United States appealed to this court.

Mr. Marsden C. Burch, Special Assistant to the Attorney General, with whom the *Solicitor General* and *Mr. John B.*

Simmons, Special Assistant United States Attorney, were on the brief, for the United States:

The bill should not have been dismissed as the allegations were sustained by the proofs.

A prior agreement to convey a preëmption claim renders the patent void, and as § 2262, Rev. Stat., provides that any person swearing falsely to procure a patent shall forfeit money paid by him for the land, the United States need not offer to refund the money when it brings an action to vacate the patent on that ground. *United States* v. *Minor*, 114 U. S. 233; *Cooke* v. *Blakeley*, 50 Pac. Rep. 981; *United States* v. *Trinidad Coal and Coking Co.*, 137 U. S. 161.

Public lands of the United States are not subject to taxation, and that a person may have procured a conveyance of the legal title from the Government, whether by mistake, fraud, or false swearing, does not alter the rule. The title so obtained, in the eye of the law, is held by the fraudulent grantee in trust for the grantor—that is, the United States. It is still in fact, not only as between the parties but as to all the world excepting *bona fide* purchasers, the property of the United States, and as such must continue exempt from taxation. *Van Brooklin* v. *Anderson*, 117 U. S. 151; *Wisconsin Central R. R. Co.* v. *Price County*, 133 U. S. 496; *Northern Pacific R. R. Co.* v. *Rockne*, 115 U. S. 600; *Central Pacific R. R. Co.* v. *Nevada*, 162 U. S. 512; *Hussman* v. *Durham*, 165 U. S. 144.

Where the original entry has been canceled, the land is held exempt till valid entry made. *Campbell* v. *Wade*, 312 U. S. 34.

As to laches the United States cannot be held to the same rules as individuals. The fraud was not discovered until 1885 and suits were begun in 1887. The cases cited by appellees do not sustain their contention. *United States* v. *St. L. Ry. Co.*, 118 U. S. 120; *United States* v. *Dalles Road Co.*, 140 U. S. 599; *San Pedro &c. Co.* v. *United States*, 146 U. S. 120; *United States* v. *Insley*, 130 U. S. 263; *Lindsey* v. *Miller*, 6 Pet. 666; *United States* v. *So. Colorado C. & T. Co.*, 18 Fed. Rep. 273;

United States v. *Bee*, 54 Fed. Rep. 112; *Willamette Road Co. Case*, 54 Fed. Rep. 807. Stinson cannot claim to be a *bona fide* purchaser as he purchased before patent. *Hawley* v. *Diller*, 178 U. S. 476.

Mr. R. M. Bashford, with whom *Mr. John C. Spooner* and *Mr. A. L. Sanborn* were on the brief, for appellees Stinson.

Laches on part of the United States is a bar to this action. Long acquiescence and laches by a party out of possession cannot be excused except by showing some actual hindrance or impediment caused by the fraud of parties in possession. All the facts should be set out in the bill. *Badger* v. *Badger*, 2 Wall. 87, 94; *March* v. *Whitmore*, 21 Wall. 178, 184; *Hume* v. *Beale*, 17 Wall. 326; *Sullivan* v. *Railway Co.*, 94 U. S. 806; *Richards* v. *McAll*, 124 U. S. 183. The same rule applies to the Government in this respect as to an individual. 9 Op. Atty. Gen. 204; *People* v. *Clark*, 10 Barb. 129; *Mayor* v. *Horner*, Cowp. 110; *Clark* v. *Boorman*, 18 Wall 493; *United States* v. *Moore*, 12 How. 222; *United States* v. *Arredondo*, 6 Pet. 746; *United States* v. *Flint*, 4 Sawyer, 58.

There is a presumption arising from the lapse of time in favor of the defendant's title and that it would be difficult to procure the witnesses who might know the facts. Cases cited *supra* and *Maxwell* v. *Kennedy*, 8 How. 221; *Brown* v. *County of Buena Vista*, 95 U. S. 160; *Wilson* v. *Anthony*, 19 Arkansas, 21. The time which must elapse to justify a court of equity in refusing to act varies in different cases, but it may be assumed that the period best approved is twenty years. *Elmendorf* v. *Taylor*, 10 Wheat. 173; *McKnight* v. *Taylor*, 1 How. 168; *Godden* v. *Kimball*, 92 U. S. 210.

Any defects in the preliminary steps of a patent are cured by the patent. *Hoofnagle* v. *Anderson*, 7 Wheat. 214; *Bagnel* v. *Broderick*, 13 Pet. 436.

The presumptions are that the patent was properly issued and that everything necessary was done before its issue.

United States v. *Mining Co.*, 129 U. S. 579; *United States* v. *White*, 17 Fed. Rep. 561.

This is of the nature of a suit to enforce a forfeiture and the rule which applies to such cases is well settled. *United States* v. *The Burdett*, 9 Pet. 682; *Chafee* v. *United States*, 18 Wall. 516; *United States* v. *Maxwell Land Co.*, 121 U. S. 325; *United States* v. *Budd*, 144 U. S. 154; § 1047, Rev. Stat.; *Adams* v. *Woods*, 2 Cranch. 336; 26 Stat. 1092; *United States* v. *Maillard*, 4 Ben. 461; *United States* v. *Tithing-yards*, 9 Utah, 273. The circumstances of the case do not show any fraud on the part of Stinson.

Mr. William E. Church, *Mr. Robert McMurdy* and *Mr. Roger Sherman* for certain other appellees, submitted a brief.

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

While the Government, like an individual, may maintain any appropriate action to set aside its grants and recover property of which it has been defrauded, and while laches or limitation do not of themselves constitute a distinct defense as against it, yet certain propositions in respect to such an action have been fully established. First, the respect due to a patent; the presumption that all the preceding steps required by law have been observed before its issue; the immense importance and necessity of the stability of titles depending upon these official instruments demand that suits to set aside or annul them should be sustained only when the allegations on which this is attempted are clearly stated and fully sustained by proof. *Maxwell Land-Grant Case*, 121 U. S. 325; *Colorado Coal Company* v. *United States*, 123 U. S. 307; *United States* v. *San Jacinto Tin Company*, 125 U. S. 273; *United States* v. *Des Moines &c. Company*, 142 U. S. 510; *United States* v. *Budd*, 144 U. S. 154; *United States* v. *American Bell Telephone Company*, 167 U. S. 224.

Second. The Government is subjected to the same rules respecting the burden of proof, the quantity and character of evidence, the presumptions of law and fact, that attend the prosecution of a like action by an individual. "It should be well understood that only that class of evidence which commands respect, and that amount of it which produces conviction, shall make such an attempt successful." *Maxwell Land-Grant case, supra,* p. 381; *United States* v. *Iron Silver Mining Co.,* 128 U. S. 673, 677; *United States* v. *Des Moines &c. Company, supra,* p. 541.

Third. It is a good defense to an action to set aside a patent that the title has passed to a *bona fide* purchaser, for value, without notice. And, generally speaking, equity will not simply consider the question whether the title has been fraudulently obtained from the Government, but also will protect the rights and interests of innocent parties. *United States* v. *Burlington & Missouri River Railroad Company,* 98 U. S. 334, 342; *Colorado Coal Company* v. *United States, supra,* p. 313—a case in which, as here, suit was brought to set aside land patents on the ground that they had been obtained by fraud, and in which we said:

"But it is not such a fraud as prevents the passing of the legal title by the patents. It follows that to a bill in equity to cancel the patents upon these grounds alone the defense of a *bona fide* purchaser for value without notice is perfect." *United States* v. *Marshall Mining Company,* 129 U. S. 579, 589; *United States* v. *California &c. Land Company,* 148 U. S. 31, 41; *United States* v. *Winona &c. Railroad Company,* 165 U. S. 463, 479.

Waiving any inquiry as to the claim of ignorance on the part of the Government in respect to the matters complained of until shortly before suit, and simply noting the fact that there was fragmentary testimony tending to show notice at about the time of the entries sufficient to put upon the Government the duty of inquiry, we pass to consider the merits of the case. Forty years intervened between the time of the

alleged fraud and the commencement of this suit. Six at least of the fourteen preëmptors were then dead. One of the living was shown to be quite old and to have failed in health and memory. Only four were called as witnesses; two by the Government and two by the defendant. The evidence of the former tended to sustain the allegations of fraud and that of the latter supported the denial of the defendant. At such a lapse of time it is not strange that the memory of all the witnesses should be of doubtful reliability. They might remember the general fact that they entered the land and that they received some money out of the transaction, but the details, the various acts and conversations, might well be forgotten. There is nothing to show that their attention was ever called to the matter during the intervening time, nothing transpired which would induce them to fix their memories upon any particular facts. Even the testimony on behalf of the Government shows that they believed that they were engaged in a legitimate effort to obtain title to the lands, and expected to make profit out of them. They naturally took the steps in reference to occupation and improvement which they were advised were sufficient, and having paid for the land supposed that everything was rightfully done. The conduct of defendant Stinson does not indicate a consciousness of wrongdoing. He remained a resident of the locality, the title was not transferred, there was no attempt to place it in the hands of a *bona fide* purchaser; no such conduct as would ordinarily characterize a conscious wrongdoer. He came to Superior when it was a mere village, interested himself with others in the building up of a city, having faith in its future. The money which was invested in these lands was his father's, and he took the title in his own name, but really in trust for his father. Subsequently he became the owner of part or all, and retained the title until after this suit was brought. The lands at the time of the entry were in the forest, with only scanty population within a reasonable distance, and apparently were worth no more than the purchase price.

Now that Superior has grown to be a city they have increased largely in value. He engaged in financial operations, contracted debts on the strength of a responsibility based upon the ownership of these lands, and finally he became so deeply in debt that the property passed into the possession of a receiver appointed at the instance of his creditors. Although the latter may not be technically a *bona fide* purchaser, yet he holds the lands for those who have dealt with the defendant Stinson, on the faith of his ownership, and they are equitably entitled to protection.

Further, the Circuit Court, on its review of the testimony, found that there was no fraud and decreed a dismissal, and that finding and decree were approved by the Court of Appeals. While such a finding is not conclusive upon this court, yet it is entitled to receive great consideration, and will not be disturbed unless plainly against the testimony.

Putting all these things together, we are of the opinion that the decree of the Circuit Court was right, and it is

Affirmed.

CLYATT *v.* UNITED STATES.

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

No. 235. Argued December 13, 14, 1904.—Decided March 13, 1905.

Peonage is a status or condition of compulsory service based upon the indebtedness of the peon to the master. The service is enforced unless the debt be paid, and however created, it is involuntary servitude within the prohibition of the Thirteenth Amendment to the Federal Constitution. While the ordinary relations of individuals to individuals are subject to the control of the States and not to that of the General Government the Thirteenth Amendment grants to Congress power to enforce the prohibition

against involuntary servitude, including peonage, and to punish persons holding another in peonage; and §§ 1990, 5526, Rev. Stat. are valid legislation under such power and operate directly on every person violating their provisions whether in State or Territory and whether there be or not any municipal ordinance or state law sanctioning such holding.

Conviction cannot be had under an indictment charging defendants with returning certain persons to a condition of peonage unless there is proof that the persons so returned had actually been in such condition prior to the alleged act of returning them thereto.

Where the bill of exceptions, after referring to the empanelling of the jury, contains recitals that the plaintiff produced witnesses, followed in each case by the testimony of the witness at the close of all of which there were farther recitals that the parties rested, these statements are sufficient, even in the absence of a technical affirmative recital to that effect, to show that the bill of exceptions contains all the testimony, and defendant is not to be deprived of a full consideration of the question of his guilt by such omission; and even in the absence of a motion to instruct the jury to find for the defendant this court may examine the question where it is plain that error has been committed.

No matter how severe may be the condemnation due to the conduct of a party charged with crime, it is the duty of the court to see that all the elements of the crime are proved or that testimony is offered which justifies a jury in finding those elements.

Sections 1990 and 5526, Rev. Stat., read:

"Sec. 1990. The holding of any person to service or labor under the system known as peonage is abolished and forever prohibited in the Territory of New Mexico, or in any other Territory or State of the United States; and all acts, laws, resolutions, orders, regulations, or usages of the Territory of New Mexico, or of any other Territory or State, which have heretofore established, maintained, or enforced, or by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise, are declared null and void."

"Sec. 5526. Every person who holds, arrests, returns, or causes to be held, arrested, or returned, or in any manner aids in the arrest or return of any person to a condition of peonage, shall be punished by a fine of not less than one thousand nor

more than five thousand dollars, or by imprisonment not less than one year nor more than five years, or by both."

On November 21, 1901, the grand jury returned into the Circuit Court of the United States for the Northern District of Florida an indictment in two counts, the first of which is as follows:

"The grand jurors of the United States of America, empaneled and sworn within and for the district aforesaid, on their oaths present, that one Samuel M. Clyatt, heretofore, to wit: on the eleventh day of February, in the year of our Lord one thousand nine hundred and one, in the county of Levy, State of Florida, within the district aforesaid, and within the jurisdiction of this court, did then and there unlawfully and knowingly return one Will Gordon and one Mose Ridley to a condition of peonage, by forcibly and against the will of them, the said Will Gordon and the said Mose Ridley, returning them the said Will Gordon and Mose Ridley to work to and for Samuel M. Clyatt, D. T. Clyatt, and H. H. Tift, copartners doing business under the firm name and style of Clyatt & Tift, to be held, by them, the said Clyatt & Tift, to work out a debt claimed to be due to them, the said Clyatt & Tift, by the said Will Gordon and Mose Ridley; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States."

The second count differs only in charging that defendant caused and aided in returning Gordon and Ridley. A trial resulted in a verdict of guilty, and thereupon the defendant was sentenced to confinement at hard labor for four years. The case was taken on appropriate writ to the Court of Appeals for the Fifth Circuit, which certified to this court three questions. Subsequently the entire record was brought here on a writ of certiorari and the case was heard on its merits.

Mr. W. G. Brantley and *Mr. A. O. Bacon*, with whom *Mr. W. M. Hammond* was on the brief, for plaintiff in error:

The anti-peonage laws, Rev. Stat. §§ 1990, 1991, §§ 5522,

5527, 5532, and the act of 1867, 14 Stat. 546, do not define peon and peonage—for definition see Standard, Webster, Worcester, Century, Black's Law, Anderson's Law, Dictionaries; *Jaremillo* v. *Romero*, 1 New Mex. 190; and as given in Congress, Cong. Globe, vol. 38, Pt. 1, pp. 239, 764, 789, Pt. 3, 1571; see also Life and Speeches of Thomas Corwin, 473; 123 Fed. Rep. 673.

Peonage is a legal status and the act of 1867 was directed against the system of peonage as then existing in New Mexico. Individual acts were not legislated against.

The true intent and meaning of the act, so far as the States were concerned, was to prevent them from establishing a "system" of peonage or from enacting, maintaining, or enforcing "laws, resolutions, orders, regulations, or usages" by which peonage could be enforced. So far as the States are concerned, the act is directed specifically against them as States; the only individuals it is directed against are the individuals in the Territories.

The act does not make void any law, regulation, usage, etc., by which there is maintained merely the voluntary or involuntary service or labor of a person in liquidation of a debt or obligation.

"Peonage," it is clear from the act, is something authorized, recognized, or maintained by the State or Territory. An individual cannot create it.

Nor was Congress endeavoring to legislate the Thirteenth Amendment into effect, because the terms "slavery" and "involuntary servitude" do not appear in the act, but the term "voluntary service," is used and the words "as peons," showing that Congress had in mind something different from the "involuntary servitude" named in the Amendment.

The record discloses no law in Georgia or Florida creating or sanctioning the system of peonage as practiced in New Mexico.

There being no law, resolution, order, or usage of the State by which "peonage" is maintained, established, or enforced, the act of a citizen in depriving another citizen of his liberty,

call the offense "peonage" or any other name, is merely the act of an individual. The wrong is a private wrong and the power to punish for it is vested exclusively in the State. Such punishment comes within the police power of the State, and Congress has no jurisdiction to punish same. Our system of government is a dual one. We have a National Government and a state government. Each has certain powers, duties and jurisdictions, and each is sovereign in its proper sphere. The Government of the United States is one of enumerated powers. As to powers reserved to the States see Ninth and Tenth Amendments; *Moore* v. *Illinois*, 14 How. 13, 17; *United States* v. *DeWitt*, 9 Wall. 41, 45; *Marlin* v. *Hunter*, 1 Wheat. 304, 326; *Slaughter House Cases*, 16 Wall. 36; *United States* v. *Cruikshank*, 92 U. S. 542; *Coffee* v. *Groover*, 123 U. S. 1, 31; *United States* v. *Fox*, 95 U. S. 670: *New York* v. *Miln*, 11 Pet. 103.

If there be but one kind of personal liberty—and we submit there is but one—its protection against the lawless acts of individuals and against lawless violence must be with either the State or the United States. It cannot be with both. There is no such thing as concurrent jurisdiction by the State and the United States over the same criminal offenses. Section 711, Rev. Stat.; *United States* v. *Cruikshank*, 92 U. S. 550; *Gibbons* v. *Ogden*, 9 Wheat. 1, 234; *Fox* v. *United States*, 5 How. 434; *Mangold* v. *United States*, 9 How. 559; *Cross* v. *United States*, 132 U. S. 131.

The State alone has sovereignty and jurisdiction to protect personal liberty against the lawless acts of individuals and against lawless violence. *Logan's case*, 144 U. S. 293, and cases cited; *Kemler's case*, 136 U. S. 448; *The Converse case*, 137 U. S. 632; *United States* v. *Harris*, 106 U. S. 629, 643; *In re Rahrer*, 140 U. S. 545, 554; Cooley's Const. Lim. 706; Pomeroy on Const. Law, 154.

The act of 1867 not being directed against a law or license of a State permitting slavery or involuntary servitude, the same is not "appropriate" legislation under the Thirteenth

Amendment. *Plessy* v. *Ferguson*, 163 U. S. 537, 542; *Civil Rights Cases*, 109 U. S. 3, 20; 25 Am. & Eng. Ency. Law, 1089; *Jones* v. *Van Zandt*, 2 McLean, 596, 601; *Miller* v. *McQuerry*, 5 McLean, 469; cases in 96 Am. Dec. 613; 20 N. Y. 563; *Robertson* v. *Baldwin*, 165 U. S. 275, 292.

The Thirteenth Amendment in its prohibitory feature is aimed solely at the States by its own language. The words "except as a punishment for crime whereof the party shall have been duly convicted" could necessarily apply only to the States, and the full meaning and scope of the Amendment is by this language made plain. *Slaughter House Cases*, 16 Wall. 36, 69; *Le Grand* v. *United States*, 12 Fed. Rep. 577, and note on p. 583; *Re Tiburcher Parrott*, 1 Fed. Rep. 481; *Re Turner*, 1 Abbott's U. S. 84; and see 28 California, 458; 40 California, 198.

The Fourteenth Amendment also is an inhibition against the States but the Fifth Amendment is not—the victim of a murderer is deprived of his life without due process of law but the murderer can be punished only under the state law; the same rule should apply to holding a man in servitude which deprives him of his liberty.

Considering the Fifth, Thirteenth and Fourteenth Amendments together they deal with liberty and the prohibitory feature is against laws, state or National. *United States* v. *Sanges*, 48 Fed. Rep. 78. Undoubtedly one detained in slavery can be set at freedom under the Thirteenth Amendment. *Re Turner*, 1 Abb. U. S. 84; *Re Sah Quah*, 31 Fed. Rep. 327, but that does not mean that the person depriving him of his liberty can be punished by the National Government. The offense is against the State.

The power of Congress over the citizens of the States, or over the police power of the States was not broadened by either the Thirteenth, Fourteenth or Fifteenth Amendments. Cases cited *supra* and *Ex parte Virginia*, 100 U. S. 339; *Powell* v. *Pennsylvania*, 127 U. S. 678; *Leeper* v. *Texas*, 139 U. S. 463; *Claybrook* v. *Owensboro*, 16 Fed. Rep. 297, 301; *James* v. *Bowman*, 190 U. S. 136.

If an act of Congress admits of two interpretations, one within and the other beyond the constitutional power of Congress, the courts must adopt the former construction. *United States* v. *Coombs*, 12 Peters, 72.

The power to enforce the Amendment rests with the States. *Neal* v. *Delaware*, 103 U. S. 370, 389. Georgia promptly recognized the Thirteenth Amendment. Constitution—Code, §§ 5699, 5700, 5701, 5714, 5718, 5763; and see cases reported 72 Georgia, 69; 34 Georgia, 483; 74 Georgia, 247; 95 Georgia, 538; 45 Georgia, 128; Part 3, Georgia Penal Code, §§ 107, 109, 111, 123–134; *Penitentiary Co.* v. *Rountree*, 113 Georgia, 799.

The act of 1867 has no application to Georgia, there being no system of peonage in that State. The indictment is insufficient, not defining the offense, and the proof did not show that any crime had been committed. *United States* v. *Eberhart*, 127 Fed. Rep. 252, 254.

Under a reasonable and proper construction of the act of 1867, in order to authorize the conviction of one for returning another to a condition of peonage, it is necessary to allege in the indictment and to show by proof the existence of some "act, resolution, order, regulation, or usage" of the State where the offense is alleged to have been committed "by virtue of which" said "return to a condition of peonage" was authorized, permitted, or sanctioned.

The language of § 5526, Rev. Stat., is ambiguous. *Neal* v. *Clark*, 95 U. S. 708; *Kohlsaat* v. *Murphy*, 96 U. S. 159; *Market Co.* v. *Hoffman*, 101 U. S. 115.

The evidence does not show any condition of peonage to which any person was returned.

The *Attorney General*, with whom *Mr. Assistant Attorney General Purdy* was on the brief, for the United States:

Congress has plenary power under the Thirteenth Amendment to prohibit the existence of a system of peonage anywhere within the jurisdiction of the United States as a form

of involuntary servitude, and also to make it a criminal offense for any individual to hold, arrest, or return any person to a condition of peonage.

As to term involuntary servitude see Northwest Territory Ordinance of 1787; *Robertson* v. *Baldwin*, 165 U. S. 275, 282; Cooley Const. Law, 237; *Slaughter House Cases*, 16 Wall. 36; *Civil Rights Cases*, 109 U. S. 3, 20; *Plessy* v. *Ferguson*, 163 U. S. 537, 542.

The system of Mexican peonage and the holding of a person to a condition of peonage is involuntary servitude within the meaning of the Constitution. *Jaremillo* v. *Romero*, 1 Gildersleeve (N. M.), 190, and historical citations; 1 Yoakum's Hist. of Texas, 262; 6 Bancroft's Hist. of Mexico, 612; XIII New International Ency. 917; Davis's El Gringo, 231; 2 Fiske's Discovery of America, 427–442; 1 Bancroft's Hist. of Pacific States, 262; Peonage Laws of New Mexico, 1850–1860.

The power of the master to compel the specific performance of an ordinary contract for personal services has never been recognized either by the laws of England or those of the United States. In case the servant abandoned the service of his master before the completion of the contract, the master could always maintain an action to recover damages because of the breach of such contract, but could never compel a specific performance. Charles Manley Smith on Master and Servant, chap. IX, p. 72, and cases cited.

The act of unlawfully and forcibly arresting and returning a person to the custody and control of such person's *creditor*, to be by him held against the will of the *debtor* to labor to pay the debt, is a violation of the laws of the United States within the meaning of section 5526 of the Revised Statutes of the United States. It was the legislative intent of Congress to so enact. Sen. Reports, 2d Sess., 39th Cong. 325.

According to the definitions of lexicographers of that day the word "peon" was not confined to a person compelled by the master to perform involuntary service in liquidation of a debt under a contract for personal service, but included any

service by which one person was bound to serve his creditor until the debt was paid.

The existence or nonexistence of a state statute or usage creating or sanctioning peonage or a system of peonage is wholly immaterial, so far as the operation and effect of § 5526 is concerned, upon the acts of individuals. *Peonage Cases*, 123 Fed. Rep. 671.

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

The constitutionality and scope of sections 1990 and 5526 present the first questions for our consideration. They prohibit peonage. What is peonage? It may be defined as a status or condition of compulsory service, based upon the indebtedness of the peon to the master. The basal fact is indebtedness. As said by Judge Benedict, delivering the opinion in *Jaremillo* v. *Romero*, 1 N. Mex. 190, 194: "One fact existed universally; all were indebted to their masters. This was the cord by which they seemed bound to their masters' service." Upon this is based a condition of compulsory service. Peonage is sometimes classified as voluntary or involuntary, but this implies simply a difference in the mode of origin, but none in the character of the servitude. The one exists where the debtor voluntarily contracts to enter the service of his creditor. The other is forced upon the debtor by some provision of law. But peonage, however created, is compulsory service, involuntary servitude. The peon can release himself therefrom, it is true, by the payment of the debt, but otherwise the service is enforced. A clear distinction exists between peonage and the voluntary performance of labor or rendering of services in payment of a debt. In the latter case the debtor, though contracting to pay his indebtedness by labor or service, and subject like any other contractor to an action for damages for breach of that contract, can elect at any time to break it, and no law or force compels

performance or a continuance of the service. We need not stop to consider any possible limits or exceptional cases, such as the service of a sailor, *Robertson* v. *Baldwin*, 165 U. S. 275, or the obligations of a child to its parents, or of an apprentice to his master, or the power of the legislature to make unlawful and punish criminally an abandonment by an employé of his post of labor in any extreme cases. That which is contemplated by the statute is compulsory service to secure the payment of a debt. Is this legislation within the power of Congress? It may be conceded as a general proposition that the ordinary relations of individual to individual are subject to the control of the States and are not entrusted to the General Government, but the Thirteenth Amendment, adopted as an outcome of the civil war, reads:

"SEC. 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

"SEC. 2. Congress shall have power to enforce this article by appropriate legislation."

This amendment denounces a status or condition, irrespective of the manner or authority by which it is created. The prohibitions of the Fourteenth and Fifteenth Amendments are largely upon the acts of the States, but the Thirteenth Amendment names no party or authority, but simply forbids slavery and involuntary servitude, grants to Congress power to enforce this prohibition by appropriate legislation. The differences between the Thirteenth and subsequent Amendments have been so fully considered by this court that it is enough to refer to the decisions. In the *Civil Rights Cases*, 109 U. S. 3, 20, 23, Mr. Justice Bradley, delivering the opinion of the court, uses this language:

"This Amendment, as well as the Fourteenth, is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances. By its own unaided force and effect it abolished slavery, and

established universal freedom. Still, legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit. And such legislation may be primary and direct in its character; for the amendment is not a mere prohibition of state laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.

* * * * * * * *

"We must not forget that the province and scope of the Thirteenth and Fourteenth Amendments are different; the former simply abolished slavery: the latter prohibited the States from abridging the privileges or immunities of citizens of the United States; from depriving them of life, liberty or property without due process of law, and from denying to any the equal protection of the laws. The amendments are different, and the powers of Congress under them are different. What Congress has power to do under one, it may not have power to do under the other. Under the Thirteenth Amendment, it has only to do with slavery and its incidents. Under the Fourteenth Amendment, it has power to counteract and render nugatory all state laws and proceedings which have the effect to abridge any of the privileges or immunities of citizens of the United States, or to deprive them of life, liberty or property without due process of law, or to deny to any of them the equal protection of the laws. Under the Thirteenth Amendment, the legislation, so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the acts of individuals, whether sanctioned by state legislation or not; under the Fourteenth, as we have already shown, it must necessarily be, and can only be, corrective in its character, addressed to counteract and afford relief against state regulations or proceedings."

In *Plessy* v. *Ferguson*, 163 U. S. 537, 542, Mr. Justice Brown, delivering the opinion of the court, said:

"That it does not conflict with the Thirteenth Amendment, which abolished slavery and involuntary servitude, except as a punishment for crime, is too clear for argument. Slavery implies involuntary servitude—a state of bondage; the ownership of mankind as a chattel, or at least the control of the labor and services of one man for the benefit of another, and the absence of a legal right to the disposal of his own person, property and services. This amendment was said in the *Slaughter House Cases*, 16 Wall. 36, to have been intended primarily to abolish slavery, as it had been previously known in this country, and that it equally forbade Mexican peonage or the Chinese coolie trade, when they amounted to slavery or involuntary servitude, and that the use of the word 'servitude' was intended to prohibit the use of all forms of involuntary slavery, of whatever class or name."

Other authorities to the same effect might be cited. It is not open to doubt that Congress may enforce the Thirteenth Amendment by direct legislation, punishing the holding of a person in slavery or in involuntary servitude except as a punishment for crime. In the exercise of that power Congress has enacted these sections denouncing peonage, and punishing one who holds another in that condition of involuntary servitude. This legislation is not limited to the Territories or other parts of the strictly National domain, but is operative in the States and wherever the sovereignty of the United States extends. We entertain no doubt of the validity of this legislation, or of its applicability to the case of any person holding another in a state of peonage, and this whether there be municipal ordinance or state law sanctioning such holding. It operates directly on every citizen of the Republic, wherever his residence may be.

Section 5526 punishes "every person who holds, arrests, returns, or causes to be held, arrested, or returned." Three distinct acts are here mentioned—holding, arresting, returning.

The disjunctive "or" indicates the separation between them, and shows that either one may be the subject of indictment and punishment. A party may hold another in a state of peonage without ever having arrested him for that purpose. He may come by inheritance into the possession of an estate in which the peon is held, and he simply continues the condition which was existing before he came into possession. He may also arrest an individual for the purpose of placing him in a condition of peonage, and this whether he be the one to whom the involuntary service is to be rendered or simply employed for the purpose of making the arrest. Or he may, after one has fled from a state of peonage, return him to it, and this whether he himself claims the service or is acting simply as an agent of another to enforce the return.

The indictment charges that the defendant did "unlawfully and knowingly return one Will Gordon and one Mose Ridley to a condition of peonage, by forcibly and against the will of them, the said Will Gordon and the said Mose Ridley, returning them, the said Will Gordon and the said Mose Ridley, to work to and for Samuel M. Clyatt."

Now a "return" implies the prior existence of some state or condition. Webster defines it "to turn back; to go or come again to the same place or condition." In the Standard Dictionary it is defined "to cause to take again a former position; put, carry, or send back, as to a former place or holder." A technical meaning in the law is thus given in Black's Law Dictionary: "The act of a sheriff, constable, or other ministerial officer, in delivering back to the court a writ, notice, or other paper."

It was essential, therefore, under the charge in this case to show that Gordon and Ridley had been in a condition of peonage, to which, by the act of the defendant, they were returned. We are not at liberty to transform this indictment into one charging that the defendant held them in a condition or state of peonage, or that he arrested them with a view of placing them in such condition or state. The pleader has seen

fit to charge a return to a condition of peonage. The defendant had a right to rely upon that as the charge, and to either offer testimony to show that Gordon and Ridley had never been in a condition of peonage or to rest upon the Government's omission of proof of that fact.

We must, therefore, examine the testimony, and the first question that arises is whether the record sufficiently shows that it contains all the testimony. The bill of exceptions, after reciting the empanelling of the jury, proceeds in these words:

"And thereupon the plaintiff, to maintain the issues upon its part, produced and offered as a witness James R. Dean, who, being first duly sworn, did testify as follows:"

That recital is followed by what purports to be the testimony of the witness. Then follows in succession the testimony of several witnesses, each being preceded by a statement in form similar to this: "The plaintiff then introduced and offered as a witness, H. S. Sutton, who, being first duly sworn, did testify as follows." At the close of the testimony of the last witness named is this statement:

"Whereupon the plaintiff rests its case.

"Defendant rests—introduces no testimony.

"And the said judge, after charging the jury on the law in the case, submitted the said issues and the evidence so given on the trial, to the jury, and the jury aforesaid then and there gave their verdict for the plaintiff."

It is true there is no affirmative statement in the bill of exceptions that it contains all the testimony, but such omission is not fatal. This question was presented in *Gunnison County Commissioners* v. *Rollins*, 173 U. S. 255, a civil case, brought to this court on certiorari to the Circuit Court of Appeals, which court had held that the bill of exceptions did not purport to contain all the evidence adduced at the trial, and for that reason did not consider the question whether error was committed in instructing the jury to find for the defendant. Mr. Justice Harlan, delivering the unanimous opinion

of the court, disposed of that question in these words (p. 261):

"We are of opinion that the bill of exceptions should be taken as containing all the evidence. It appears that as soon as the jury was sworn to try the issues in the cause 'the complainants, to sustain the issues on their part, offered the following oral and documentary evidence.' Then follow many pages of testimony on the part of the plaintiffs, when this entry appears: 'Whereupon complainants rested.' Immediately after comes this entry: 'Thereupon the defendants, to sustain the issues herein joined on their part, produced the following evidence.' Then follow many pages of evidence given on behalf of the defendant, and the evidence of a witness recalled by the defendant, concluding with this entry: 'Whereupon the further proceedings herein were continued until the 20th day of May, 1896, at 10 o'clock A. M.' Immediately following is this entry: 'Wednesday, May 20th, at 10 o'clock, the further trial of this cause was continued as follows.' The transcript next shows some discussion by counsel as to the exclusion of particular evidence, after which is this entry: 'Thereupon counsel for defendant made a formal motion under the evidence on both sides that the court instruct the jury to return a verdict for the defendant.' Although the bill of exceptions does not state, in words, that it contains all the evidence, the above entries sufficiently show that it does contain all the evidence."

The present case is completely covered by that decision. If in a civil case such recitals in the bill of exceptions are sufficient to show that it contains all the testimony *a fortiori* should this be the rule in a criminal case, and the defendant therein should not be deprived of a full consideration of the question of his guilt by an omission from the bill of the technical recital that it contains all the evidence.

While no motion or request was made that the jury be instructed to find for defendant, and although such a motion is the proper method of presenting the question whether there is evidence to sustain the verdict, yet *Wiborg* v. *United States*,

163 U. S. 632, 658, justifies us in examining the question in case a plain error has been committed in a matter so vital to the defendant.

The testimony discloses that the defendant with another party went to Florida and caused the arrest of Gordon and Ridley on warrants issued by a magistrate in Georgia for larceny, but there can be little doubt that these criminal proceedings were only an excuse for securing the custody of Gordon and Ridley and taking them back to Georgia to work out a debt. At any rate, there was abundant testimony from which the jury could find that to have been the fact. While this is true, there is not a scintilla of testimony to show that Gordon and Ridley were ever theretofore in a condition of peonage. That they were in debt and that they had left Georgia and gone to Florida without paying that debt, does not show that they had been held in a condition of peonage, or were ever at work willingly or unwillingly for their creditor. We have examined the testimony with great care to see if there was anything which would justify a finding of the fact, and can find nothing. No matter how severe may be the condemnation which is due to the conduct of a party charged with a criminal offense, it is the imperative duty of a court to see that all the elements of his crime are proved, or at least that testimony is offered which justifies a jury in finding those elements. Only in the exact administration of the law will justice in the long run be done, and the confidence of the public in such administration be maintained.

We are constrained, therefore, to order a reversal of the judgment, and remand the case for a new trial.

MR. JUSTICE MCKENNA concurs in the judgment.

MR. JUSTICE HARLAN: I concur with my brethren in holding that the statutes in question relating to peonage are valid under the Constitution of the United States. I agree also that the record sufficiently shows that it contains all the evidence introduced at the trial.

But I cannot agree in holding that the trial court erred in not taking the case from the jury. Without going into the details of the evidence, I care only to say that, in my opinion, there was evidence tending to make a case within the statute. The opinion of the court concedes that there was abundant testimony to show that the accused with another went from Georgia to Florida to arrest the two negroes, Gordon and Ridley, and take them against their will back to Georgia to work out a debt. And they were taken to Georgia by force. It is conceded that peonage is based upon the indebtedness of the peon to the master. The accused admitted to one of the witnesses that the negroes owed him. In any view, there was no motion or request to direct a verdict for the defendant. The accused made no objection to the submission of the case to the jury, and it is going very far to hold in a case like this, disclosing barbarities of the worst kind against these negroes, that the trial court erred in sending the case to the jury.

UNITED STATES v. MILLS.

APPEAL FROM THE COURT OF CLAIMS.

No. 509. Submitted February 20, 1905.—Decided March 13, 1905.

The ten per cent increase over and above pay proper allowed to an officer of the United States Army for service in Porto Rico, Cuba, Philippine Islands, Hawaii and Alaska, under the act of May 26, 1900, 31 Stat. 211, and beyond the limits of the States comprising the Union and Territories contiguous thereto under the act of March 2, 1901, 31 Stat. 903, is to be computed upon the total amount to which the officer is entitled at the time of such service both for longevity pay and the pay provided for by § 1261, Rev. Stat.

THIS is an appeal from a judgment of the Court of Claims in favor of the appellee. The question relates to the amount of compensation payable to him under the acts of May 26,

1900, and March 2, 1901, making appropriations for the Army. The particular provisions of these acts are set forth in the margin.[1]

The court gave judgment in favor of appellee upon the authority of its opinion in *Irwin* v. *United States*, 38 C. Cl. 87.

The facts found by the court are as follows:

"The claimant, Stephen C. Mills, entered the military service of the United States as a cadet at the Military Academy, July 1, 1873, was commissioned second lieutenant June 15, 1877, and by successive promotions became major and inspector-general July 25, 1888, and lieutenant-colonel and inspector-general February 2, 1901, and still holds the last-named rank and office.

"The claimant was, by proper military orders, on duty with the Army of the United States in the Philippine Islands from a date prior to May 26, 1900, continuously until April 15, 1902, when, in accordance with orders, he arrived at San Francisco, California, on his return from said Philippine Islands. During all of that period he was serving in the Philippine Islands and beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto.

"During the entire period from May 26, 1900, to April 15, 1902, named in the next preceding finding, the claimant while

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[1] Act of May 26, 1900, 31 Stat. 205, 211.

"That hereafter the pay proper of all officers and enlisted men serving in Porto Rico, Cuba, the Philippine Islands, Hawaii and in the Territory of Alaska shall be increased ten per centum for officers and twenty per centum for enlisted men over and above the rates of pay proper as fixed by law in time of peace."

Act of March 2, 1901, 31 Stat. 895, 903; 1 Comp. Stat. 896.

"That hereafter the pay proper of all officers and enlisted men serving beyond the limits of the States comprising the Union, and the Territories of the United States contiguous thereto, shall be increased ten per centum for officers and twenty per centum for enlisted men over and above the rates of pay proper as fixed by law for time of peace, and the time of such service shall be counted from the date of departure from said States to the date of return thereto."

holding the rank of major was paid at the rate of $2,500 a year, the minimum pay of the grade of major established by section 1261 of the Revised Statutes; $1,000 longevity increase established by section 1262 of the Revised Statutes, and $250 a year as the increase of ten per cent. upon his pay proper provided by the act of May 26, 1900, 31 Stat. 211, but calculated only upon the minimum or grade pay fixed by said section 1261.

"While holding the rank of lieutenant-colonel during said period the claimant was paid at the rate of $3,000 a year, the minimum pay of that grade as provided by section 1261 of the Revised Statutes, $1,000 longevity increase provided by section 1262, and $300 a year as ten per cent. increase on his pay proper as provided by the acts of May 26, 1900, and March 2, 1901 (31 Stat. 211, 903), but computed only on the minimum pay of the grade.

"If said ten per cent. increase should be calculated upon the total pay of $3,500 received by the claimant while in the rank of major, his increase would be at the rate of $350 a year instead of $250, and if so calculated while he was in the rank of lieutenant-colonel the increase would be at the rate of $400 a year instead of $300, making a difference of $100 a year for the period covered by the claim, and aggregating for the entire period $188.87."

Mr. Assistant Attorney General Pradt and *Mr. Special Attorney John Q. Thompson* for the United States.

Mr. George A. King and *Mr. William B. King* for appellee.

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

The question is, upon what principal sum the ten per cent increase of compensation, to which the Government concedes the appellee is entitled, is to be computed. The appellee as

major was entitled, by section 1261 of the Revised Statutes, 1 Comp. Stat. 893, to the pay of $2,500 a year. Subsequently as lieutenant-colonel he was entitled, by the same section, to the pay of $3,000 per year. By the following section, 1262, 1 Comp. Stat. 896, it is provided that there shall be paid to the officers below the rank of brigadier-general "ten per centum of their current yearly pay for each term of five years of service," and by section 1263 the total amount of such increase for length of service cannot exceed, in any case, "forty per centum on the yearly pay of the grade as provided by law." Under section 1262 the appellee had become entitled to pay to the amount of $1,000 a year in addition to the pay provided for in section 1261; thus, as major, he was entitled to $2,500 per year, and under section 1262, $1,000 more, or $3,500 under these two sections; as lieutenant-colonel he was paid $3,000 per year under section 1261 and $1,000 more under section 1262, or $4,000 under these two sections. He contended that the additional ten per cent under the acts of 1900 and 1901 should be computed on the respective sums of $3,500 and $4,000, the total compensation granted by the two sections, while the Government insists that the percentage must be computed upon the sums of $2,500 and $3,000 respectively, the minimum pay granted to the grades of major and lieutenant-colonel.

The Court of Claims directed the computation to be made on the total of the sums given by the two sections, and in our opinion that court was right in so doing. The term "pay proper" used in the acts of May 26, 1900, and March 2, 1901, includes, in our opinion, the longevity pay under section 1262 as well as the sum named as pay under section 1261, the latter being the minimum sum for the grade. Every five years of service, under section 1262, up to a certain percentage of the yearly pay of the grade, as provided by law, section 1263, entitles the officer to be paid ten per centum of his yearly pay. The term "current yearly pay," (sec. 1262), was the subject of examination as to its meaning in *United States* v. *Tyler*,

105 U. S. 244. The case related to the claim of a retired officer, and the question was, whether he was entitled to the benefit of the section (1262) after his retirement; and, also, if he were so entitled, how was the computation to be made. The court held that he was entitled to the benefit of the section, and that the percentage was to be computed on the total amount of the pay of the officer, increased as it might be by the periods of five years of service. Thus the increased pay derived from additional periods of five years' service was added to the minimum pay of the grade, and ten per centum of that total was held to be the proper compensation.

The Government, however, contends that the term "current yearly pay," mentioned in section 1262, has a different meaning from the term "pay proper," contained in the acts under discussion, and it insists that the latter term is not as comprehensive as the former. We do not think that there is any such material difference between the two expressions as in this case to demand their different construction. "Current yearly pay" and "pay proper," as used in the sections, mean the regular, ordinary pay which an officer may be entitled to under the facts in his case, and if, by virtue of length of service, he is entitled to receive the compensation provided for in section 1262, that compensation is his "pay," or his "pay proper," as distinguished from possible other compensation by any allowances, or commutation, or otherwise. The method of computation adopted herein by the Court of Claims is the same as that adopted in *United States* v. *Tyler, supra;* that method has therefore received the approval of this court, or at least it has been held that the ten per centum of the current yearly pay is to be calculated upon the aggregate pay provided for in the two sections (1261 and 1262), and not merely upon the minimum pay granted by section 1261.

In regard to retired officers, Congress subsequently provided otherwise. 22 Stat. 117, 118.

The words, "pay proper," we see no reason to think are to be construed differently from the word "pay." The term

means compensation, which may properly be described or designated as "pay," as distinguished from allowances, commutations for rations or other methods of compensation, not specifically described as pay.

The Government refers to the act of Congress approved March 15, 1898 (army appropriation act, 30 Stat. 318), as giving some ground for the contention it makes in this case, because, as is stated, Congress itself therein distinguishes between "pay proper," and "additional pay for length of service," and it is urged that pay proper does not include longevity pay in the opinion of Congress as expressed in the act. The provision of the act is as follows:

"For pay proper of enlisted men of all grades, four million two hundred and ninety thousand dollars.

"Additional pay for length of service, including hospital corps, six hundred and seventy-one thousand one hundred and seventy-two dollars."

The act cited by the Government, it will be seen, refers to enlisted men and not to officers at all. In that same act of 1898 provision for the payment of officers is in the following language (30 Stat. 318):

"For pay of officers of the line, two million eight hundred sixty-five thousand dollars.

"For pay of officers for length of service, to be paid with their current monthly pay, seven hundred and ninety thousand dollars."

And in the appropriation act of March 3, 1899, the appropriation for enlisted men was changed so that it reads as follows (30 Stat. 1064, 1065):

"Pay of enlisted men of all grades, including recruits, thirteen million five hundred thousand dollars.

"For additional pay for length of service, seven hundred and twenty-five thousand dollars."

Under the language of the act of March 15, 1898, the Comptroller of the United States had held that the language used in that act showed that the compensation of enlisted men,

upon which the per centum provided for was to be computed, was the minimum pay, not enlarged by any longevity pay to which the person was entitled. At the very next session of Congress the form of the appropriation was changed, as we have seen. That change has been continued since. See acts of May 26, 1900, 31 Stat. 206; March 2, 1901, 31 Stat. 896; June 30, 1902, 32 Stat. 508; March 2, 1903, 32 Stat. 929, and April 23, 1904, 33 Stat. 260.

The ground for arguing that the term "pay proper" does not include the "additional pay for length of service" was thus taken away by a change in the form of the appropriation in all the acts subsequent to that of 1898. As we have already stated, however, that particular form in regard to enlisted men in the act of 1898 was never adopted, providing for the pay of officers. Their regular compensation and their compensation by reason of longevity services are both spoken of in that act as "pay."

We have no doubt that the pay of the officer under the statutes of 1900 and 1901, in connection with the Revised Statutes referred to, consists of the amount granted for longevity service as well as of the amount provided in section 1261, and that the total is "pay proper," upon which total the percentage is to be computed provided for in the acts of 1900 and 1901. Our attention has not been called to any decision of this court looking to the contrary principle.

The judgment of the Court of Claims is right and must be

Affirmed.

BARTLETT *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 259. Submitted February 27, 1905.—Decided March 13, 1905.

The words "waters and shores" of a river as used in §§ 2550, 2551, Rev. Stat., are broad enough to include the whole of a city on those shores and within the limits named. The Collection District of Georgetown includes the whole of the city of Washington, D. C., and the Secretary of the Treasury has no power, general or statutory, under §§ 3657, 3658, Rev. Stat., to appoint, and allow compensation to, a disbursing agent for funds appropriated for building a post office in Washington.

THE facts are stated in the opinion.

Mr. J. M. Vale for appellant:

No legislative authorization was required to empower the Secretary of the Treasury to contract with appellant as set out in findings of fact 2 and 3 (Record, pp. 4 and 5); such power is incident to the general sovereignty of the United States. *Dugan* v. *United States*, 3 Wheat. 172; *United States* v. *Tingey*, 5 Pet. 114; *United States* v. *Bradley*, 10 Pet. 343; *Cotton* v. *United States*, 11 How. 229; *United States* v. *Maunce*, 2 Brock. 96.

The duties of appellant as disbursing clerk of the Treasury Department are such as the Secretary of the Treasury may prescribe. They are not otherwise defined by law. The Secretary of the Treasury did not prescribe the duties of disbursing agent for the Post Office, Washington, D. C., as part of or additional to the duties of appellant as disbursing clerk of the Treasury Department. On the contrary the Secretary separates the former from the latter by the terms of appellant's appointment as disbursing agent for the Post Office. Rev. Stat. §§ 173, 174, 176.

The city of Washington, in the District of Columbia, the

place of the location of the public work, was not the place of the location of the port of Georgetown, in the District of Columbia, for the purpose of making disbursements for the Post Office building at the city of Washington. No collector of customs was located at the city of Washington, the place of the public work. Sections 2550, 2551, 3658, Rev. Stat., act of February 11, 1895, 28 Stat. 650.

Appellant is entitled to recover under the authority of: *Converse* v. *United States*, 21 How. 463; *United States* v. *Brindle*, 110 U. S. 688; *United States* v. *Saunders*, 120 U. S. 126.

Mr. Assistant Attorney General Pradt and *Mr. Special Attorney Frederick de C. Faust* for the United States:

The Secretary of the Treasury had no power to appoint claimant to the duties specified in the letter of November 27, 1891. Sections 3657, 3658, 255, Rev. Stat. and act of August 7, 1882, 22 Stat. 306, govern the case. As to collector in Washington see §§ 2550, 2551, Rev. Stat., 28 Stat. 650; as to salaried officers of the United States receiving compensation for discharging duties of any other office see §§ 1760, 1763–1765, Rev. Stat.; *United States* v. *Saunders*, 120 U. S. 126.

The act making appropriations for the construction of this post office required the Secretary of the Treasury to disburse the money and did not contain any provision whatever for payment of compensation for such service. 26 Stat. 174, 413; 27 Stat. 351, 573; 28 Stat. 373, 913; 29 Stat. 415; 30 Stat. 13. No office of disbursing agent was created by those acts. In the execution thereof and in conformity with the duty thus conferred, the Secretary of the Treasury appointed the disbursing clerk of the Treasury Department to make these disbursements.

At the time these services were rendered appellant was an officer in the public service, and, as such, was receiving pay or salary as fixed by law. He was the proper officer and the one naturally to be selected for these duties, which, as stated by

the court below, "were not only germane to his regular duties as disbursing clerk, but were identical therewith, and hence they cannot be considered as two distinct offices or employments having different duties.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an appeal from a judgment of the Court of Claims rejecting the claim of the appellant. 39 C. Cl. 338. The claimant while a disbursing clerk of the Treasury Department received a letter from the Secretary of the Treasury, as follows: "George A. Bartlett, disbursing clerk, Treasury Department, Washington, D. C. Sir: You are hereby appointed disbursing agent for such funds as may be advanced to you from time to time on account of the appropriation for post-office, Washington, D. C. You will be entitled to such compensation for the services named as is provided by law, and the same rate of compensation will be allowed on all amounts disbursed by you since October 15, 1891, on account of the appropriation named." Directions followed.

The claimant gave no new bond and took no additional oath of office. He proceeded to disburse nearly two and a half millions of dollars and claims three-eighths of one per cent upon the sum disbursed.

The claimant puts his right to compensation on two grounds, the general powers of the Secretary of the Treasury apart from statute, and Rev. Stat. § 3658. As to the former it is enough to say that whatever power the Secretary might have in the absence of legislation, Congress has dealt with the subject so fully that it is plain that we must look to the statutes alone. Rev. Stat. §§ 1760–1765, 3657, 3658, 255. Act of August 7, 1882, c. 433; 22 Stat. 302, 306. Looking to the statutes, the claimant relies on Rev. Stat. § 3658: "When there is no collector at the place of location of any public work specified in the preceding section [which section specifies post-offices], the Secretary of the Treasury may appoint a disbursing agent

for the payment of all moneys appropriated for the construction of any such public work, with such compensation as he may deem equitable and just." It is urged that there is no collector at Washington, the place of location of the public work concerned.

The statutes as to the collector for Washington are as follows: Rev. Stat. § 2550. "There shall be in the District of Columbia one collection-district, as follows: The district of Georgetown; to comprise all the waters and shores of the Potomac River within the State of Maryland and the District of Columbia from Pomonkey Creek to the head of the navigable waters of that river; in which Georgetown shall be the port of entry." § 2551. "There shall be in the district of Georgetown a collector." It appears from § 2550 that the collection district of Georgetown is more extensive than the city of Georgetown. And this is not changed by the later statute making Georgetown a part of Washington. Act of February 11, 1895, c. 79, 28 Stat. 650. We do not perceive on what ground it is denied that the Washington post office is within this district. The words, "shores of the Potomac River," seem to us broad enough to include the whole of a city on those shores and within the other limits named. "Waters and shores" is the usual phrase in Rev. Stat. Title 34, c. 1, §§ 2517–2612. The words "in which" assume that Georgetown is embraced within the district. If within the district it is so simply because it is on the shores as that word is used in § 2550, and if Georgetown is within it Washington is in it also, on the same ground. The same form of expression and the same assumption constantly recur in other sections. To show still further that collection districts run inland and are not limited to the mathematical line which bounds the water, it may be observed that, while "waters and shores" is the most common expression, a district frequently is declared to include towns; e. g., § 2517, Seventh, Thirteenth; § 2522; § 2531, First, Second; § 2533, First. It may include lands, § 2519; or embrace a county, § 2517, First, Sixth; or

even a State, § 2522. If Washington is within the collection district, then there was a collector at the place of location of the Washington post office, see § 3657, and the authority of the Secretary to appoint a disbursing agent under § 3658 was excluded by its very words.

The claimant does not contend that his case gets any appreciable help from the act of August 7, 1882, c. 433, 22 Stat. 306. That gives the compensation allowed by law to collectors of customs to disbursing agents appointed to disburse any appropriation for any United States post office or other buildings, "not located within the city of Washington." No other statute is relied upon. No doubt the Secretary was under the impression, when the letter was written, that he was making an appointment which would entitle the claimant to distinct compensation for new work and responsibility. He did not regard the claimant as designated to be disbursing agent within the claimant's district under Rev. Stat. § 255, and therefore as not entitled to any additional pay. Rev. Stat. §§ 1764, 1765. But we do not see how the case can be put any higher. It is agreed that the claimant was not appointed to a new office by the Secretary's letter. Therefore no help is to be got from *United States* v. *Saunders*, 120 U. S. 126, 129. The case is a hard one, but we are of opinion that the decision of the Court of Claims was right.

Judgment affirmed.

GREER COUNTY, OKLAHOMA TERRITORY, *v.* TEXAS.

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

No. 160. Submitted March 6, 1905.—Decided March 20, 1905.

The decision in *United States* v. *Texas*, 162 U. S. 1, that Greer County was not within the boundaries of Texas did not effect a cession of the territory included in the county from Texas to the United States or amount to a transfer of sovereignty, but was simply a revelation that such territory belonged to the United States. Greer County, Oklahoma, as created after that decison by the act of 1896, 29 Stat. 113, is a corporation created by a different sovereignty from that which purported to create Greer County, Texas, and as such is technically a different person, and does not succeed to land situated elsewhere in Texas granted by that State prior to such decision for school purposes to Greer County, Texas.

THE facts are stated in the opinion.

Mr. George Clark, *Mr. H. N. Atkinson* and *Mr. D. C. Bolinger* for plaintiff in error:

When a grant is made by a State to an individual or municipal corporation, and the grant is accepted, the contract is complete; and any action by the State through either its legislative, executive or judicial department, which tends to impair the obligation of said contract, is in violation of Sec. 10 of Art. I, of the Constitution of the United States. *Fletcher* v. *Peck*, 6 Cranch, 87, 148; *Trust Co.* v. *Baltimore*, 64 Fed. Rep. 153; *Dartmouth College* v. *Woodward*, 4 Wheat. 518; *Chicago* v. *Sheldon*, 9 Wall. 50.

When the land in controversy was patented to Greer County, as a part of Texas, said county took title to the land. *Cameron* v. *Texas*, 95 Texas, 545.

This decision shows a valid grant from the State of Texas

to Greer County, and that Greer County was not affected by the result of the litigation between the United States and the State of Texas. A grant is a contract, and any attempt by the State of Texas to revoke its grant to Greer County, is, under the agreed facts of this case, an attempt to impair the obligation of the contract evidenced by the grant.

The grants evidenced by the patents issued by the State of Texas vested title in Greer County, which title so vested was beyond recall by the State through any department of its government, executive, legislative or judicial. Constitution of Texas, art. 7, § 6; *Cameron* v. *State*, 95 Texas, 545; *Milam County* v. *Bateman*, 54 Texas, 166; *Palo Pinto County* v. *Gano*, 60 Texas, 251.

Even though the State itself may have donated the property, it thereby becomes such a vested right as will be protected. Wade on Retroactive Laws, 56; *Grogan* v. *San Francisco*, 18 California, 590. Rights of private property are never affected either by cession, conquest, change of sovereignty or otherwise, and the change in such sovereignty never divests rights of property. The decision of this court in 1895, that Greer County did not belong to Texas, but was a part of the domain of the United States, can therefore have no effect upon the rights of property or grants hitherto made to Greer County by the State of Texas. *United States* v. *Roselius*, 15 How. 36; *Townsend* v. *Greely*, 5 Wall. 326; *Dent* v. *Emmeger*, 14 Wall. 308; *Hardy* v. *De Leon*, 5 Texas, 234; *Musquez* v. *Blake*, 24 Texas, 466; *Kilpatrick* v. *Sisneros*, 23 Texas, 124; *Maxey* v. *O'Connor*, 23 Texas, 242; *United States* v. *Percheman*, 7 Pet. 51; *Strother* v. *Lucas*, 12 Pet. 410; *Airhart* v. *Massieu*, 98 U. S. 496.

When the State enters her courts as a suitor, the same law applies to it as to citizens. The undisputed evidence demonstrates that the State of Texas, through all its departments, executive, legislative and judicial, at the time the lands were granted to Greer County, was fully aware of the controversy then existing between the United States and the State of

Texas as to the ownership of said county, and perfected said grants to Greer County with such knowledge. And where the means of inquiry or knowledge are equally open to both parties, if a mistake occurs without fraud or falsehood, neither party is entitled to relief. *Fristoe* v. *Blum*, 92 Texas, 80; *Railway Co.* v. *Van Alstyne*, 56 Texas, 448; *Galveston County* v. *Gorham*, 49 Texas, 303; *Gilliam* v. *Alford*, 69 Texas, 271; *Farnsworth* v. *Duffner*, 142 U. S. 43; *Baltzer* v. *Railway Co.*, 115 U. S. 634; *May* v. *Le Claire*, 11 Wall. 217; Adams Eq., 7th ed., 166 *et seq.;* Fronb. Eq. 116.

The grants to Greer County by the State, being in trust for public school purposes, the children of that county became the donees of the charity and their rights and interests cannot be affected by subsequent action on the part of the State as donor. The fact that Texas has lost her dominion over Greer County since the grants were made, cannot enter into the question, as the State thereby is remitted to her action in the proper tribunals, if so disposed, to prevent or correct a perversion or waste of the funds. Property given in charity is always preserved by chancery, and even in cases where the use fails because illegal, the property does not revert, but must be applied as near as practicable to the original intention. *Dartmouth College* v. *Woodward*, 4 Wheat. 518; *Fontain* v. *Ravenel*, 17 How. 384; *Russell* v. *Allen*, 107 U. S. 167; *Girard* v. *Philadelphia*, 7 Wall. 15; *Jones* v. *Haversham*, 107 U. S. 189; *Mormon Church* v. *United States*, 136 U. S. 51; *Croxall* v. *Shererd*, 5 Wall. 281.

Counties may hold property in trust for schools. 1 Beach on Trusts, § 12, p. 19; *Parish* v. *Cole*, 3 Pick. 232; *Perin* v. *Cary*, 24 How. 575; 2 Perry on Trusts, § 707; *Attorney General* v. *Hellis*, 2 Simmons & St. Ch. Rep. 77, and the grant was a grant for charitable use and no matter if Greer County, Texas, ceased to exist, and no matter whether Greer County, Oklahoma Territory, is its natural or legal successor, or otherwise, it cannot affect the question; in either or both events a court of chancery may take charge of the funds and administer them

as near as may be possible according to the intention of the grantor.

Texas has been reimbursed for these lands. See act of Congress, April 27, 1904; Doc. & R. 571, Part II, 57th Cong., 2d Sess., from which it appears that the land sued for in this case, to-wit: 7,236 acres, was sold by Greer County when she was a part of Texas, but that afterwards Greer County by foreclosure of the vendor's lien bought in this 7,236 acres again and title was revested in Greer County. The balance of the land, 10,476 acres, became the property of Cameron and was involved in the suit decided adversely to the State in *Cameron* v. *State*, 95 Texas, 545. The Supreme Court of Texas holding in that case that the patents were valid and passed the title to Greer County, and that the Camerons held superior title to the State.

That the State of Texas has been reimbursed not only for every expenditure made by her in Greer County during the existence of her claim to that county, but had been even reimbursed by the Government for the 10,476 acres of these lands owned by the Camerons; and it was, at least, inferable that in case she does not prevail in her suit in this cause the Government will be equally beneficent and liberal and reimburse her, if she asks for it, for the value of these lands.

The court would take judicial notice of the public records of the executive department. *N. Y. Indians* v. *United States*, 170 U. S. 22, 42; *Heath* v. *Wallace*, 138 U. S. 584; *Underhill* v. *Fernandez*, 168 U. S. 253; *The Paquette Habana*, 175 U. S. 700; *Jones* v. *United States*, 137 U. S. 216; *Kennett* v. *Chambers*, 14 How. 47; *United States* v. *Leschmaker*, 22 How. 405; *Romero* v. *United States*, 1 Wall. 742; *The Delaware*, 161 U. S. 473.

Mr. C. K. Bell, former Attorney General of the State of Texas, with whom *Mr. R. V. Davidson*, Attorney General of the State of Texas, *Mr. C. A. Culberson* and *Mr. T. S. Reese* were on the brief, for defendant in error:

Whatever contract there was by virtue of the patents, was

between the State of Texas and Greer County, Texas, a legal subdivision of the State, now nonexistent, and if there has been any impairment of this contract, it does not in any way concern plaintiff in error, or affect its rights. But there has been in no sense an impairment of the obligation of this contract by the decisions of the Texas courts, and finally neither in the judgment of the state court nor in the assignments of error in this court, nor in the brief of counsel, is there any reference to any *legislation* with reference to the matter. The case was decided upon the general principles of law governing the case and applicable to the facts presented. The provisions of § 10, Art. I, Constitution United States, do not apply. *Knox* v. *Exchange Bank*, 12 Wall. 379; *Central Land Co.* v. *Laidley*, 159 U. S. 103, 109.

The effect of the judgment of the state court was in no sense the taking of private property for public use without making compensation, as charged in the fourth assignment of error, even if, as is assumed by plaintiff in error, there were any inhibition in the Federal Constitution, of such action by the State.

Greer County, Texas, the grantee in the patents, was a political subdivision and a *de facto* municipal corporation of the State of Texas, and its existence as such was terminated by the decision of this court in *United States* v. *Texas*, 162 U. S. 1; Const., Texas, Art. 9, § 1; Art. 11, § 1; Rev. Stat. Texas, 1895, Arts. 756, 789.

The grant of four leagues of land for school purposes was not to the territory embraced within the limits of Greer County, nor to the inhabitants thereof, but to Greer County as a political subdivision and municipal corporation of the State of Texas, in trust for the benefit of the public free schools of the county as such, and to be administered under the general control and supervision of the legislature. Constitution, 1875, Art. 7, § 6; act January 26, 1839; act February 5, 1840; act January 16, 1850; act March 13, 1875; act April 7, 1883, Rev. Stat., 1895, Arts. 4280, 4281. This last act is the one

upon which the patents were issued, as stated in the face of the patents, and authorizes the issuance of patents to each county *of the State*, as it is organized, out of the 325 leagues surveyed for that purpose under the act of March 16, 1882. Revised Statutes, 1895, Arts. 3902, 4270, 4271, 4272; *Palo Pinto Co.* v. *Gano*, 60 Texas, 251; *Worley* v. *State*, 48 Texas, 12.

Upon the decision of this court in *United States* v. *Texas*, 162 U. S. 1, and the surrender by the political department of the state government of all claim to or right of control over, the territory formerly embraced in the geographical limits of Greer County, Texas, the title to the lands involved in this suit was extinguished, and the lands reverted to the State. 1 Dillon Mun. Corp. § 169*a*; *Merriwether* v. *Garrett*, 102 U. S. 472, 512; *Bass* v. *Fontleroy*, 11 Texas, 698, 706.

The grant was not a contract within the meaning of § 10, Art. I, Const. United States. *East Hartford* v. *Hartford Bridge Co.*, 10 How. 491; *Newton* v. *Commissioner*, 100 U. S. 566.

Mr. Justice Holmes delivered the opinion of the court.

This is a suit brought by the State of Texas to recover certain lands in Hockley and Cochran Counties, Texas, for which patents were issued to Greer County, Texas, on July 18, 1887, under color of the general laws of the State granting four leagues of land to each county of the State for school purposes. Texas Gen. Laws, 1883, c. 55. Greer County, Texas, was created by an act of February 8, 1860, and was organized as a county in 1886. In March, 1896, it was decided by this court that the territory known as Greer County belonged to the United States and not to the State of Texas. *United States* v. *Texas*, 162 U. S. 1. Thereupon by act of Congress of May 4, 1896, c. 155, the same territory was organized as Greer County, Oklahoma, the present defendant, plaintiff in error. 29 Stat. 113. On April 13, 1897, Texas passed a law purporting to set aside the land in controversy for the support of schools in

Texas and directing proceedings to recover the land against all adverse claims. Gen. Laws, 1897, c. 72. Then this suit was brought. The defendant, among other things, set up that the State was attempting to impair the obligation of its grant.

The case was heard on agreed facts and the State District Court decided in favor of the State on the ground that the general laws of Texas authorized patents to be issued to the counties of Texas only, and that therefore the patents were void. Another suit was brought against a purchaser from the *de facto* Texas county of a part of the land, in which the Supreme Court of the State decided that the purchaser got a good title, holding that the action of the state legislature still was conclusive on the court notwithstanding the decision in *United States* v. *Texas*; *Cameron* v. *State*, 95 Texas, 545. The present cause was taken to the Court of Civil Appeals, which distinguished *Cameron* v. *State*, and affirmed the judgment on the different ground that the grant was for public school purposes within the State of Texas, and, as the defendant could not and would not use the land for such purposes, the State was entitled to have the patents cancelled and to recover the land. 31 Texas Civ. App. 223. Then a writ of error was obtained from this court to enforce the constitutional right alleged by the defendant as stated above.

The decisions below and in *Cameron* v. *Texas* suggest interesting questions, which it is not necessary to answer. It may be doubted how far any court can be bound by legislation after this court declared such legislation beyond the power of the State, any more than it would be if the law had been held unconstitutional. It would be curious to consider whether the mutual mistake in a matter which, on the face of the transaction, obviously went to the root of the gift was of such a nature as to warrant an avoidance when the mistake was discovered, including the question whether the mistake was one of law or fact. See *Bispham* v. *Price*, 15 How. 162; *Upton* v. *Tribilcock*, 91 U. S. 45; *Snell* v. *Insurance Co.*, 98 U. S. 85, 90-92; *Griswold* v. *Hazard*, 141 U. S. 260, 284; *Hirschfeld* v.

London, Brighton & South Coast Ry., 2 Q. B. D. 1. There is the further consideration whether the gift created a public charity, as contended by the plaintiff in error, and if so, or whatever the nature of the trust, whether there is such a failure of the donee as to invalidate the gift and to destroy the legal title of the defendant, if otherwise good. See *Stratton* v. *Physio-Medical College*, 149 Massachusetts, 505, 508, and cases cited.

We shall consider none of these questions, because we are of opinion that the plaintiff in error must fail on the short ground that it is a stranger to the gift. The plaintiff in error treats the change brought about by the decision in 162 U. S. 1, as if it had been a cession of territory or mere transfer of sovereignty by that or other means. It was nothing of the sort. It was a discovery that the State of Texas never had had a title to the land known as Greer County. The United States found itself at liberty to do what it chose with that land. It could have done nothing. It could have subdivided it at will. It could have made it part of some existing county. The land and its inhabitants retained no legal personality, least of all that personality with which Texas had purported to endow them. The United States, it is true, very properly did what it could to preserve the former condition of things. By § 1 of the act of May, 1896, c. 155, 29 Stat. 113, it provided that "all public buildings and property of every description heretofore belonging to Greer County, Texas, or used in the administration of the public business thereof is hereby declared to be the property of said Greer County, Oklahoma," and otherwise it did all in its power to keep up the legal continuity of the county with the supposed old one. But some things were not within its power, and one thing which it could not do was to make an artificial creation of its own successor to the title to lands in Texas, supposing that title to have been parted with, by its independent fiat. Without the consent of Texas no corporation created by another sovereignty could succeed to Texas lands.

Greer County, Oklahoma, being a corporation created by a different sovereignty from that which purported to create Greer County, Texas, is technically a different person. It can claim the legal title, which Texas purported to convey to a creation of its own, only by succession, or that feigned identity familiar in the cases of executor and heir. See *Day* v. *Worcester, Nashua & Rochester R. R.*, 151 Massachusetts, 302, 307, 308; Littleton, § 337; *North* v. *Butts*, Dyer, 139*b*, 140*a*; *Oates* v. *Frith*, Hob. 130. But succession to land is governed wholly by the law of the place where the land lies. *De Vaughn* v. *Hutchinson*, 165 U. S. 566, 570. The land in controversy was no part of Greer County, but lies in Texas, and Texas, so far from having assented to the succession of the defendant, has assumed to deal with the land as its own, by legislation, and has directed this suit to be brought to recover it. The legal title of the State is clear, for on the disappearance of the *de facto* county the State took whatever title that county had. See *Meriwether* v. *Garrett*, 102 U. S. 472. The legal title is what is in question before us, and the actual continuity of the inhabitants of the county could be recognized only by way of trust. But it would be wrong to encourage the notion that the title still may be charged with a trust in favor of schools in Greer County. The aim of the statute, under which the patents were made out, was the support of Texas schools. That was its dominant purpose. We think it unlikely that any court of equity would deem it equitable to direct the fund to any other trust.

Judgment affirmed.

HARRIMAN *v.* NORTHERN SECURITIES COMPANY.

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

No. 512. Argued March 1, 2, 1905.—Decided March 6, 1905.—Opinion delivered April 3, 1905.

After affirmance of the decree in the *Northern Securities case*, 193 U. S. 197, adjudging the combination illegal under the Anti-Trust Act the corporation adopted a resolution reducing its capital stock and distributing the surplus of assets created by the reduction and consisting of shares of the Northern Pacific and Great Northern Railway Companies ratably among its stockholders. Complainants objected to the *pro rata* distribution and insisted that the Northern Pacific stock they had delivered to the Securities Company was not so delivered in pursuance of an absolute sale but to be held in trust; that they were entitled to have their stock returned to them; that the decree in the Government suit practically so adjudicated and that as they acted in good faith, believing that the original contract was not within the prohibitions of the Anti-Trust Act, the doctrine of *in pari delicto* did not apply.

The Circuit Court granted a temporary injunction against *pro rata* distribution and the Circuit Court of Appeals reversed the order and practically disposed of the entire case adversely to complainants. This court granted a writ of certiorari. *Held*, that:

Where the decree of the Circuit Court of Appeals in an action in equity, only reverses an order of the Circuit Court granting an injunction, but the court, the record presenting the whole case, practically disposes of the entire controversy on the merits, certiorari may issue from this court and this court may finally dispose of it by its direction to the Circuit Court.

The decree of the Circuit Court in the *Northern Securities case*, affirmed by this court, 193 U. S. 197, did not determine the quality of the transfer as between the defendants, and the provisions therein as to return of shares of stock transferred to it by the railway stockholders were permissive only, and not an adjudication that any of the vendors were entitled to a restitution of their original railway shares.

The judgment of this court affirming the decree of the Circuit Court in the *Northern Securities case* went no further than the decree itself, and while it leaves the Circuit Court at liberty to proceed in the execution of its decree as circumstances may require, it does not operate to change the decree or import a power to do so not otherwise possessed.

General expressions in an opinion which are not essential to dispose of a case are not permitted to control the judgment in subsequent suits.

Nothing in the judgment or opinion of this court in the *Northern Securities*

case, 193 U. S. 197, enlarged the scope of the decree of the Circuit Court so as to make it an adjudication that any of the vendors of railway stocks were entitled to judicial restitution of the stocks transferred by them to the Securities Company, or that the Securities Company could not distribute the shares of railway stock held by it *pro rata* between its own shareholders.

The transaction between complainants and the Northern Securities Company was one of purchase and sale of Northern Pacific Railway Company stock for shares of stock of the Securities Company and cash and not a bailment or trust.

When a vendor testifies that the transaction was an unconditional sale and that he attached to his negotiations no other conditions than that of price he is estopped from afterwards denying that this is a statement of fact and claiming that he only swore to a conclusion of law.

Property delivered under an executed illegal contract cannot be recovered back by any party *in pari delicto*, and the courts cannot relax the rigor of this rule where the record discloses no special considerations of equity, justice or public policy.

The fact that the complainants in this case acted in good faith and without intention to violate the law does not exempt them from the doctrine of *in pari delicto*. All the parties having supposed the statute would not be held applicable to the transaction neither can plead ignorance of the law as against the other and the defendant secured no unfair advantage in retaining the consideration voluntarily delivered for the price agreed.

Where a vendor after transferring shares of railway stock to a corporation in exchange for its shares becomes a director of the purchasing corporation and participates in acts consistent only with absolute ownership by it of the railway stocks, and does so after an action has been brought to declare the transaction illegal, his right to rescind the contract and compel restitution of his original railway shares, if it ever existed, is lost by acquiescence and laches.

The Northern Pacific system taken in connection with the Burlington system is competitive with the Union Pacific system, and the entire record considered, to deliver to the complainants, the Northern Pacific stock claimed by them and distribute the balance of the stock ratably between the other Securities Company stockholders, would not only be inequitable but would tend to smother competition and thus contravene the object of the Sherman law and the purposes of the suit brought by the Government against the Northern Securities Company.

It was the duty of the Securities Company under the decree in the Government suit to end a situation which had been adjudged unlawful, and as this could be effected by sale and distribution in cash, or by distribution in kind, the company was justified in adopting the latter method and avoiding the forced sale of several hundred million dollars of stock which would have involved disastrous results.

EDWARD H. HARRIMAN, Winslow S. Pierce, Oregon Short

Line Railroad Company and The Equitable Trust Company of New York exhibited their bill against the Northern Securities Company in the Circuit Court of the United States for the District of New Jersey, April 20, 1904, on which, with accompanying affidavits and exhibits, a restraining order was issued, pending an application for an injunction as prayed in the bill. April 26 an amended bill was filed, and the application for a preliminary injunction was heard May 20, 21 and 23 by Bradford, J., holding the Circuit Court.

On the fourth day of June a second amended bill was filed, and on July 15, 1904, Judge Bradford delivered an opinion sustaining the application. 132 Fed. Rep. 464.

The order for injunction was entered August 18, 1904, and an appeal therefrom was prosecuted to the Circuit Court of Appeals for the Third Circuit, which, on January 3, 1905, reversed the order. 134 Fed. Rep. 331.

Thereupon complainants applied to this court for the writ of certiorari, which was granted January 30, and the matter advanced for hearing, and heard March 1 and 2. The affirmance of the decree of the Circuit Court of Appeals was announced March 6, it being added that an opinion would be filed afterwards.

The Northern Pacific Railway Company was the successor through reorganization of the Northern Pacific Railroad Company, and by its charter it was provided that its capital stock might be increased from time to time by a vote of a majority of the stockholders, and that the company might, by a like vote, classify its stock into common and preferred, and might "make such preferred stock convertible into common stock upon such terms and conditions as may be fixed by the board of directors." On July 1, 1896, by the unanimous vote of its then stockholders, the capital stock was increased to one hundred and fifty-five million dollars, divided into eighty millions of common stock and seventy-five millions of preferred stock, and it was resolved "that such preferred stock shall be issued upon the condition that at its option the com-

pany may retire the same, in whole or in part, at par, from time to time, on any first day of January prior to 1917." The plan of reorganization which was adopted provided that as to the new company which it was contemplated should acquire the properties and franchises of the Northern Pacific Railroad Company, and the issue of preferred stock by it, "the right will be reserved by the new company to retire this stock, in whole or in part, at par, from time to time, upon any first day of January during the next twenty years."

All the certificates of stock, whether common or preferred, at that time or subsequently issued, contained this clause: "The company shall have the right at its option, and in such manner as it shall determine, to retire the preferred stock, in whole or in part, at par, from time to time, upon any first day of January prior to 1917."

The reorganization had been managed by J. P. Morgan & Co., and the directory of the Northern Pacific Railway Company were friendly to that firm. During the same period the president of the Great Northern Railway Company was James J. Hill, and its directors were friendly to him.

The two companies were friendly to each other, and in April, 1901, acquired the shares of the Chicago, Burlington and Quincy Railroad Company.

At this time the Union Pacific Railway system included the Union Pacific Railway, the railroad of the Oregon Short Line Railroad Company, and the railroad of the Oregon Railroad and Navigation Company. The Union Pacific Company was practically the owner of the entire capital stock of the Oregon Short Line Railroad Company, and the latter company was the owner of practically the entire capital stock of the Oregon Railway and Navigation Company. The interests in control of the Union Pacific system might properly be called the Harriman interests. Shortly thereafter, at the instance of the Union Pacific Railway Company and with money furnished by that company, the Oregon Short Line Company purchased Northern Pacific preferred stock to the amount of $41,085,000,

and common stock to the amount of $37,023,000, aggregating $78,100,000 of stock, being a majority of the $155,000,000, total capital stock of the Northern Pacific Company as then outstanding. But the preferred stock was subject to retirement at par at the option of the company, and the 370,230 shares of common stock was less than a majority of the total common stock, which majority was held by the Morgan-Hill party.

In October, 1901, complainant Harriman was elected a member of the board of directors of the Northern Pacific Railway Company and James Stillman was reëlected. They were also directors of the Union Pacific Railway Company. They both attended a meeting of the Northern Pacific board on November 13, 1901, and Harriman was chosen a member of the executive committee. At this meeting resolutions were adopted providing for and resulting in the retirement of the preferred stock on January 1, 1902, by the payment of $100 cash for each and every share to each and every holder of record on that day.

These resolutions declared that the company thereby determined to exercise its right to retire the preferred stock; provided that for the purpose of raising the funds necessary to do so, the company should issue its negotiable bonds for $75,000,000, convertible at par into shares of the common stock of the company at par; authorized the making of a contract for the sale of all of such bonds at par and accrued interest, the contract to contain a provision giving to the holder of every share of the common stock the opportunity to receive from the contract purchaser, at par and interest, such bonds to an amount equal to seventy-five eightieths of the par amount of said common stock at such time owned by such holder, and arranged for the retirement from and after December 31, 1901, of the $75,000,000 preferred stock, by the payment to each and every holder of record thereof on January 1, 1902, of $100 cash for each and every share.

On November 15, the executive committee of the Northern

Pacific Company authorized the execution of a contract with the Standard Trust Company of New York for the sale and delivery of the convertible certificates for $75,000,000 provided for in the resolutions.

The preferred stock was subsequently taken up in accordance with the plan resolved upon.

The Northern Securities Company was incorporated under the laws of New Jersey in November, 1901, its articles of association having been filed at Trenton on the thirteenth day of that month, with a capital stock of $400,000,000, divided into 4,000,000 shares of the par value of $100 each, and its objects being certified to be:

"(1.) To acquire by purchase, subscription or otherwise, and to hold as investments any bonds or other securities or evidences of indebtedness, or any shares of capital stock created or issued by any other corporation or corporations, association or associations, of the State of New Jersey or of any other State, Territory or country.

"(2.) To purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of, any bonds or other securities or evidences of indebtedness created or issued by any other corporation or corporations, association or associations, of the State of New Jersey, or of any other State, Territory or country, and, while owner thereof, to exercise all the rights, powers and privileges of ownership.

"(3.) To purchase, hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of shares of the capital stock of any other corporation or corporations, association or associations, of the State of New Jersey, or of any other State, Territory or country; and, while owner of such stock, to exercise all the rights, powers and privileges of ownership, including the right to vote thereon.

"(4.) To aid in any manner any corporation or association of which any bonds or other securities or evidences of indebtedness or stock are held by the corporation; and to do any acts or things designed to protect, preserve, improve or en-

hance the value of any such bonds or other securities or evidences of indebtedness or stock.

"(5.) To acquire, own and hold such real and personal property as may be necessary or convenient for the transaction of its business.

"The business or purpose of the corporation is from time to time to do any one or more of the acts and things herein set forth.

"The corporation shall have power to conduct its business in other States and in foreign countries, and to have one or more offices out of this State, and to hold, purchase, mortgage and convey real and personal property out of this State."

On the fourteenth day of November, 1901, fifteen gentlemen, including complainant Harriman and two other directors of the Union Pacific, James J. Hill, president of the Great Northern, and two members of J. P. Morgan & Co., were elected directors of the Northern Securities Company. Complainant Harriman took his seat at the board and an executive committee of five was elected, of which he was one.

November 15 resolutions were passed authorizing the purchase of the Northern Pacific stock held by Harriman and Pierce, as follows:

"The president stated that he now had an opportunity of acquiring $37,023,000 par value of the common stock, and $41,085,000 par value of the preferred stock, of the Northern Pacific Railway Company, at an aggregate price of $91,407,500, payable, as to $82,491,871, in the fully paid-up and non-assessable shares of this company at par, and, as to the remaining $8,915,629, in cash.

"On motion, and by affirmative vote of all the directors present, it was—

"*Resolved*, That the president be, and hereby he is, authorized in behalf of this company, to purchase said stock—namely $37,023,000 par value of the common stock, and $41,085,000 par value of the preferred stock of the Northern Pacific Railway Company, at an aggregate price of $91,407,500,

payable as to $82,491,871 thereof in the fully paid-up and non-assessable shares of the capital stock of this company at par, and as to $8,915,629 in cash; and that the officers of this company be, and hereby they are, authorized to issue fully paid-up and non-assessable shares of stock of this company to the amount of $82,491,871, and to pay $8,915,629 in cash, in consideration of such $37,023,000 of the common stock and $41,085,000 of the preferred stock of the Northern Pacific Railway Company.

"*Resolved*, That the president be, and hereby he is, authorized at any time to retire at par, for cash, any and all preferred stock of the Northern Pacific Railway Company that may be acquired by this company, and in case such retirement shall be effected prior to January 1, 1902, to allow interest up to January 1, 1902, at the rate of four per cent per annum, on the sum receivable for such preferred stock.

"*Resolved*, That the president be, and hereby he is, authorized in behalf of this company to purchase at their par value an amount of the convertible certificates of the Northern Pacific Railway Company, to be issued pursuant to the resolutions of the board of directors of the Northern Pacific Railway Company, passed November 13, 1901, equal to seventy-five eightieths of the par amount of any and all common stock of the Northern Pacific Railway Company that shall have been acquired by this company.

"*Resolved*, That the president be, and hereby he is, authorized, in case of the purchase by this company of any of the convertible certificates of the Northern Pacific Railway Company, to convert the same into common stock of the Northern Pacific Railway Company whenever such conversion may be effected.

"*Resolved*, That the president be, and hereby he is, authorized to borrow, on such terms as he may arrange, any moneys required for the purpose of carrying out the foregoing resolutions, and to make all financial arrangements,

and to do all acts and things, which he may deem needful in the premises."

Complainant Harriman and his co-directors of the Union Pacific were not present at this meeting, but were present at the next meeting of the board on November 19, at which the minutes of the meeting of November 15 were read and on motion were approved.

At a subsequent meeting of the executive committee, in which Mr. Harriman participated, the form of the company's permanent stock certificate, being the usual form, was unanimously approved.

In the meantime, and on November 18, Harriman and Pierce had delivered their Northern Pacific stock to the Northern Securities Company and that company had delivered to them the 824,000 shares of its stock and $8,915,629 in cash.

The Northern Pacific stock certificates received from Harriman and Pierce were surrendered by the Securities Company to the Northern Pacific Railway Company. The certificates for the 370,230 shares of common stock were exchanged for 370,230 shares of common stock issued in the name of the Northern Securities Company. The certificates for the 410,580 shares of preferred stock were surrendered to the Northern Pacific Railway Company for retirement, and paid for and retired as provided, the transaction resulting in the receipt by the Northern Securities Company of certificates for 347,090 shares of new common stock. This made 717,320 shares, and the Securities Company also acquired 820,270 shares, from a large number of separate individual owners. And from a large number of stockholders of the Great Northern 1,181,242 shares of the stock of the latter company.

At a meeting of the board of directors of the Northern Securities Company on January 22, 1903, at which complainant Harriman was present, the sale by the company of 75,000 shares of its own stock for cash was approved. The second amended bill says $7,522,000 "was issued for cash used for the purchase of other property and for corporate purposes."

From the organization of the Securities Company until the affirmance of the decree in the Government suit, hereafter mentioned, complainants continued to exercise the right of holders of 824,000 shares of stock in the Securities Company; received their share of dividends, and gave their proxy to vote at the annual meetings of 1902 and 1903.

July 17, 1902, Harriman and Pierce and the Oregon Short Line Company pledged the 824,000 shares of Northern Securities Company stock to the Equitable Trust Company, the Short Line Company executing a trust indenture, which contained this clause: "The deposit and pledge hereunder of said shares of stock, or of any other securities which shall become subject to this indenture, shall not prevent the consolidation, union or merger with any other corporation of the Securities Company, or of any other corporation by which said securities shall have been issued, or the sale of its property or the distribution of its assets. In any such case the trustee shall receive such amounts of stock, bonds or other securities, or money, or of either or all of them, as the holders of the pledged shares of stock of the Securities Company or other pledged securities, as the case may be, shall be entitled to receive and upon receipt thereof shall surrender the deposited stock certificates or other securities."

March 10, 1902, a bill was exhibited in the Circuit Court of the United States for the District of Minnesota by the United States against the Northern Securities Company, the Northern Pacific Railway Company, the Great Northern Railway Company, James J. Hill, William P. Clough, D. Willis James, John S. Kennedy, J. Pierpont Morgan, Robert Bacon, George F. Baker and Daniel S. Lamont, to restrain the violation of the act of Congress of July 2, 1890, 26 Stat. 209, c. 647, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," which resulted April 9, 1903, in a decision in favor of complainants, 120 Fed. Rep. 721, and a decree as follows:

"That the defendants above named have heretofore entered

into a combination or conspiracy in restraint of trade and commerce among the several States, such as an act of Congress, approved July 2, 1890, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' denounces as illegal; that all of the stock of the Northern Pacific Railway Company and all the stock of the Great Northern Railway Company, now claimed to be held and owned by the defendant, the Northern Securities Company, was acquired and is now held by it in virtue of such combination or conspiracy in restraint of trade and commerce among the several States; that the Northern Securities Company, its officers, agents, servants, and employés, be, and they are hereby, enjoined from acquiring or attempting to acquire further stock of either of the aforesaid railway companies; that the Northern Securities Company be enjoined from voting the aforesaid stock which it now holds or may acquire, and from attempting to vote it, at any meeting of the stockholders of either of the aforesaid railway companies, and from exercising or attempting to exercise any control, direction, supervision, or influence whatsoever over the acts and doings of said railway companies, or either of them, by virtue of its holding such stock therein; that the Northern Pacific Railway Company and the Great Northern Railway Company, their officers, directors, servants, and agents, be, and they are hereby, respectively and collectively enjoined from permitting the stock aforesaid to be voted by the Northern Securities Company, or in its behalf, by its attorneys or agents, at any corporate election for directors or officers of either of the aforesaid railway companies, and that they, together with their officers, directors, servants, and agents, be likewise enjoined and respectively restrained from paying any dividends to the Northern Securities Company on account of stock in either of the aforesaid railway companies which it now claims to own and hold; and that the aforesaid railway companies, their officers, directors, servants, and agents, be enjoined from permitting or suffering the Northern Securities Company, or

any of its officers or agents, as such officers or agents, to exercise any control whatsoever over the corporate acts of either of the aforesaid railway companies.

"But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring to the stockholders of the Northern Pacific Railway Company and the Great Northern Railway Company, respectively, any and all shares of stock in either of said railway companies which the said Northern Securities Company may have heretofore received from such stockholders in exchange for its own stock; and nothing herein contained shall be construed as prohibiting the Northern Securities Company from making such transfer and assignments of the stock aforesaid to such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies."

The case was brought to this court, and March 14, 1904, the decree was affirmed. 193 U. S. 197.

March 22, 1904, the board of directors of the Northern Securities Company adopted the following preamble and resolutions:

"Whereas, In the course of its business, this company has acquired, and now holds 1,537,594 shares in the capital stock of the Northern Pacific Railway Company; and 1,181,242 shares in the capital stock of the Great Northern Railway Company; and

"Whereas, In a suit brought by the United States against this company, the said railway companies and others, this company has been enjoined from voting upon the shares of either of the said railway companies, and each of the said railway companies has been enjoined from paying to this company any dividends upon any of the shares of such railway company held by this company; and

"Whereas, This company has issued, and there are now outstanding 3,954,000 shares of its own capital stock; and

"Whereas, This company desires and intends to comply with the decree in the said suit, fully and unreservedly, and without delay:

"*Resolved*, In consideration of the premises, it is declared necessary and desirable for this company so to reduce its present stock as will enable it, without delay, in connection with such reduction, to distribute among its shareholders, the shares of capital stock of said railroad companies held by it.

"*Resolved*, That the board of directors of this company hereby declares it advisable that article (Fourth) of this company's certificate of incorporation be amended, so as to read as follows:

"Fourth. The capital stock of this company is hereby reduced to three million nine hundred and fifty-four thousand dollars ($3,954,000), and shall hereafter be three million nine hundred and fifty-four thousand dollars ($3,954,000), divided into thirty-nine thousand five hundred forty (39,540) shares of one hundred dollars ($100) each. Such reduction of capital stock shall be accomplished by each holder of outstanding shares of this company's stock surrendering to the company, for retirement, ninety-nine (99) per centum of the shares held by him.

"Upon the surrender to this company, by any shareholder, of the entire number of shares, and parts of shares, of this company's stock, which he is hereby required to surrender, this company will assign to him, for each share so surrendered, thirty-nine dollars and twenty-seven cents ($39.27) of the stock of the Northern Pacific Railway Company, and thirty dollars and seventeen cents ($30.17) of the preferred stock of the Great Northern Railway Company, and proportional amounts thereof for fractional shares of the stock of this company.

"The board of directors or executive committee from time to time shall make such rules and regulations as it shall deem necessary or convenient for carrying out the provisions hereof and all matters pertaining to the surrender and retirement

of the stock of this company, or to the assignment and transfer of the stocks of the said railway companies, hereby contemplated, shall be under the direction of the board. For the purposes hereof, the stockholders of this company, and the number of shares held by them, respectively, shall be determined from the stock transfer books of the company, which, for such determination, shall be closed at a day and hour to be determined by resolution of the board.

"*Resolved*, That a meeting of the stockholders of this company, for the purpose of taking action upon the said alteration of the certificate of incorporation of this company and also upon such other business as may come before the meeting, be, and is hereby called, to be held at the general offices of this company in the city of Hoboken, county of Hudson, and State of New Jersey, at 11 o'clock A. M., on April 21, A. D. 1904."

Notice was accordingly given that the meeting of the stockholders would be held on April 21, and a copy of the resolutions and an explanatory letter were sent to the Attorney General of the United States. Early in April the three principal complainants in the present suit presented to the Circuit Court for the District of Minnesota their petition for leave to intervene in the suit of the United States against the Northern Securities Company, setting up substantially the same grounds as in this suit, and seeking similar relief. This application was heard at St. Paul, April 12 and 13. The Government appeared by the Attorney General, and filed a declaration that it was satisfied with the relief granted. April 19, 1904, the court rendered its decision, denying leave to intervene. 128 Fed. Rep. 808.

Up to April 18, 1904, the Securities Company had issued 86,945 certificates of stock and there had been 16,000 transfers registered on the books of the company. At the closing of the transfer books on that day there were 3,953,971 shares of stock outstanding in the hands of 2,531 separate holders.

The meeting of the stockholders of the Northern Securities Company was duly held April 21, 1904; and at that meeting the stock of the company was reduced ninety-nine per centum, and the proposed *pro rata* distribution of the stock of the Northern Pacific Railway Company and of the preferred stock of the Great Northern Railway Company, to and amongst the shareholders of the Northern Securities Company, was assented to. Two million nine hundred and forty-four thousand seven hundred and forty shares were represented and all voted for the plan adopted by the directors.

As has been stated, the second amended bill was filed after the hearing on the application for the preliminary injunction, and it was therein alleged, among other things, that the Northern Securities Company was incorporated and organized in pursuance of a combination in restraint of trade and commerce among the several States; that the said company was to "acquire and permanently hold a majority of the shares of the capital stock of said Great Northern and Northern Pacific Companies and control the operation and management thereof in perpetuity, and that the then existing holders of such railway shares should deposit the same with said holding company and receive in lieu thereof share certificates of said holding company upon the basis of $180 par value of its stock for each share of Great Northern stock and $115 par value of its stock for each share of Northern Pacific stock, and that said holding company should act as custodian, depositary, or trustee of said railway shares on behalf of the existing stockholders of said railway companies and their assigns."

"That prior to the incorporation of said Northern Securities Company your orator Oregon Short Line Railroad Company, had acquired and at the time of the incorporation and organization of said Securities Company owned $37,023,000 par value of the common stock and $41,085,000 par value of the preferred stock of the defendant Northern Pacific Railway Company represented by certificates issued to and registered in the name of your orators Harriman and Pierce; and that after

the incorporation of the said Northern Securities Company had been resolved upon as aforesaid, your orators Harriman, Pierce and Oregon Short Line Railroad Company agreed with the promoters and incorporators of said Northern Securities Company to transfer to and deposit with said Northern Securities Company, under the terms and conditions aforesaid, the said shares of said Northern Pacific Railway Company of the aggregate par value of $78,108,000 owned by said Oregon Short Line Railroad Company as aforesaid, and to receive in exchange therefor certificates of said Northern Securities Company representing an interest therein of $82,491,871 par value and $8,915,629 in cash, and in pursuance of said agreement your orators Harriman and Pierce, acting for your orator Oregon Short Line Railroad Company, did, on or about the eighteenth day of November, 1901, transfer and deliver to said Northern Securities Company certificates for $37,023,000 par value of the common stock and $41,085,000 par value of the preferred stock of said Northern Pacific Railway Company owned by your said orator as aforesaid and received in exchange therefor certificates of said Northern Securities Company representing an interest in $82,491,871 par value and said cash. . . ."

"That at the time of such exchange, on said eighteenth of November, 1901, it was agreed between said Harriman and Pierce and said defendant Northern Securities Company that the said $41,085,000 par value of said preferred stock of the said Northern Pacific Railway Company should be converted into common stock of said Northern Pacific Railway Company; that said preferred stock was subsequently and in or about the month of December, 1901, converted by said defendant Northern Securities Company into common stock of said Northern Pacific Railway Company of the same par value; that certificates for $34,709,062 par value of such common stock registered in its name on the books of said railway company were substituted in lieu and place of the certificates for said preferred stock; that said Northern Securities Company

caused said original common stock to be transferred into its name upon the books of said railway company, and that said Northern Securities Company now holds within the jurisdiction of this court certificates registered in its name on the books of the Northern Pacific Company for said common stock so originally received from your orators Harriman and Pierce and for said common stock into which said preferred stock was so converted and certificates substituted as aforesaid."

"Your orators are advised by counsel and, therefore, aver that the effect of said decree of April 9, 1903, as affirmed by the Supreme Court of the United States, was to adjudge that the Northern Securities Company was not a purchaser or owner but simply a custodian of the shares of stock of said railway company acquired and held by it as aforesaid, that it acquired and held possession thereof in violation of said anti-trust act, that it acquired no title thereto and cannot transfer any rights in respect thereof, and that the legal and equitable owners of said shares of the stock of said railway companies were and are the several parties who originally exchanged the same for stock of the Northern Securities Company or their assigns."

The prayer of the bill was "that it be decreed that said proposed plan of distribution is illegal and contrary to law and in violation of the rights and equities of your orators, and that the complainants are entitled to the return and transfer to them by the defendant Northern Securities Company of the shares of common stock of said Northern Pacific Railway Company which were so delivered by said Harriman and Pierce and the shares of common stock into which the preferred stock of the Northern Pacific Railway Company delivered by them were converted, in exchange for the certificates of stock of the Northern Securities Company so issued to and now held by your orators and such sum in cash as may be just; and that the said defendant, Northern Securities Company, its directors, officers and agents, may be ordered and directed to endorse

the certificates now held by it for said stock of the Northern Pacific Railway Company to your said orator Oregon Short Line Railroad Company or in blank, and deliver the same to your orator The Equitable Trust Company of New York in exchange for the stock of the Northern Securities Company now held by it to be held subject to its rights and lien as trustee aforesaid; and that the defendant Northern Securities Company, its directors, officers, agents and employés be perpetually enjoined and restrained from in any manner parting with, disposing of, transferring, assigning or distributing any part of said stock of the Northern Pacific Railway Company so received from your orators Harriman and Pierce as aforesaid, or any common stock into which the preferred stock received from them may have been converted, or the certificates now representing the same or any part thereof, except to return the same to your orators in exchange for its own stock so issued as aforesaid and said cash; and that your orators have such other or further or general relief against said Northern Securities Company as shall be proper and just under the circumstances of the case.

"Your orators further pray that the defendant Northern Securities Company may be enjoined and restrained from parting with, disposing of, transferring, assigning or distributing said stock of the Northern Pacific Railway Company or any part thereof during the pendency of this suit or any certificates now representing the same."

The proofs embraced the pleadings and decrees in the suit of *United States* v. *Northern Securities Company;* the *ex parte* affidavits of Harriman, Hill, and others; the deposition of Harriman taken before the Interstate Commerce Commission at Chicago in January, 1902; the deposition of Harriman taken in the suit of *Minnesota* v. *Northern Securities Company* in December, 1902; extracts from the minutes of proceedings of the board of directors of the Northern Pacific Railway Company, and of the executive committee and board of directors of the Northern Securities Company.

Mr. William D. Guthrie, with whom *Mr. D. T. Watson*, *Mr. R. S. Lovett*, *Mr. Maxwell Evarts*, *Mr. John F. Dillon*, *Mr. R. V. Lindabury* and *Mr. Bainbridge Colby* were on the brief, for petitioners:

As to the power of the court to enter final judgment; this case does not fall under *Smith* v. *Vulcan Iron Works*, 165 U. S. 518, but under the exceptions in *Mast, Foos Co.* v. *Stover Mfg. Co.*, 177 U. S. 485, 494, and see *Brill* v. *Peckham Motor Truck Co.*, 189 U. S. 57, 63.

The Northern Securities Company, having been organized for an illegal purpose and having obtained possession of the railway stocks in pursuance of such purpose, could not thereby acquire the title to and ownership of the stocks.

The whole transaction was illegal, *ultra vires* and void from the beginning to the end. It was, legally speaking, a nullity —"an aggregate of nothings." *Scovill* v. *Thayer*, 105 U. S. 150; *Ashbury Ry. Carriage & Iron Co.* v. *Riche*, L. R. 7 H. L. 653; *Thomas* v. *Railroad Co.*, 101 U. S. 71; *Oregon Ry. Co.* v. *Oregonian Ry. Co.*, 130 U. S. 1, 22; *Penna. Co.* v. *St. L., A. &c. R. R. Co.*, 118 U. S. 290.

The contract is void; the objection is not only that the corporation ought not to have made it, but that it could not make it, that the contract cannot be ratified or confirmed by the stockholders, because it could not have been authorized by them, and that no performance can give the unlawful agreement any validity by way of estoppel or otherwise, or be the foundation of any right. *Central Transp. Co.* v. *Pullman's Car Co.*, 139 U. S. 24, 60; *McCormick* v. *Market Bank*, 165 U. S. 538, 550; *California Bank* v. *Kennedy*, 167 U. S. 362, 368; *Pullman's Car Co.* v. *Transportation Co.*, 171 U. S. 138. In fact any contract made in violation of a statute is void, *Gibbs* v. *Baltimore Gas Co.*, 130 U. S. 396, 410; *Miller* v. *Ammon*, 145 U. S. 421, 426; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 548, and it is vain to contend that any right can be acquired under such a contract. *Montgomery* v. *United States*, 15 Wall. 395, 399; *Desmare* v. *United States*, 93 U. S.

605, 612; *Sprott* v. *United States*, 20 Wall. 459, 461; *United States* v. *Lapène*, 17 Wall. 601, 602, 603; *United States* v. *Grossmayer*, 9 Wall. 72, 76; *The Ouachita Cotton*, 6 Wall. 521, 532; and cases cited in *Bank of the United States* v. *Owens*, 2 Pet. 527, 541.

Where the purpose and consideration of a contract have failed by reason of illegality resulting in corporate disability to perform, the vendor may rescind and is entitled to restitution of his title. *Chapman* v. *Douglas County*, 107 U. S. 348; *Am. Table Works* v. *Boston Machine Co.*, 139 Massachusetts, 5. When property is transferred for an illegal purpose which has been terminated, prevented or abandoned, the holder must return the property on demand. *Louisiana* v. *Wood*, 102 U. S. 294; *Parkersburg* v. *Brown*, 106 U. S. 487, 503. To deny a remedy to reclaim it, is to give effect to the illegal contract. *Davis* v. *Old Colony Railroad*, 131 Massachusetts, 258, 275; *White* v. *Franklin Bank*, 22 Pick. (Mass.) 181; *La Caussade* v. *White*, 7 D. & E. 535; *Nat. Bank & Loan Co.* v. *Petrie*, 189 U. S. 423; *Sittel* v. *Wright*, 122 Fed. Rep. 434; *Railroad Co.* v. *Railroad Co.*, 66 N. H. 100. The contract having been declared invalid no rights were acquired thereunder. Cases *supra* and *Jacksonville &c. Ry. Co.* v. *Hooper*, 160 U. S. 514, 524; *Dwight* v. *Brewster*, 1 Pick. 50, 55. As to invalidity of contracts entered into in violation of statutes see *Langdon* v. *Branch*, 37 Fed. Rep. 449, 463; *State* v. *Standard Oil Co.*, 49 Ohio St. 137, 183; *People* v. *Chicago Gas Trust Co.*, 130 Illinois, 268; *People* v. *N. R. S. R. Co.*, 121 N. Y. 582; *Cameron* v. *Havemeyer*, 25 Abb. N. C. 438, 446; *Unckles* v. *Colgate*, 148 N. Y. 529; *State* v. *Distilling Co.*, 29 Nebraska, 700.

The question of ownership of stock was involved and decided in the Government suit. 193 U. S. 197, 227; 307, 325, 353, 362. The decree authorized the *return* of the stock, and as it also decided that the combination was illegal it is vain to contend that any rights were acquired under the contract. *Montgomery* v. *United States*, 15 Wall. 395.

The extent and effect of the decision of any court, as *res*

adjudicata or as a judicial precedent, must be ascertained, not merely from the decree or mandate, but also from the pleadings and the opinions delivered by the court. It is likewise proper to refer to the evidence before the court and to the arguments of counsel whenever necessary in order to determine exactly what points the court has ruled upon. The court is always at liberty to refer to its own records. *Dimmick* v. *Tompkins*, 194 U. S. 540, 548; *Bienville Water Supply Co.* v. *Mobile*, 186 U. S. 212, 217; *Butler* v. *Eaton*, 141 U. S. 240. Every question directly presented by the issues and discussed and passed upon in the opinions is as much a part of the decision and judgment of the court as if it had been expressly recited in its decree or mandate. So, the mandate of this court is always to be read in the light of its opinion, and it has never been the practice to recite in the mandate any of the points decided, but simply to declare the ultimate conclusion of affirmance, reversal, dismissal or qualification of the decree below. *Last Chance Min. Co.* v. *Tyler Min. Co.*, 157 U. S. 683, 690; *In re Sanford Fork & Tool Co.*, 160 U. S. 247, 256; *In re Potts*, 166 U. S. 263; *Baker* v. *Cummings*, 181 U. S. 117, 126; *Nat. Foundry &c. Co.* v. *Oconto Water Supply Co.*, 183 U. S. 216, 234; *Northern Securities Co.* v. *United States*, 193 U. S. 332; *Railroad Companies* v. *Schutte*, 103 U. S. 118, 143.

As stockholders, the complainants were clearly not strangers to a litigation which involved the right of the corporation to carry out the objects for which it was organized and which affected the title to all its property, received from them. As depositors, they were represented by their custodian, agent or trustee as to its right to hold and the legality of its custodianship. All identified in interest and in privity with one of the litigating parties are concluded by a judgment and entitled to invoke its effect. *New Orleans* v. *Citizens' Bank*, 167 U. S. 371, 396. Even if the decision in the Government suit does not constitute *res adjudicata* in the strict technical sense, it undoubtedly should have been regarded as a controlling judi-

cial precedent on the same facts sufficient to establish *prima facie* all that the complainants were called upon to show on the motion for a preliminary injunction. *Brill* v. *Peckham Motor Truck Co.*, 189 U. S. 57, 59–63; *American Bell Telephone Co.* v. *National Imp. Telephone Co.*, 27 Fed. Rep. 663, 664; *Kerr* v. *New Orleans*, 126 Fed. Rep. 920, 924.

A stockholder is so far an integral part of the corporation that he is considered privy to any legal proceedings touching its status and powers. *Sanger* v. *Upton*, 91 U. S. 56. See also, *Hawkins* v. *Glenn*, 131 U. S. 319, 329; *Glenn* v. *Liggett*, 135 U. S. 533, 544; *Great Western Telegraph Co.* v. *Purdy*, 162 U. S. 329, 337; 3 Cook on Corporations, 5th ed. § 750; Herman on Estoppel and Res Judicata, 154, 165; *Hale* v. *Hardon*, 95 Fed. Rep. 747, 759; *Hendrickson* v. *Bradley*, 85 Fed. Rep. 508, 516; *Wilson* v. *Seymour*, 76 Fed. Rep. 678, 681; *National Foundry & Pipe Works* v. *Oconto Water Co.*, 68 Fed. Rep. 1006; *Secor* v. *Singleton*, 41 Fed. Rep. 725. As the Securities Company was the custodian or trustee of the railway shares deposited with it, it represented the complainants as its *cestui que trustent* and they are bound by the decree. *Kerrison* v. *Stewart*, 93 U. S. 155, 160; *Graham* v. *Boston, Hartford & Erie R. R. Co.*, 118 U. S. 161, 179; *McCampbell* v. *Mason*, 151 Illinois, 500, 508; *McElrath* v. *Pittsburg and Steubenville Railroad Co.*, 68 Pa. St. 37, 40, 41.

In the Government suit certain stockholders of different railroad companies were made defendants as of their respective classes. The judgment therefore bound the whole. *Smith* v. *Swormstedt*, 16 How. 288, 303.

The court below was in error in holding that the form and not the legal effect of the transaction was controlling.

The assertion of a legal conclusion under such circumstances never operates to estop a party from showing the real facts. *Sturm* v. *Boker*, 150 U. S. 312, 336; *Mutual Life Ins. Co.* v. *Phinney*, 178 U. S. 327, 342; *Towle* v. *White*, 29 L. T. N. S. 78; *Heryford* v. *Davis*, 102 U. S. 235, 243, 244, 246; *Chicago Railway Co.* v. *Merchants' Bank*, 136 U. S. 268, 280; *McGourkey*

v. *Toledo & Ohio Railway*, 146 U. S. 536, 569; *McNamara* v. *Culver*, 22 Kansas, 661, 668; *Pugh* v. *Davis*, 96 U. S. 332, 336.

The bill and proofs in the Government suit were all to effect that the Northern Securities Company was organized to effectuate an illegal *holding* corporation.

In the case of an illegal trust and combination entered into and adjudged to be in violation of an act of Congress, particularly where, at the very inception of any such scheme, its legality is at once publicly challenged by the National Government, justice and sound public policy will be promoted by decreeing the restoration of the *status quo*, and not permitting distribution on the basis of alleged rights acquired under and by virtue of the illegal contract and in disregard and defiance of the pending litigation.

If Mr. Hill and his associates are to be judged as other men are judged and are to be presumed to have contemplated and intended the consequences of their own acts, there can be no escape for them from the conclusion that the present proposed plan of distribution is a willful and deliberate attempt to circumvent the decree in the Government suit, and was, in fact, all along, the alternative intended as part of their original unlawful scheme.

The Circuit Court in Minnesota did not intend to pass upon or to prejudice or prejudge the merits of a controversy which it declined to consider or decide.

There has been no equitable estoppel created for the benefit of the Northern Securities Company by what the company did or continued to do during the pendency of the Government suit and in defiance of the serious claim therein made, either as to sale of stock, all of the purchasers having notice of the situation, or by the receipt of dividends on the Northern Securities stock by the complainants. *L. & N. Railroad Co.* v. *Kentucky*, 161 U. S. 677, 691; *Scoville* v. *Thayer*, 105 U. S. 143, 151; *Central Transportation Co.* v. *Pullman Car Co.*, 139 U. S. 24, 60; *Tieton* v. *Cofield*, 93 U. S. 163. Illegal acts cannot be given validity by assenting to them or acting under

them. If so, a statute could be abrogated by simply contracting to do the prohibited act. Cases *supra* and *Thomas* v. *Railroad Co.*, 101 U. S. 71, 86; *Veeder* v. *Mudgett*, 95 N. Y. 295, 310.

The Northern Securities Company claims that because it now holds possession by virtue of an illegal contract between parties *in pari delicto*, the complainants and all other depositors can be allowed no standing in any court of law or equity to reclaim their property. This contention cannot be sustained. Its result obviously would be that the company might dispose of and distribute at will all the property it held without legal accountability to any one. *Yarmouth* v. *France*, 19 Q. B. D. 647, 653; *Northrup* v. *Graves*, 19 Connecticut, 548, 554; 2 Stephen Cr. Law, 4; *McMullen* v. *Hoffman*, 174 U. S. 639, 669. Complainants acted in good faith and belief that the Northern Securities Company was not an illegal combination. As to what Congress itself contemplated by the statute is uncertain. See Cong. Rec., 51st Cong., 1st Sess., vol. 21, Pt. 3, pp. 2460, 3146, 4089.

Where the illegal purpose cannot be continued and must necessarily be abandoned, the innocent owner of property transferred does not forfeit his legal rights so that he has become outlawed, and cannot maintain an action to recover his property, and the other party may retain the property free from accountability and convert it to his own use or dispose of it as he sees fit, and the one in possession is protected in appropriating the property by a maxim of equity. *Nat. Bank & Loan Co.* v. *Petrie*, 189 U. S. 423.

The rule as to parties *in pari delicto* contemplates the existence of a *delictum*, that is, a wrongful act knowingly done, an intentional "transgression against positive law." Parties are not *in pari delicto* when there is concededly no intentional wrongdoing or crime. Even in criminal cases, satisfactory proof of a mistake of the law, honestly held in consequence of a reasonable, but erroneous, construction of a doubtful statute, often operates to prevent a conviction. *Queen* v.

Tolson, 23 Q. B. D. 168, 171; *Taylor* v. *Newman*, 4 Best & S. 89; *Regina* v. *Allday*, 8 C. & P. 136; *Rex* v. *Twose*, 14 Cox C. C. 327; *Reg.* v. *Sleep*, 8 Cox C. C. 472; *Regina* v. *Tinkler*, 1 F. & F. 513; *Rider* v. *Wood*, 2 E. & E. 338; *Buckmaster* v. *Reynolds*, 13 C. B. (N. S.) 62; *United States* v. *Conner*, 3 McLean, 573; *United States* v. *Pearce*, 2 McLean, 14; *Halsted* v. *State*, 41 N. J. L. 552, 591; *Cutter* v. *State*, 36 N. J. L. 125; *Stone* v. *United States*, 167 U. S. 178, 188; *Hedden* v. *Iselin*, 31 Fed. Rep. 266; *Iowa* v. *Sheeley*, 15 Iowa, 404; *Commonwealth* v. *Bradford*, 9 Metc. (Mass.) 268; *State* v. *Hause*, 71 N. Car. 518; *Dotson* v. *State*, 6 Coldw. (Tenn.) 545.

As to whether the rule applicable to parties *in pari delicto* applies where the parties have acted in good faith and under a mutual mistake as to the law, see *Spring Co.* v. *Knowlton*, 103 U. S. 49; *St. Louis Railroad* v. *Terre Haute Railroad*, 145 U. S. 393; *City of Detroit* v. *Detroit City Ry. Co.*, 60 Fed. Rep. 161, and *Pullman Palace Car Co.* v. *Central Transp. Co.*, 65 Fed. Rep. 158.

Relief will be granted from the consequences of a mistake of law, whenever the mistake is clearly proved or *admitted* and, by reason of such mistake, the party against whom relief is sought would otherwise secure an unfair advantage. *Moses* v. *Macferlan*, 2 Burrows, 1005, 1012; *Farmer* v. *Arundel*, 2 W. Bl. 824; *Bingham* v. *Bingham*, 1 Ves. Sen. 126; Belt's Supp. 79; *Bize* v. *Dickason*, 1 D. & E. 285; *Earl of Beauchamp* v. *Winn*, L. R. 6 H. L. 223; *Re Saxon Life Assurance Society*, 2 J. & H. 408; *Jones* v. *Clifford*, L. R. 3 Ch. D. 779; *Allcard* v. *Walker* [1896], 2 Ch. 369, 381; *Griswold* v. *Hazard*, 141 U. S. 260, 284; *Spring Co.* v. *Knowlton*, 103 U. S. 49, 60; *Snell* v. *Insurance Co.*, 98 U. S. 85; *Hunt* v. *Rousmanier*, 8 Wheat. 174, 215; *S. C.*, 1 Pet. 1, 17; *State* v. *Paup*, 13 Arkansas, 129, 138; *Griffith* v. *Sabastian County*, 49 Arkansas, 24, 34; *Northrop* v. *Graves*, 19 Connecticut, 548, 554; *Stedwell* v. *Anderson*, 21 Connecticut, 139, 144; *Culbreath* v. *Culbreath*, 7 Georgia, 64; *Underwood* v. *Brockman*, 4 Dana (Ky.), 309, 317; *Ray & Thornton* v. *Bank*, 3 B. Mon. (Ky.) 510; *Stockbridge Iron Com-*

pany v. *Hudson Iron Company*, 102 Massachusetts, 45; *Lowndes* v. *Chisholm*, 2 McCord Ch. (S. C.) 455; *Mortimer* v. *Pritchard*, Bailey Eq. (S. C.) 505; *Hopkins* v. *Mazyck*, 1 Hill Ch. (S. C.) 242; 250; *MacKay* v. *Smith*, 27 Washington, 442.

When an illegal contract is sought to be specifically enforced or when damages are claimed for its breach, undoubtedly the sound rule is that the difference between *malum prohibitum* and *malum in se* is immaterial. *Gibbs* v. *Baltimore Gas Co.*, 130 U. S. 396, 412.

But the distinction between *malum prohibitum* and *malum in se* has been often recognized by the courts when considering the right to recover property transferred under an illegal contract, upon disaffirmance or termination of the illegal transaction, under circumstances which result in a failure of consideration. Where the transaction involves moral turpitude, such as the giving of a bribe, or facilitating the commission of an immoral act or a heinous crime, the party is so clearly culpable and deserving of punishment that the courts will refuse to lend him any assistance against another party to the immoral transaction, but will leave both parties where their own immoral conduct has placed them. Where, however, the act involves no moral turpitude, but is merely *malum prohibitum* as distinguished from *malum in se*, relief has often been granted by restoring the *status quo* so far as practicable. *Pratt* v. *Short*, 79 N. Y. 437, 445. For distinction between *malum prohibitum* and *malum in se* see *Stock Yards* v. *Railroad Co.*, 196 U. S. 217; *Spring Co.* v. *Knowlton*, 103 U. S. 49; *McCutcheon* v. *Merz Co.*, 71 Fed. Rep. 787, 789; *Parkersburg* v. *Brown*, 106 U. S. 487; *Bank* v. *Townsend*, 139 U. S. 67, 75.

In this case the transaction was not *malum in se*. All the parties believed they were not violating the law. The transaction was not forbidden by the common law. *In re Greene*, 52 Fed. Rep. 104, 111; *Mogul Steamship Company* v. *McGregor, Gow & Co.*, 23 Q. B. D. 598, 619, 626; [1892] A. C. 25; *United States* v. *Freight Association*, 166 U. S. 290, 334; *United States* v. *Joint Traffic Association*, 171 U. S. 505, 572. It was

also apparently legal according to the law of New Jersey where it occurred. New Jersey Corporation Act, revision of 1896, §§ 49, 51; Dill. on Corp. 88, 93; *Trenton Potteries Co.* v. *Oliphant*, 58 N. J. Eq. 507, 524; *Ansboro* v. *United States*, 159 U. S. 695. The transaction was at most *malum prohibitum*. *Tappenden* v. *Randall*, 2 B. & P. 467, 470; *Ex parte Bulmer*, 13 Vesey, 313; *White* v. *Franklin Bank*, 22 Pick. (Mass.) 181; *Lowell* v. *Boston and Lowell Railroad Corporation*, 23 Pick. (Mass.) 24, 32; *Washington Gas Co.* v. *Dist. of Columbia*, 161 U. S. 316, 327; *Hanauer* v. *Doane*, 12 Wall. 342; *Douglass* v. *Kavanaugh*, 90 Fed. Rep. 373.

Where money or property has been deposited with a trustee or stakeholder the doctrine of *in pari delicto* does not apply. A mere custodian as was the Securities Company cannot take advantage of the illegality of the transaction but must return the property to the owners. *Brooks* v. *Martin*, 2 Wall. 70, 80; *Planters' Bank* v. *Union Bank*, 16 Wall. 483, 500; *Block* v. *Darling*, 140 U. S. 234; *Pointer* v. *Smith*, 7 Heisk. (Tenn.) 137, 144; *Railroad* v. *Railroad*, 66 N. H. 100, 131; *Newbold* v. *Sims*, 2 S. & R. (Pa.) 317; *Jeffrey* v. *Ficklin and Bennett*, 3 Arkansas, 227, 236; *Barrett* v. *Neil*, Wright (Ohio), 472; *Skinner* v. *Henderson*, 10 Missouri, 205; *Walker* v. *Chapman*, Lofft, 342; *Wassermann* v. *Sloss*, 117 California, 425; *Morgan* v. *Groff*, 4 Barb. (N. Y.) 524; *Barnard* v. *Taylor*, 23 Oregon, 416, 422; *S. C.*, 18 L. R. A. 859; *Kiewert* v. *Rindskopf*, 46 Wisconsin, 481; *Douville* v. *Merrick*, 25 Wisconsin, 688; *Bone* v. *Ekless*, 5 H. & N. 925; *Wright* v. *Stewart*, 130 Fed. Rep. 905, 921; *Dauler* v. *Hartley*, 178 Pa. St. 23; *Mallory* v. *Oil Works*, 86 Tennessee, 598, 606; *Dwight* v. *Brewster*, 1 Pick. (Mass.) 50, 55; *Sampson* v. *Shaw, Executor*, 101 Massachusetts, 145, 151; *Morgan* v. *Beaumont*, 121 Massachusetts, 7; *Clarke, Harrison & Company* v. *Brown*, 77 Georgia, 606; *Shannon* v. *Baumer*, 10 Iowa, 210; *Taylor* v. *Bowers*, 1 Q. B. D. 291; *In re Cronmire, ex parte Waud* [1898], 2 Q. B. 383; *Kinsman* v. *Parkhurst*, 18 How. 289.

The contention of the Northern Securities Company that the illegal contract had been executed, and that this precluded

any relief to the complainants, is fallacious and cannot be sustained. *Northern Securities Co.* v. *United States*, 193 U. S. 197, 357.

A universally recognized exception to the rule concerning parties *in pari delicto* is that the courts will permit the recovery of property delivered and held under an illegal contract which has been terminated *in fieri*, when the public interests will be advanced thereby. *Starke's Exrs.* v. *Littlepage*, 4 Rand. (Va.) 368; *O'Conner* v. *Ward*, 60 Mississippi, 1025, 1037; 5 Thompson on Corp. § 6410; 2 Pomeroy's Eq. § 941; Story's Eq. Jur. § 298.

These complainants can follow the common Northern Pacific stock obtained by the Northern Securities Company by the conversion of the preferred stock. Where specific property belonging to another is changed by a custodian, bailee, trustee or agent into other property or funds, the original owner is entitled to follow it as long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fail. *National Bank* v. *Insurance Co.*, 104 U. S. 54, 68. See also *Silsbury* v. *McCoon*, 3 N. Y. 379, 390; *McLarren* v. *Brewer*, 51 Maine, 402, 404.

The real nature of the transaction was not changed by the conversion of stock. It was not an independent subscription for bonds.

The issue of the convertible certificates, the retirement of the preferred stock, and the conversion of the convertible certificates into common stock, are shown to have taken place all on the same day as part of one transaction and the securities are traceable. This was the only way it could be done under the laws of Wisconsin and the corporate powers of the Northern Pacific Railway Company. *Weidenfeld* v. *Northern Pacific Ry. Co.*, 129 Fed. Rep. 305; Laws Wisconsin, 1895, ch. 244, § 10; *Scovill* v. *Thayer*, 105 U. S. 143; *Hamor* v. *Taylor-Rice Engineering Co.*, 84 Fed. Rep. 392; *Trevor* v. *Whitworth*, L. R. 12 App. Cas. 409, 416.

There is no merit in the fierce attack made on behalf of the

Securities Company upon the motives of the complainants in instituting this suit and the announcement that if complainants prevailed and recovered their property, the so-called Union Pacific Railroad System would secure control of the Northern Pacific Railway Company nor should this consideration influence the court, change the rules of law, and produce a different result than if this feature did not exist.

This court will not consider the motives of parties in instituting legal proceedings to protect their alleged legal or equitable rights. *Dickerman* v. *Trust Co.*, 176 U. S. 181, 190; *South Dakota* v. *North Carolina*, 192 U. S. 286, 311. There is an uncontradicted statement in the record that the roads are not parallel and competitive. And see also *Louisville and Nashville* v. *Kentucky*, 161 U. S. 677, 698. The real competitive lines are the Great Northern and the Northern Pacific and it has been the motive of those in control of the Great Northern to stifle competition.

If the railway shares deposited are not to be returned but to be regarded as assets of the Securities Company then the corporation should sell the stocks and make the distribution in cash. *Mason* v. *Pewabic Mining Co.*, 133 U. S. 50, 63; *Kean* v. *Johnson*, 9 N. J. Eq. 401, 408, 409; *Coler* v. *Tacoma Railway and Power Co.*, 64 N. J. Eq. 117, 125; *S. C.*, 54 Atl. Rep. 413. It is so in the case of a partnership. Lindley on Part., 555, and much stronger are the reasons for such course in the case of a corporation. 4 Thompson on Corp. § 4548; 2 Cook on Corp. § 671. As to § 54, Corporation Act of New Jersey, Revision of 1896, see *Beals* v. *Hale*, 4 How. 37, 54.

Mr. D. T. Watson also for petitioners:

This court, in the Government case decided that the Securities Company was not the lawful purchaser or absolute owner of the capital stock of the Northern Pacific Railway Company assigned to it by appellants, but held it as custodian for the appellants. 193 U. S. 325, 334, 346, 353, 361, 365, 390, 400. The decree authorized the return of the stock to the original

stockholders of the constituent companies. The Securities Company cannot hold the railway stock and prevent giving relief to complainants under the doctrine of *in pari delicto*.

By the affirmance of this court the decree of the Circuit Court became the decree of this court and binding upon all parties and privies and other courts. *In re Potts*, 166 U. S. 265; *Durant* v. *Essex County*, 101 U. S. 555; *Sandford &c. Co., Petitioner*, 160 U. S. 247. The opinion of this court is part of the record and may be freely resorted to to determine what this court has decided. *Foundry Co.* v. *Water Co.*, 183 U. S. 217; *Baker* v. *Cummings*, 181 U. S. 124; *Mining Co.* v. *Mining Co.*, 157 U. S. 683, 690; *So. Pac. Co.* v. *United States*, 183 U. S. 519, 532; *United States* v. *Norfolk Railway Co.*, 114 Fed. Rep. 686; *Russell* v. *Russell*, 129 Fed. Rep. 434; *West* v. *Brashear*, 14 Pet. 342; *DeSollar* v. *Hanscome*, 158 U. S. 221; *Cromwell* v. *County of Sac*, 94 U. S. 359; *Strong* v. *Grant*, 2 Sup. Ct. D. C. 222; *Fulton* v. *Pomeroy*, 111 Wisconsin, 668; Barton's Suit in Equity, 150; Equity Rule, 86; *Putnam* v. *Day*, 22 Wall. 66.

As parties by representation in the Government case, complainants are entitled in their own right to plead or give in evidence against, and as binding upon, the Securities Company, the conclusions in that case on the same questions which arise in this—even if the cause of action, parties, testimony and measure of relief in the two suits are different. *Cromwell* v. *County of Sac*, 94 U. S. 352; *Lumber Co.* v. *Buchtel*, 101 U. S. 638; *So. Pac. R. R. Co.* v. *United States*, 168 U. S. 48; Black on Judgments, 609, 614; *Burlen* v. *Shannon*, 99 Massachusetts, 202; *Railway Co.* v. *Schutte*, 103 U. S. 143; *Duchess of Kingston Case*, 20 Howell's State Trials, 355.

The appellants, as parties by representation in the Government case, are entitled in their own right to set up and assert the decree in that case as against the Northern Securities Company in this case. Story Eq. Pl. § 372; 2 Daniel's Ch. Pl. & Pr. 1539; *Wilton's Appeal*, 97 Pa. 393; *Griffin* v. *Spence*, 69 Georgia, 397.

It is not necessary that all the parties to the Government suit should be the same in the subsequent litigation. *Thompson* v. *Roberts*, 24 How. 240; *Smith* v. *Kernochen*, 7 How. 217; *Wilson* v. *Buell*, 117 Indiana, 315, 318; Wells on Res Adjudicata, § 35; *Lawrence* v. *Hunt*, 10 Wend. 80; Freeman on Judgments, § 154; 1 Greenleaf, § 523; *Green* v. *Bogue*, 158 U. S. 478, 502.

Where there are several grounds of recovery or defense on which the decree may have been rested, it will be conclusive on the specific findings, which led up to the proposition, on which the court decided the case, and what that ground was may be determined by evidence *aliunde* where the decree itself is silent on it. *Russell* v. *Place*, 94 U. S. 606; *DeSollar* v. *Hanscome*, 158 U. S. 216; *Flint Nat. Bk.* v. *Covington*, 129 Fed. Rep. 798; *Hawes* v. *Water Co.*, 5 Sawyer, 287; *Corcoran* v. *Ches. Canal Co.*, 94 U. S. 741.

The former opinion and decree of this court is conclusive even on this court when the same case comes back here, and certainly so where that former opinion and decree is set up as conclusive in another litigation where the parties are not all the same, and where the complainant in the former case, the United States, is not a party to the second. *Roberts* v. *Cooper*, 20 How. 467, 481; *Barney* v. *Winona &c. R. R. Co.*, 117 U. S. 231; *United States* v. *Camon*, 184 U. S. 574; *Thompson* v. *Maxwell &c. Co.*, 168 U. S. 456; *Yazoo &c. Ry. Co.* v. *Adams*, 180 U. S. 7; *Great Western Tile Co.* v. *Burnaham*, 162 U. S. 343; *Chaffin* v. *Taylor*, 116 U. S. 567; *Clark* v. *Keith*, 106 U. S. 464; *Supervisors* v. *Kenniott*, 94 U. S. 498; *Tyler* v. *Maguire*, 17 Wall. 283.

The appellants were by representation parties and privies in the Government case, as stockholders of the Securities Company, as of class represented by Morgan, Hill and others, as *cestuis que trust*, and as stockholders of the Northern Pacific Railway they are therefore in their own right entitled to set up the findings and conclusions of this court in that case as *res adjudicata* in any subsequent litigation between them-

selves and the Northern Securities Company so far as regards the issues raised and decided in that case. 3 Cook on Corp. § 750; *Hendrickson* v. *Bradley*, 85 Fed. Rep. 516; *Foundry Co.* v. *Water Co.*, 68 Fed. Rep. 1007; *Wilson* v. *Seymour*, 76 Fed. Rep. 681; Herman on Estoppel, 154–165; *Secor* v. *Singleton*, 41 Fed. Rep. 725; *Gt. West. Tel. Co.* v. *Purdy*, 162 U. S. 329; *Hawkins* v. *Glenn*, 131 U. S. 319; *Glenn* v. *Williams*, 60 Maryland, 93, 116; *Hancock Bank* v. *Farmers*, 176 U. S. 640; *Sanger* v. *Upton*, 91 U. S. 56; *Whitman* v. *Bank*, 176 U. S. 560; *Flash* v. *Conn*, 109 U. S. 371; *Hall* v. *Hardon*, 95 Fed. Rep. 759; *Fruit Co.* v. *Railroad Co.*, 89 Fed. Rep. 24; *McElrath* v. *P. & S. R. Co.*, 68 Pa. St. 40; *Shaw* v. *Railroad Co.*, 105 U. S. 605; *Kerrison* v. *Stewart*, 93 U. S. 160; *Vetterlein* v. *Barnes*, 124 U. S. 169; *Beals* v. *Railway Co.*, 133 U. S. 290; *Kent* v. *Lake Superior Co.*, 114 U. S. 90; *Manson* v. *Duncannon*, 166 U. S. 542; *Smith* v. *Swormstedt*, 16 How. 288; *McIntosh* v. *Pittsburg*, 112 Fed. Rep. 705; *Willoughby* v. *Chicago &c. R. R. Co.*, 50 N. J. 609.

Complainants in this case are entitled to set up and plead as *res adjudicata* the findings, conclusions and decree of this court in the Government case as hereinbefore enumerated, even if the cause of action in the Government case was different from the cause of action in the present case.

The decision in the Government case caused the present litigation. This case is the child of that parent. The parties to the present case, the appellants and the Northern Securities Company, were parties to the Government case, and in the same capacity.

The subject matter of the present litigation is 717,320 shares of the capital stock of the Northern Pacific Railway Company, and this identical capital stock was the stock which the complainants assigned to the Northern Securities Company for the purpose of carrying out the combination.

The averments of the bill and answers in the Government case distinctly raised, *inter alia*, as material numerous questions upon which the controversy turned, questions which

are in substance, the same as are now restated in somewhat different form.

These stocks in the two railroad companies which, as averred in the bill in the Government case, and as found by this court, were transferred by Hill, Morgan and other stockholders to the Securities Company in pursuance of, and to perfect the illegal combination to restrain trade and commerce, included the stock owned by the Oregon Short Line Railroad Company and held in the name of Harriman and Pierce as trustees, being the identical stock in controversy in this case.

This court had before it in the Government case all the testimony which was before the Court of Appeals in the present case as to the manner in which, and the purpose for which, the Securities Company acquired the Oregon Short Line stock in the Northern Pacific Railway Company, and this included the evidence of Mr. Harriman.

Not only did the pleadings sharply raise the issues in the Government case which are also in this case,—and this court discussed these issues and decided them,—but the evidence in the Government case, including all of Mr. Harriman's, supported the conclusions of this court on those issues.

The so-called permissive portion of the decree certainly did authorize the return by the Securities Company to the individual stockholders who assigned to the Securities Company the identical stock so assigned. If it was Northern Pacific stock, then Northern Pacific stock was to be returned.

The St. Paul opinion of Judge Thayer misconstrued the St. Louis decree as the St. Louis court did not make, as the controlling question in the case, the distinction between the real, substantial ownership and the mere holding of the railroad stocks as custodian that this court did.

The Court of Appeals erred in deciding that this court did not even "incidentally" consider the question of ownership and deciding this case as if the Government case had not arisen.

The equities of the case are with complainants.

All parties fully believed this plan to be lawful and really

beneficial to commerce, but this court adjudged it was a violation of the Sherman Act, and made a decree which restrained the Securities Company from carrying out the scheme and rendered the railway stock worthless in its possession. This necessitated a dissolution of the Securities Company, as the Supreme Court foresaw.

Evidently, the scheme having failed, this put every one in *statu quo, ante* as to the transfer to the Securities Company of their respective stocks—and this could only be done by retransferring to each his stock, the Securities Company still holds it—each still holds his Securities Company stock. The retransfer is simple. If there be strangers who came in afterwards and who have equities, do what is fair to them.

Whoever bought stock after March 10, 1902, had notice *pendente lite* and is concluded by the decree. *Tilton* v. *Cofield*, 93 U. S. 163. Hill, Morgan and Company are taking the property and seeking shelter behind either one of two innocent holders. They control the Securities Company and therefore owe complainants good faith but having induced complainants to put their stock into the Securities Company now they intend to avail of the situation to make money and secure control of the railway companies for themselves.

The Securities Company cannot compel complainants to accept Great Northern stock in lieu of their Northern Pacific. The stockholders of a corporation upon dissolution cannot be compelled to accept a distribution of their share of the assets in kind. *Post* v. *Beacon &c. Co.*, 84 Fed. Rep. 369, 375; *Mason* v. *Pewabic Mining Co.*, 132 U. S. 50, 58.

As to when the Circuit Court of Appeals may, on an appeal from an interlocutory decree, enter a final one, see *Forsythe* v. *Hammond*, 166 U. S. 512; *Smith* v. *Vulcan Iron Works*, 165 U. S. 524; *Mast, Foos & Co.* v. *Stover Mfg. Co.*, 177 U. S. 494; *Britt* v. *Peckham Motor Co.*, 189 U. S. 58, from which it appears that the present case is not one where the Circuit Court of Appeals on an appeal from an interlocutory order granting a

preliminary injunction, could enter what is practically a final decree, and finally dispose of the case on the merits.

The necessity for a hearing in the ordinary way where each side could put in all its proofs, cross-examine witnesses, compel the attendance of hostile witnesses and the production of all books and papers, is not only apparent from the complications in this case, but is further shown by the inaccuracy which the Circuit Court of Appeals fell into in finally considering and passing on the case merely on an interlocutory hearing and upon *ex parte* affidavits.

Mr. Elihu Root, with whom *Mr. Francis Lynde Stetson* was on the brief, for respondent:

Everything in the record, by mere recital and without argument, shows that in fact and by intent of both parties, there was a sale of the Northern Pacific stock to the Securities Company in consideration of a stockholder's interest in that company, and a large sum of money—*i. e.*, the issue to Harriman and Pierce of 824,918 shares of the stock and the payment to them of $8,915,629 in cash.

The complainants are estopped from asserting that the Securities Company is a trustee or bailee. They have publicly held out the Securities Company to be the owner of the railway stocks, and have induced innocent third persons to acquire interests in the corporation in reliance thereupon.

But whether the Securities Company be a vendee or a custodian, the complainants are not entitled to recover the Northern Pacific stock. The transaction was in contravention of public policy and a penal statute, and their demand for the return of the stock by them delivered for such illegal purpose, is barred by the rule *In pari delicto potior est conditio defendentis et possidentis*. The complainants cannot avoid the bar of the rule, if the Securities Company be regarded as vendee. The complainants and the Securities Company are *in pari delicto*.

Neither can the complainants avoid the operation of the rule by treating the Securities Company merely as custodian,

to hold a deposited stock, to collect dividends, etc. The Securities Company is *in pari delicto* with the complainants. It was an active party to the illegality.

The complainants assisted in placing the control of the railway companies in the hands of the Securities Company, and in maintaining that status until the decree in the Government suit was affirmed by the Supreme Court. This executed the illegal purpose to such a degree as to bar the assertion of any right to withdraw the property deposited.

Property delivered under an illegal contract cannot be recovered back by any party *in pari delicto;* certainly not in any case where the contract has been executed in whole or in part. *Scott* v. *Brown,* L. R. [1892] 2 Q. B. 724; *Hill* v. *Freeman,* 73 Alabama, 200; *Thornhill* v. *O'Rear,* 108 Alabama, 299; *Inhabitants &c.* v. *Eaton,* 11 Massachusetts, 368; *Atwood* v. *Fisk,* 101 Massachusetts, 353; *Myers* v. *Meinrath,* 101 Massachusetts, 366; *Horton* v. *Buffington,* 105 Massachusetts, 399; *Cranson* v. *Goss,* 107 Massachusetts, 439; *Traders' Bank* v. *Steere,* 165 Massachusetts, 389; *White* v. *Hunter,* 23 N. H. 128; *Ellicott* v. *Chamberlin,* 38 N. J. Eq. 604; *Hope* v. *Linden Assn.,* 29 Vroom, 627; *Allebach* v. *Hunsicker,* 132 Pa. St. 139; *Moore* v. *Kendall,* 52 Am. Dec. 145; *Cohn* v. *Heimbauch,* 86 Wisconsin, 176; *Bank of U. S.* v. *Owens,* 2 Pet. 527; *Vandalia case,* 145 U. S. 393; *Central Co.* v. *Pullman Co.,* 139 U. S. 24; *Equitable Society* v. *Wetherill,* 127 Fed. Rep. 946; Pomeroy's Equity Juris, § 939; Addison on Contracts: Domat.

After delivery of the property for an accepted consideration, the contract has ceased to be executory, even though it was entered into with the expectation of a continuity of benefits no longer susceptible of complete realization. *Kearley* v. *Thomson,* L. R. 24 Q. B. D. 742; *Herman* v. *Jeuchner,* L. R. 12 Q. B. D. 561; *Harse* v. *Pearl L. Co.,* L. R. [1904] 1 K. B. 558; *Vandalia case,* 145 U. S. 393; *Equitable Society* v. *Wetherill,* 127 Fed. Rep. 946; *McIntosh* v. *Wilson,* 81 Iowa, 339; *Atwood* v. *Fisk,* 101 Massachusetts, 353; *Bruer* v. *Kansas Ins. Co.,* 100 Mo. App. 540; *Ellicott* v. *Chamberlin,* 38 N. J.

Eq. 604; Pollock, Principles of Contract, 364; *Miller* v. *Larson*, 19 Wisconsin, 463; *Martin* v. *Wade*, 37 California, 168.

The indisposition of the court to grant relief is not limited to the cases in which the plaintiff is endeavoring to enforce the contract; a party exhibiting the contract merely to denounce it as illegal will be denied judicial assistance. *Taylor* v. *Chester*, L. R. 4 Q. B. 309; *Brindley* v. *Lawton*, 53 N. J. Eq. 259; *Hope* v. *Linden Association*, 29 Vroom, 627; *Herman* v. *Jeuchner*, L. R. 12 Q. B. D. 561; *Kearley* v. *Thompson*, L. R. 24 Q. B. D. 742; *Harse* v. *Pearl Co.*, L. R. [1904] 1 K. B. 558; *Hill* v. *Freeman*, 73 Alabama, 200; *Watkins* v. *Nugen*, 45 S. E. Rep. 262; *McIntosh* v. *Wilson*, 81 Iowa, 339; *Atwood* v. *Fisk*, 101 Massachusetts, 353; *Myers* v. *Meinrath*, 101 Massachusetts, 366; *Bagg* v. *Jerome*, 7 Michigan, 145; *White* v. *Hunter*, 23 N. H. 128; *Ellicott* v. *Chamberlin*, 38 N. J. Eq. 604; *Markley* v. *Village*, 51 N. E. Rep. 28; *Moore* v. *Kendall*, 52 Am. Dec. 145; *Equitable Life Assurance Society* v. *Wetherill*, 127 Fed. Rep. 946.

In all such cases the defendant's possession is a sufficient answer to the plaintiff's demand; both because such possession stands as the equivalent of a title in the defendant, and because to discourage such transactions, courts will be deaf to the clamor of a complainant *in pari delicto*. *Myers* v. *Meinrath*, 101 Massachusetts, 366; *Horton* v. *Buffington*, 105 Massachusetts, 399; *Bagg* v. *Jerome*, 7 Michigan, 145; *Smith* v. *Bean*, 15 N. H. 577; *Watkins* v. *Nugen*, 45 S. E. Rep. 262; *McIntosh* v. *Wilson*, 81 Iowa, 339; *Traders' National Bank* v. *Steere*, 165 Massachusetts, 389; Harris, Sunday Laws, § 169.

The condition of the possessor is so much better than that even of the original owner, that the possessor can recover the property not only from a stranger but from such original owner, if by chance the latter has been able to repossess himself of the property. *Kinney* v. *McDermott*, 55 Iowa, 674; *Smith* v. *Bean*, 17 N. H. 577; *Thompson* v. *Williams*, 58 N. H. 248; *Cohn* v. *Heimbauch*, 86 Wisconsin, 176.

The distinction between *mala in se*, and *mala prohibita* has been abandoned, but were this otherwise, there is authority for regarding as *malum in se* any act contravening public policy and a penal statute. *Irwin* v. *Curie*, 171 N. Y. 409, 415; *Gibbs* v. *Gas Co.*, 130 U. S. 396; *McMullen* v. *Hoffman*, 174 U. S. 639; *Equitable Society* v. *Wetherill*, 127 Fed. Rep. 946.

The doctrine of *locus pœnitentiæ* is available only to those who seasonably seek to make restitution and to withdraw from their illegal executory contract. Laches is a fatal vice. *Vandalia case*, 145 U. S. 393; *Union T. Co.* v. *Illinois Co.*, 117 U. S. 434; *In re Great Berlin S. Co.*, 26 Ch. D. 616; *Hardwood* v. *Railroad Co.*, 17 Wall. 80; *Twin Lick Oil Co.* v. *Marbury*, 91 U. S. 587; *Grimes* v. *Sanders*, 93 U. S. 55, 62; *Haywood* v. *Nat. Bank*, 96 U. S. 611, 617; *McLean* v. *Clapp*, 141 U. S. 429, 432; *Hoyt* v. *Latham*, 143 U. S. 553, 567; *Townsend* v. *Vanderworker*, 160 U. S. 171; *Ward* v. *Sherman*, 192 U. S. 168; *Rugan* v. *Sabin*, 53 Fed. Rep. 415, 418; *Kinney* v. *Webb*, 54 Fed. Rep. 34; *Boston R. R.* v. *New York R. R.*, 13 R. I. 264; *Kitchen* v. *St. Louis Ry. Co.*, 69 Missouri, 224; *Peabody et al.* v. *Flint*, 6 Allen, 56; *Dunphy* v. *Travelers' Assn.*, 16 N. E. Rep. 426; *Graham* v. *Birkenhead*, 2 McN. & G. 156.

The rigor of the rule against the complainant is never relaxed out of consideration for him, but only when necessary to promote equity and justice. *Pullman Co.* v. *Central Co.*, 171 U. S. 138; *Spring Co.* v. *Knowlton*, 103 U. S. 49.

In cases presenting no such special considerations of equity, justice or public policy, a party even to an unexecuted illegal contract cannot recover back money paid or property delivered thereunder. *Scott* v. *Brown*, L. R. [1892] 2 Q. B. 724; *In re Great Berlin S. Co.*, 26 Ch. D. 616; *McIntosh* v. *Wilson*, 81 Iowa, 339; *Bruer* v. *Kansas Ins. Co.*, 100 Mo. App. 540; *Thompson* v. *Williams*, 58 N. H. 248; *Markley* v. *Village*, 51 N. E. Rep. 28; *Storz* v. *Finkelstein*, 46 Nebraska, 477.

As to Northern Pacific preferred stock retirement see *Hackett* v. *Northern Pacific Ry. Co.*, 36 Misc. 583.

Mr. John G. Johnson, with whom *Mr. John W. Griggs* and *Mr. W. P. Clough* were on the brief, also for respondent:

On appeal from an interlocutory decree granting a special injunction in a suit for establishing title to property, if the record fully and fairly discloses the case on the point of title, the Appellate Court not only may, but rightfully should, determine the question of the injunction upon the merits of plaintiff's claim. The action of the Circuit Court of Appeals in this case was controlled by that rule, and proceeded upon it. 1 High on Injunction, 3d ed. § 7; *Knoxville* v. *Africa*, 47 U. S. App. 74; *Bissell Co.* v. *Goshen Co.*, 43 C. C. A. 47; *Shinkle* v. *Louisville & Nashville*, 62 Fed. Rep. 690; *Mast, Foos & Co.* v. *Stover Mfg. Co.*, 177 U. S. 485.

If, up to the time of argument of the appeal in the Circuit Court of Appeals, plaintiffs had been entitled to a stay of the *pro rata* plan of distribution, until opportunity could be given for fair argument and advisement upon the law points involved in their claim, such right was exhausted by their opportunity to be heard in the Circuit Court of Appeals.

In the Circuit Court of Appeals, therefore, the whole case for an injunction, *pendente lite*, was thrown back upon the first ground of the Circuit Court, viz., "grave and difficult" questions of fact, for ultimate determination.

The bill claims two distinct parcels of stock, one of which complainants never owned.

Plaintiffs' claims are self-contradictory and can be established, if at all, only under rules of common law. Equity rules cannot be invoked in their support.

The facts constituting title to the stock in controversy necessarily consist of, and are limited to, the things said and done, and mutually intended, by Harriman and Pierce on the one part, and the Securities Company on the other. As all material facts in regard to those sayings, doings and mutual intentions appear in this record, the entire case, on both sides, relating to title, must be here and can be disposed of.

The Union Pacific owns the Oregon Short Line. The latter owns the Oregon Railway and Navigation Company.

As to effect of acquisition of control of the stock of a competing road made by a railway company, and by the stockholders of a railway company see the *Pearsall case,* 161 U. S. 646; *Kentucky* v. *Louisville & Nashville,* 161 U. S. 676.

Plaintiffs in effect ask the court to place control of the Northern Pacific system of railways in the hands of the Union Pacific Railroad Company. Of the relative geographical positions of the Union Pacific and the Northern Pacific Railway systems, and of the public laws of the several States on the subject of railway combinations, as well as of the Federal laws on the same subject, the court will take notice without proofs.

The burden of proof is on plaintiffs to show, by proper evidence, that the sale to Securities Company was different from what, on its face, it appears to have been. No such proof was tendered.

Plaintiffs really found their claims on what they assert to have been adjudicated in the Government suit, and not on what was actually done and intended by the parties. The plaintiffs were strangers to that suit.

For the assumed adjudication in their favor, plaintiffs rely not on the decree, but upon the opinion of Mr. Justice Harlan which does not, however, mean what plaintiffs claim, and their alternate theory, that the title of Securities Company was subject to a condition, since broken, is unsupported by fact, law or adjudication.

Where there has been a transfer of property, illegal from any cause, and possession has been delivered to the person to whom the title under the transfer was intended ultimately to go, the transaction has become executed on the part of the transferrer, and he cannot thereafter repudiate it and reclaim the property because of the illegality.

This rule governs under all forms of illegality; whether in doing something which the laws positively prohibit, or something which they merely omit to allow. *Thomas* v. *Railroad*

Co., 101 U. S. 71, 83; *Vandalia case*, 145 U. S. 393, 399, 408; *Central Co.* v. *Pullman Co.*, 139 U. S. 24.

When complainants had transferred the Northern Pacific shares to the Securities Company, and the latter had made payment of the price therefor by handing over to them the cash and the certificates for its own stock, coming to them, nothing remained executory between the parties save the implied mutual obligations concerning the Northern Securities stock resulting from the relation of corporation and stockholder, thus created.

Mr. Thomas Thacher also submitted a brief for respondent:

The injunction *pendente lite* can be justified only upon the theory that it is a necessary incident to the granting of such final relief as the complainants appear to be entitled to. The right to such final relief must appear; if not, the injunction was error. If such right did not appear, the question of granting or denying the injunction was not addressed to the discretion of the court. If, upon the record, it does not appear that the complainants are entitled to recover this stock the order appealed from was erroneous and should be reversed. *Brooklyn Club* v. *McGuire*, 116 Fed. Rep. 783; *Home Ins. Co.* v. *Nobles*, 63 Fed. Rep. 643; *Central Stock Yards Co.* v. *L. & N. R. R. Co.*, 112 Fed. Rep. 823; *Stevens* v. *M., K. & T. Ry. Co.*, 106 Fed. Rep. 771; *Amelia Milling Co.* v. *Tennessee C. I. & R. Co.*, 123 Fed. Rep. 811.

In some cases "a probable right" is deemed enough. *New Memphis Gas Co.* v. *Memphis*, 72 Fed. Rep. 952; *Indianapolis Gas Co.* v. *Indianapolis*, 82 Fed. Rep. 245; *Reduction Works* v. *California Co.*, 94 Fed. Rep. 694; *Georgia* v. *Brailsford*, 2 Dallas, 402; or a "*prima facie* right" *Charles* v. *Marion*, 98 Fed. Rep. 166; *Cosmos Exploration Co.* v. *Grey Eagle Oil Co.*, 104 Fed. Rep. 20; *Utah N. & C. R. R. Co.* v. *Utah N. & C. Ry. Co.*, 110 Fed. Rep. 879. As to preservation of *status quo* see *Allison* v. *Corson*, 88 Fed. Rep. 581; *Denver & R. G. R. R. Co.* v. *United States*, 124 Fed. Rep. 156; *Haddon* v. *Dooley*,

74 Fed. Rep. 429; *Cartersville Light Co.* v. *Cartersville*, 114 Fed. Rep. 699; *Cohen* v. *Delavina*, 104 Fed. Rep. 946; *Newton* v. *Levis*, 79 Fed. Rep. 715; *West. U. Tel. Co.* v. *Pennsylvania R. R. Co.*, 123 Fed. Rep. 33.

On appeals from injunction orders the court will not only consider the merits but dismiss the bill, if it can see that the complainant is not entitled to final decree. *Smith* v. *Vulcan Iron Works*, 165 U. S. 518; *Mast, Fooz & Co. case*, 177 U. S. 485; *Castner* v. *Coffman*, 178 U. S. 168; *Knoxville* v. *Africa*, 77 Fed. Rep. 501; *Bissell Co.* v. *Goshen Co.*, 72 Fed. Rep. 545.

If the argument of the complainants, therefore, still rests upon the theory of *res adjudicata*, that is upon the effect of the decrees in the Government suit, or upon any other theory concerning which the facts are substantially undisputed, this court, finding such theory unsound, will not simply reverse the injunction order, but dismiss the bill.

It was not the legal effect of the decree in the Government suit that title to the stocks of the Northern Pacific Railway Company and the Great Northern Railway Company, which the Securities Company now holds, never passed to the last-named company. See opinions 193 U. S. 197, 321, 324, 327, 334, 344, 357.

It does not follow as matter of law, from the facts shown by the record, including the decree, that title to these stocks did not pass to the Securities Company. The transaction was not void because illegal. *Harris* v. *Runnels*, 12 How. 79; *Mining Co.* v. *National Bank*, 96 U. S. 641; *National Bank* v. *Mathews*, 98 U. S. 621; *National Bank* v. *Whitney*, 103 U. S. 99; *Logan County Bank* v. *Townsend*, 139 U. S. 67, 76; *Thompson* v. *St. Nicholas Nat. Bank*, 146 U. S. 240, 251; *Scott* v. *Deweese*, 181 U. S. 202, 211; *Burck* v. *Taylor*, 152 U. S. 634, 648; *Frits* v. *Palmer*, 132 U. S. 282; *McBroom* v. *Investment Co.*, 153 U. S. 318; *Jarvis Trust Company* v. *Willhoit*, 84 Fed. Rep. 514; *Central Trust Co.* v. *Columbus Ry. Co.*, 87 Fed. Rep. 815; *Terminal Co.* v. *Trust Co.*, 82 Fed. Rep. 134; *Chattanooga S. R. Co.* v. *Evans*, 66 Fed. Rep. 809, 815.

The Sherman Anti-Trust Act expressly contemplates that contracts may be made in violation of the statute under which property will be owned.

Nor was the transaction void because *ultra vires*.

The law of New Jersey as declared by its courts is that an executed *ultra vires* transaction is not void. *Cam. & Atl. R. R. Co.* v. *May's Landing &c. R. R. Co.*, 48 N. J. L. 530, 567.

The place of the transaction in this case was New York, and the New York law is to the same effect as that of New Jersey—that an executed *ultra vires* transaction stands as valid. *Whitney Arms Co.* v. *Barlow*, 63 N. Y. 62; *Woodruff* v. *Erie Ry. Co.*, 93 N. Y. 609; *Rider Life Raft Co.* v. *Roach*, 97 N. Y. 378; *Bath Gas Light Co.* v. *Claffy*, 151 N. Y. 24; *Vought* v. *Eastern Bldg. &c. Assoc.*, 172 N. Y. 508.

In the Federal courts, with respect to the passing of title, the law is the same. See *National Bank* cases above referred to.

Even if the transaction in which the Oregon Short Line Railroad Company parted with the stock was void because illegal or *ultra vires*, nevertheless the complainants could not recover. *Equitable Life Assurance Society* v. *Wetherill*, 127 Fed. Rep. 947; *Smith* v. *Bean*, 15 N. H. 577; *Myers* v. *Meinrath*, 101 Massachusetts, 366; *Vandalia case*, 145 U. S. 393; *Higgins* v. *McCrea*, 116 U. S. 671; *White* v. *Barber*, 123 U. S. 392; *Horton* v. *Buffington*, 105 Massachusetts, 399.

The transaction has never been abandoned. The Securities Company claims the ownership which was thus acquired and proposes to exercise the rights of such ownership by distributing the stocks as surplus assets among its stockholders.

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

In applying to this court for the writ of certiorari counsel for complainants insisted that the Circuit Court of Appeals had practically disposed of the entire controversy on the

merits, although its decree only reversed the order of the Circuit Court granting the preliminary injunction. We accepted that view and granted the writ, in the circumstances, notwithstanding the decree was not final. In our opinion the record presented the whole case to that court, in such wise, that it might properly have been finally disposed of in terms by its decree, in accordance with the well settled rule upon that subject. *Mast, Foos & Co.* v. *Stover Manufacturing Co.*, 177 U. S. 485, 495; *Castner* v. *Coffman*, 178 U. S. 168, 183; *Mayor &c. of Knoxville* v. *Africa*, 77 Fed. Rep. 501.

In *Western Union Telegraph Company* v. *Pennsylvania Railroad Company et al.*, 195 U. S. 540, 547, the Circuit Court had granted a preliminary injunction, 120 Fed. Rep. 981, which was reversed by the Circuit Court of Appeals. 123 Fed. Rep. 33. The telegraph company moved that the decree be modified so as to direct the dismissal of the bill. The motion was denied, and the telegraph company took an appeal to this court. Subsequently the Circuit Court *sua sponte* entered an order dismissing the bill, and the telegraph company appealed therefrom to the Circuit Court of Appeals. 195 U. S. 547. We then granted a certiorari, and, considering both appeals together, affirmed the decree of dismissal.

In the present case we granted the certiorari, at the instance of complainants, before the case had gone back to the Circuit Court, and shall do what the Circuit Court of Appeals might have done, that is, finally dispose of the case by our direction to the Circuit Court.

Complainants deny that the Securities Company became the owner of the Northern Pacific Railway shares, and assert to the contrary that the company held the shares as a trustee or a bailee for complainants.

And the principal ground on which this contention is rested is that it was so adjudicated by the Circuit Court for the District of Minnesota in the Government suit, by the decree of April 9, 1903, affirmed by this court.

It may be said in passing that complainants were not parties

of record to that suit, and that they were not parties by representation, if the effect of the transfers as between the parties thereto had been in issue and the vital conflict between complainants and the corporation, now set up, then existed, which would destroy the community of interest on which the rule of representation is founded. And, on the other hand, in that suit the Northern Securities Company, at a time when complainant Harriman was a director, answered that: "Every share of the Great Northern Company and the Northern Pacific Company acquired by this defendant has been, and, so long as it remains the property of the defendant, will continue to be, held and owned by it in its own right, and not under any agreement, promise, or understanding on its part, or on the part of its stockholders and officers, that the same shall be held, owned, or kept by it for any period of time whatever, or under any agreement that in any manner restricts or controls to any extent any use of the same which might lawfully be exercised by any other owner of said stocks."

But we are of opinion that the Circuit Court did not determine the quality of the transfer as between the defendants themselves, nor was that the purpose of the Government proceedings.

The decree of April 9, 1903, adjudged that defendants had theretofore entered into a combination or conspiracy in restraint of trade and commerce; that all stock of either of the railway companies then held or owned by the Securities Company was acquired and held in virtue of such combination; and enjoined the Securities Company and the two railway companies from receiving, or permitting the exercise of, any control by the Securities Company over either railway, or any exercise of the voting power of the railway shares, and the payment or reception of dividends upon the railway shares held by the Securities Company; and the Securities Company was forbidden from acquiring further stock of either of the railway companies.

And it was provided that nothing should be construed as

prohibiting the Securities Company from returning and transferring the railway shares to the original railway stockholders who had delivered their shares to the Securities Company for shares of its stock; or to such person or persons as might be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the railway companies.

This did not involve a decision that any original vendor of the railway shares was entitled to a judicial restitution thereof, and such was the view of the Circuit Court itself, for in its opinion of April 19, 1904, the court said:

"The decree was wholly prohibitory. It enjoined the doing of certain threatened acts, and so long as these acts are not done it enforces itself, and no further action looking to its enforcement is deemed essential.

"In its bill of complaint the United States prayed, among other things, for a mandatory injunction against the Securities Company requiring it to recall and cancel the certificates of stock which it had issued, and to surrender the stock of the two railway companies in exchange for which its stock had been issued. This prayer for relief was denied. The court doubted its power to compel stockholders of the Securities Company, who had not been served with process, and were not before the court otherwise than by representation (if, indeed, they were present by representation), to surrender stock which was in their possession, and to take other stock in lieu thereof. It accordingly contented itself with an order which rendered the stock of the two railway companies, so long as it was in the hands of the Securities Company, valueless for the purpose of carrying out the objects of the unlawful combination in restraint of interstate trade.

"The Government was satisfied with the relief obtained, and expresses itself as fully satisfied therewith at the present time. When the decree was entered it was assumed by the court that when the stock was thus rendered valueless in the hands of the Securities Company the stockholders of that

company would be able, and likewise disposed, to make a disposition of the stock which, under all the circumstances of the case, would be fair and just, and would restore it to the markets of the world, where it would have some value, instead of being a worthless commodity. It was thought that the duty of thus disposing of it could be safely left to the stockholders of the Securities Company, and that, if any controversy arose in the discharge of this function, in view of the situation that had been created by the decree, it would be a controversy that would properly form the subject matter of an independent suit between the parties immediately interested.

"It is true that the decree contained a provision, in substance, that nothing therein contained should be construed as prohibiting the Securities Company from returning to the stockholders of the Northern Pacific Railway Company and the Great Northern Railway Company any and all shares of stock in either of said railway companies which the Northern Securities Company had acquired in exchange for its own stock, and that nothing therein contained should be construed as prohibiting the Securities Company from making such transfer of the stock aforesaid to such person or persons as had become owners of its own stock originally issued in exchange for the stock in the two railway companies; but this provision was purely permissive. It did not command that the stock should be so returned, or exclude other methods of disposition of it that, in view of all the circumstances, might appear to be more equitable. The fact that the directors of the Securities Company have proposed to its stockholders a plan of distributing the stock of the two railway companies in a manner somewhat different from that which was tentatively suggested by the decree, but not commanded, cannot be regarded as a failure to obey the decree. It was said in argument that one purpose of the intervention is to have that clause of the decree which is now merely permissive made mandatory. But this would be to modify the provisions of a decree which had become final by affirmance, and make an

order which we expressly and on full consideration declined to make when the decree was entered. This we must decline to do."

The decree of April 9, 1903, was affirmed by the judgment of this court, which, of course, went no further than the decree itself. We did, indeed, by our judgment leave the Circuit Court at liberty "to proceed in the execution of its decree as the circumstances may require," but this did not operate to change the decree or import a power to do so not otherwise possessed.

Counsel argue, however, that certain expressions in the opinion of Mr. Justice Harlan so enlarged the scope of the decree as to give it the effect now attributed to it by complainants.

This suggestion is inconsistent with the settled rule that general expressions in an opinion, which are not essential to dispose of a case, are not permitted to control the judgment in subsequent suits. *Cohens* v. *Virginia*, 6 Wheat. 264, 399; *Caroll* v. *Caroll's Lessees*, 16 How. 275. But we do not think that the opinion of Mr. Justice Harlan is open to the construction put upon it. In speaking of the situation as between the Government and the defendants, the Securities Company is sometimes referred to as the custodian of the shares and sometimes as the absolute owner, but in the sense that in either view the combination was illegal. For the purposes of that suit it was enough that in any capacity the Securities Company had the power to vote the railway shares and to receive the dividends thereon. The objection was that the exercise of its powers, whether those of owner or of trustee, would tend to prevent competition, and thus to restrain commerce.

Some of our number thought that as the Securities Company owned the stock the relief sought could not be granted, but the conclusion was that the possession of the power, which, if exercised, would prevent competition, brought the case within the statute, no matter what the tenure of title was.

Treating the question as an open one, it seems to us indisputable that, as between these parties, the transaction was one of purchase and sale. The situation is thus well put by Dallas, J.:

"The resolution which authorized the acquisition of the railway stock on behalf of the Securities Company was adopted by its board of directors at a meeting at which Mr. Harriman was present as a member of the board, and the only authority it conferred was 'to purchase said stock . . . at an aggregate price of $91,407,500, payable, as to $82,491,871 thereof, in the fully paid-up and non-assessable shares of the capital stock of this company at par, and as to $8,915,629, in cash.' It is obvious that this resolution contemplated a 'purchase,' and not a bailment or trust; and that it accurately stated the nature and terms of the contract which was actually made by and with the Securities Company is unequivocally shown by what was done in pursuance of it. The railway shares were unconditionally assigned to that company. The price specified in the resolution was paid by it, and this payment was made partly in cash and partly in shares of its own stock, for which corporate certificates in the ordinary form were delivered and accepted. . . . The complainants received dividends upon the stock that was issued to them, which were paid out of the general funds of the Securities Company; and by its indenture to the Equitable Trust Company of New York the Oregon Short Line Railroad Company irrefutably asserted its ownership of the Securities Company stock which it thereby pledged."

And the Securities Company sold 75,000 shares of its stock for $7,522,000 cash, "used," as stated in the bill, "for the purchase of other property and for corporate purposes."

But assuming that the transaction was in form, and at least *prima facie* in substance, one of purchase and sale, it is denied that the equitable title vested because, as alleged in the second amended bill, there was an agreement by the promoters of the Securities Company, carried out by that

company, that the latter should "acquire and hold the shares of said railway stocks, as aforesaid, as custodian, depositary, or trustee, and to issue in exchange therefor its own share certificates upon said agreed basis." And here again we concur in the views of the Circuit Court of Appeals as expressed by Judge Dallas.

"The agreement thus set up is not in accord with the documentary evidence which has been referred to, and to establish its existence a clear preponderance of proof should at least be required, whereas, in our opinion, it conclusively appears that no such agreement was ever made. Mr. Harriman himself has distinctly testified that the Northern Pacific stock in question was sold; that the transaction was not an exchange; that he, principally, negotiated the sale; and that there was not attached to the negotiations any condition except as to price. And to the same effect is his affidavit in this case, in which he deposed that he was urged by Messrs. Morgan & Co. to dispose of the Northern Pacific stock held by the Oregon Short Line Company, and that 'they further stated that, upon the organization of the proposed holding company,' not that it would take as custodian or trustee, but that 'they would be prepared to purchase the holdings of stock of the Northern Pacific owned by the Oregon Short Line, and pay therefor in the stock of the holding company.' These statements of that one of the complainants having most knowledge of the subject, confirmed, as they are, by other evidence, make it quite impossible to believe that the railway stock was received by the Securities Company merely as a custodian or depositary. The only agreement upon which it was transferred was an unqualified agreement of sale, and the fact that the design with which the Securities Company was organized has been compulsorily abandoned has not divested or in any way affected the absolute title which, by executed contract of purchase, it acquired. Undoubtedly, it was anticipated by the complainants, as by all concerned, that the rights ordinarily incident to the ownership of stock, including the right to vote and

to receive dividends, would be exercisable as to this stock by the Securities Company. But expectation is not contract, and therefore the frustration of this anticipation cannot be said to have occasioned a failure of consideration. The only consideration agreed upon was payment of the price, and admittedly that payment was made."

Complainants' counsel say, in respect of Mr. Harriman's testimony that the transaction was an unconditional purchase and sale, that he only swore to his opinion on a question of law. This will hardly do when applied to testimony as to what was said and done in conference with the alleged promoters of the Securities Company. When Mr. Harriman testified that he attached to his negotiations in the sale of Northern Pacific stock no other condition than that of the price, and that the transaction was completed, how can complainants be permitted to deny that this was a statement of fact? And how can the establishment of the contract and its terms as embodied in the resolutions of November 15, 1901, approved at the succeeding meeting by the vote of Mr. Harriman, and which appeared to be, and were testified to by Mr. Hill, President of the Securities Company, as constituting the only contract which was made and authorized, be overthrown in the absence of any evidence to the contrary?

The consideration received by complainants consisted of money and Northern Securities stock certificates. Those certificates were in common form, and each was a muniment of the holder's title to a proportionate interest in the corporate estate vested in the corporation. By the provisions of the corporation act of New Jersey, and its certificate of incorporation, the Securities Company had power to acquire and to hold, and at any time to sell, the shares of other corporations. And under that act it had power, in the discretion of its directors and of the holders of two-thirds of its capital stock, at any time, on notice, to dissolve and to wind up the corporation and distribute its assets. Complainants subjected themselves to this power in accepting the shares of the

Northern Securities Company, and their unqualified transfer of their railway stock was inconsistent with any obligation of the Securities Company to retain the railway shares for any particular period.

In acquiring the Securities stock, complainants acquired the ordinary rights of stockholders in New Jersey business corporations, including the right to receive dividends, and to share in the distribution of the assets of the corporation on its dissolution, or of any surplus of assets on reduction of its capital stock. In view of the decree of the Circuit Court for the District of Minnesota in the Government's suit the continued ownership of the railway shares became useless to the stockholders of the Securities Company, and accordingly the directors decided to reduce the capital stock and distribute the surplus of assets created by that reduction, and the resolutions to that end were ratified by a vote of more than two-thirds of the Securities shares.

By the transfer of the Northern Pacific shares and the payment therefor as agreed the contract was executed, and the implied obligations resulting from the relation of corporation and stockholder alone remained executory. And when the Securities Company resolved to distribute these railway shares ratably among all its stockholders, it did this in performance of its contract with them and not in repudiation of it. It is the complainants who are seeking the determination and repudiation of the contract. Their final contention in that regard is that they are entitled to a decree rescinding the contract of purchase and sale, and directing the return of the railway shares parted with by them thereunder, because of the illegality of the transaction as adjudged in the Federal courts.

And this in defiance of the settled rule that property delivered under an illegal contract cannot be recovered back by any party *in pari delicto*. "The general rule, in equity, as at law," said Mr. Justice Gray in *St. Louis, Vandalia & Terre Haute Railroad Company* v. *Terre Haute & Indianapolis*

Railroad Company, 145 U. S. 393, "is *In pari delicto potior est conditio defendentis;* and therefore neither party to an illegal contract will be aided by the court, whether to enforce it or to set it aside. If the contract is illegal, affirmative relief against it will not be granted, at law or in equity, unless the contract remains executory, or unless the parties are considered not in equal fault, as where the law violated is intended for the coercion of the one party, and the protection of the other, or where there has been fraud or oppression on the part of the defendant. *Thomas* v. *Richmond*, 12 Wall. 349, 355; *Spring Co.* v. *Knowlton*, 103 U. S. 49; Story Eq. Jur. § 298. . . .

"When the parties are *in pari delicto*, and the contract has been fully executed on the part of the plaintiff, by the conveyance of property, or by the payment of money, and has not been repudiated by the defendant, it is now equally well settled that neither a court of law nor a court of equity will assist the plaintiff to recover back the property conveyed or money paid under the contract. *Thomas* v. *Richmond*, *supra*; *Ayerst* v. *Jenkins*, L. R. 16 Eq. 275, 284."

That was a suit in equity by the maker of an unauthorized lease of a railway and franchises, against the lessee, to enforce an attempted repudiation of the lease by the former, on the ground of the illegality. The lease was for nine hundred and ninety-nine years, of which but a few years had elapsed at the date of the attempted rescission.

The illegality of the lease and the consequent breach of public duty were manifest, but the right of the lessor, therefore, to maintain the suit was denied by this court.

In the present case complainants seek the return of property delivered to the Securities Company pursuant to an executed contract of sale on the ground of the illegality of that contract, but the record discloses no special considerations of equity, justice or public policy, which would justify the courts in relaxing the rigor of the rule which bars a recovery.

The Circuit Court decrees put at rest any question that the

ratable distribution resolved upon was in violation of public policy.

And it is clear enough that the delivery to complainants of a majority of the total Northern Pacific stock and a ratable distribution of the remaining assets to the other Securities stockholders would not only be in itself inequitable, but would directly contravene the object of the Sherman Law and the purposes of the Government suit.

The Northern Pacific system, taken in connection with the Burlington system, is competitive with the Union Pacific system, and it seems obvious to us, the entire record considered, that the decree sought by complainants would tend to smother that competition.

While the superior equities, as against complainants' present claim, of the many holders of Securities shares who purchased in reliance on the belief that they thereby acquired a ratable interest in all of the assets of the Securities Company, are too plain to be ignored.

The illegal contract could not be made legal by estoppel, but the ownership of the assets, unaffected by a special interest in complainants, could be placed beyond dispute on their part by their conduct in holding the Securities Company out to the world as unconditional owner.

And, without repeating in detail what has been already set out, it is plain that right of rescission of the executed contract of November 18, 1901, even if rescission could have otherwise been sustained, had been lost by acquiescence and laches at the time this bill was filed.

Since the transfer of that date Securities stock had passed into the hands of more than 2,500 holders, many of them in Great Britain, France and other parts of Europe; nearly a year after the filing of the Government bill 75,000 shares were sold for cash, complainant Harriman concurring; some months after, Harriman and Pierce and the Oregon Short Line Company pledged their 824,000 shares to the Equitable Trust Company; notwithstanding the decree of April 9, 1903, they

stood upon their rights as shareholders; and it was not until after March 22, 1904, when defendant's board of directors resolved upon a ratable distribution that complainants undertook to change an election already so pronounced as to be irrevocable in itself in view of the rights of others.

We regard the contention that complainants are exempt from the doctrine *in pari delicto* because the parties acted in good faith and without intention to violate the law as without merit. With knowledge of the facts and of the statute, the parties turned out to be mistaken in supposing that the statute would not be held applicable to the facts. Neither can plead ignorance of the law as against the other, and defendant secured no unfair advantage in retaining the consideration voluntarily delivered for the price agreed.

Perhaps it should be noticed that the bill sought the return of two parcels of Northern Pacific common stock, the 370,230 shares delivered to the Securities Company, November 18, 1901, and the 347,090 shares received December 27, 1901, from the Northern Pacific Company on the retirement of preferred stock.

Early in 1901 the Hill-Morgan party held a majority of the common stock, and had asserted the intention to retire the preferred stock, "without," as Mr. Harriman testified, "affording the holders of the preferred stock the right to participate in any new securities that might be issued."

With full knowledge of that intention the proceedings of the two companies followed in November, 1901, and the absolute and unconditional sale and purchase, as we hold the transaction to have been.

We find no evidence of any express agreement that complainants should be entitled to the new common stock, and it was certainly not the natural increase of the old stock, but the result of the exercise of the right of subscription. The purchase by the Securities Company was on its own account and not in trust, and cannot be disturbed because of illegal purpose at the clamor of parties *in pari delicto*. And there is

here no offer of the restoration of the *status quo*, if that were practicable.

Doubtless it became the duty of the Securities Company to end a situation that had been adjudged unlawful, and this could be effected by sale and distribution in cash, or by distribution in kind, and the latter method was adopted, and wisely adopted, as we think, for the forced sale of several hundred millions of stock would have manifestly involved disastrous results.

In fine, the title to these stocks having intentionally been passed, the former owners or part of them cannot reclaim the specific shares and must be content with their ratable proportion of the corporate assets.

Decree affirmed; cause remanded to Circuit Court with a direction to dismiss the bill.

WESTERN ELECTRICAL SUPPLY COMPANY *v.* ABBEVILLE ELECTRIC LIGHT AND POWER COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

No. 178. Argued March 14, 1905.—Decided April 3, 1905.

A foreign corporation sued in a state court appeared specially and objected to the jurisdiction on the sole ground that the person served was not its agent within the meaning of the state statute; the lower court sustained the objection, but on plaintiff's appeal the highest court of the State held the service good; defendant then demurred on the ground that the statute as to service on foreign corporations was violative of the Federal Constitution; on second appeal after the demurrer had been overruled and there had been judgment for plaintiff on the merits, the highest court of the State declined to consider the constitutionality of the statute on the ground that the question of jurisdiction had been settled on the first appeal. *Held*, that the writ of error must be dismissed. Had the objection been raised in the first instance and disposed of on plaintiff's

appeal, the adherence by the state court on defendant's appeal to its prior adjudication might not have cut off consideration of the Federal question, but as it was not so raised, and as the state court could in its discretion consider it as coming too late and refuse to pass upon it, the jurisdiction of this court cannot be maintained.

THE facts are stated in the opinion.

Mr. Lee W. Grant, with whom *Mr. Jackson H. Ralston* and *Mr. F. L. Siddons* were on the brief, for plaintiff in error, cited *Gt. West. Tel. Co.* v. *Burnham,* 162 U. S. 339, in support of the jurisdiction of this court.

Mr. William N. Graydon for defendant in error:

The Supreme Court of the State expressly refused to pass on the alleged Federal question, and based its judgment on another and entirely different ground. The Federal question, therefore, is not involved at all in this case.

Where the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not Federal, has also been raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this court will not review the judgment. *DeSaussure* v. *Galliard,* 127 U. S. 216; *Chemical Bank* v. *City Bank,* 160 U. S. 646; *Capital Bank* v. *Cadiz Bank,* 172 U. S. 425; *McQuade* v. *Trenton,* 172 U. S. 636; *Allen* v. *Southern Pacific R. R. Co.,* 173 U. S. 479; *Beals* v. *Cone,* 188 U. S. 184; *Harrison* v. *Morton,* 171 U. S. 47.

The question decided by the Supreme Court of South Carolina is purely a local question. Each State has a right to declare the terms upon which foreign corporations shall do business in the State, and the doing of the business is an acceptance of the terms imposed by statute. *Simon* v. *Craft,* 182 U. S. 427; *New Orleans Waterworks Co.* v. *Louisiana,* 185 U. S. 336. The Fifth Amendment to the Constitution con-

tains no restriction on the powers of the State. *Brown* v. *New Jersey*, 175 U. S. 172.

To give this court jurisdiction of a writ of error for the review of a judgment of a state court, it must appear affirmatively, not only that a Federal question was raised, and presented for decision to the highest court of the State having jurisdiction, but that it was decided, or that its decision was necessary to the judgment that was rendered. *Adams County* v. *Burlington & Mo. R. R. Co.*, 112 U. S. 123; *Chouteau & Maffit* v. *Gibson*, 111 U. S. 200.

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

The Abbeville Electric Light and Power Company, a corporation of South Carolina, brought this action in the Circuit Court of Abbeville County, South Carolina, against the Western Electrical Supply Company, a corporation of Missouri, by service of summons and complaint on one George F. Schminke, as agent of the defendant. The complaint alleged that "the cause of action set forth herein arose in this State," and set up the breach of a contract of guaranty in respect of a machine for generating electricity sold by defendant to plaintiff. Defendant appeared specially and moved "to set aside the service of the summons herein on the ground that the party served with the summons and complaint herein on the seventh day of November, 1900, was not an agent of the defendant." The motion was heard on affidavits at the February term, 1901, of the Circuit Court, the service set aside and the case dismissed for want of jurisdiction.

The Circuit Judge was of opinion that Schminke was not "an agent in the sense in which 'any agent' is used in the Code." The case was then carried by appeal to the Supreme Court of South Carolina, and the judgment below was reversed and the cause remanded for further proceedings. 61 S. Car. 361.

The court held, speaking through Mr. Chief Justice McIver, that under the second paragraph of section 155 of the Code,

as amended by an act approved March 2, 1899, the facts being considered in connection with section 1466 of the Revised Statutes of 1893, as amended by an act of 1897, the service was good and valid.

In this view the court said: "The case must be regarded as a case in which a domestic corporation, having, as is supposed, a claim against a foreign corporation doing business in this State, arising out of a contract made and to be performed in this State, has undertaken to commence its action against such foreign corporation by serving, personally, within the limits of this State, an agent of such foreign corporation, with a copy of the summons; and in such a case we do not think that any authority has been or can be cited, which holds that the state court had not thereby acquired jurisdiction of the foreign corporation."

On the other hand, the court held that if the case were one in which the plaintiff, a domestic corporation, had brought its action on a contract not made, and not to be performed, in the State, against the defendant, a foreign corporation, and had undertaken to obtain jurisdiction by the personal service of the defendant's agent within the limits of the State, even then, as it appeared upon the facts that the agent was a representative of the defendant corporation in respect of the transaction out of which the suit arose, and was served while within the State for the purpose of attending to the business of the corporation, the service was a good service.

The case having gone back to the Circuit Court, defendant, by demurrer, renewed its objection to the jurisdiction, this time "on the ground that subdivision 1 of section 155 of the Code, providing for service upon a foreign corporation, and the act of the general assembly of South Carolina amending the said section of the Code, by striking out the word 'resident,' approved March 2, 1899, are in contravention of the Fifth and Fourteenth Amendments to the Constitution of the United States, and on the further ground that the act of the General Assembly of South Carolina, entitled 'An act to

further prescribe the terms and conditions upon which foreign corporations may do business within this State,' approved the second day of March, A. D. 1897, is in contravention of the Fifth and Fourteenth Amendments to the Constitution of the United States."

The demurrer was overruled and the case went to verdict and judgment on the merits, whereupon it was again taken by appeal to the Supreme Court. That court declined to express any opinion on the constitutional questions, and affirmed the judgment. 66 S. Car. 328. The court held the question of jurisdiction had already been determined and that it was not bound to reëxamine it. This was, of course, a ground broad enough to sustain the judgment, and as the objection that the state statutes were inconsistent with the Federal Constitution was not raised until the case came on for the second hearing, it is plain that the Supreme Court could, in its discretion, treat it as coming too late to call for decision. Had that objection been raised in the first instance and been disposed of, then inasmuch as the judgment of the Circuit Court was at that time reversed on plaintiff's appeal, the adherence by the Supreme Court to its prior adjudication as the law of the case, on defendant's appeal, would not in itself have cut off consideration of the Federal questions; but it was not so raised, and, as the case stands, we are of opinion that our jurisdiction cannot be maintained.

Writ of error dismissed.

McMICHAEL *v.* MURPHY.

ERROR TO, AND APPEAL FROM, THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

No. 166. Submitted March 7, 1905.—Decided April 3, 1905.

A settlement or entry on public land already covered of record by another entry, valid upon its face, does not give a second entryman any right in the land notwithstanding the first entry may subsequently be relinquished or ascertained to be invalid by reason of facts *dehors* the record of such entry; and one first entering after the relinquishment or cancellation has priority over one attempting to enter prior to such relinquishment or cancellation.

It is the duty of this court in the absence of cogent reasons therefor, not to overrule the construction of a statute upon which the Land Department has uniformly proceeded in its administration of the public lands.

THE facts in this case may be summarized as follows:

On April 23, April 24 and May 1, 1889, White, Blanchard and Cook, respectively and in the order named, applied, at the United States Land Office in Guthrie, Oklahoma Territory, to make a homestead entry on certain lands, being part of the Southwest ¼ of Section 27, Township 12, north of range 3 west. The applications of Blanchard and Cook were each rejected, as being in conflict with White's entry. On April 27, 1889, Blanchard filed his affidavit of contest, charging that White entered the Territory prior to twelve o'clock noon of April 22, 1889, in violation of the act of Congress approved March 2, 1889, 25 Stat. 980, 1004, c. 412, and the President's Proclamation issued under that act. 26 Stat. 1544. On May 1, 1889, Cook also filed an affidavit of contest against White, alleging the latter's disqualification as above stated, to enter the land, and also that Blanchard was also disqualified upon the same grounds as those alleged in reference to White.

The contest having been tried before the local land office—each party charging that the other two had entered the Terri-

tory prior to noon of April 22, 1889,—the Register and Receiver recommended the cancellation of White's entry, and dismissed the contest of both Blanchard and Cook. From this decision all parties appealed to the Commissioner of the General Land Office, and on March 7, 1890, the decision of the local office was affirmed. An appeal was then taken to the Secretary of the Interior. While the case was pending before that officer, namely, on November 29, 1890, White relinquished of record his entry, and Murphy, the defendant, on the same day, entered the land. The Secretary of the Interior, July 21, 1891, affirmed the decision of the Commissioner of the General Land Office. *Blanchard* v. *White*, 13 L. D. 66.

On or about June 3, 1889, White's homestead entry *being still intact, of record*, McMichael entered upon the land with a view of establishing his residence thereon and initiating a homestead right to it; and on July 21, 1889, he made application to the local office to enter the land, tendering the required fees; but his application was rejected by the local office as being in conflict with White's entry. From that order no appeal was taken.

On August 31, 1889, McMichael again tendered his application to the local office with the required fees. That application was received, but it was suspended pending the contest of White, Blanchard and Cook. On the day last named McMichael filed a contest or protest, alleging that he had made settlement on the land on June 3, 1889, had lived there in a tent with his family until August 2, 1889, when, at the instance of White, he was forcibly removed therefrom by the military authorities; that his rights were superior to those of White, Blanchard and Cook, all of whom, he alleged, were disqualified by reason of having entered the Territory during the period prohibited by law; that his application of June 3, was rejected because it conflicted with White's interests, although he was the only qualified settler on the tract entitled to make entry. The case, as between McMichael and Murphy, having been heard on February 15, 1892, a decision was rendered in favor

of the latter. Thereupon McMichael appealed to the General Land Office which, on January 18, 1893, affirmed the decision of the local office. He then appealed to the Secretary of the Interior, and that officer, on February 25, 1895, affirmed the decision of the Land Office. *McMichael* v. *Murphy,* 20 L. D. 147.

A patent was issued to Murphy for the land; whereupon the present action was brought in the District Court of Oklahoma County by McMichael against Murphy and his grantees, the relief asked being a decree declaring the legal title to be held in trust for the use and benefit of McMichael. Murphy demurred on the ground that the petition did not state facts sufficient to constitute a cause of action—McMichael's claim being that the Secretary of the Interior had misconstrued and misapplied the law. The demurrer was sustained, and the plaintiff having elected to stand on his petition the court dismissed the case. From that decree the plaintiff brings the case here for review.

After the cause was entered in the Supreme Court of the Territory McMichael died and the cause was revived in the name of his heirs.

Mr. Joseph K. McCammon, Mr. James H. Hayden and *Mr. Frank Clark* for plaintiffs in error and appellants:

By his settlement and residence upon the land in dispute the plaintiff McMichael acquired preferential rights therein, and his applications to enter the said land were entitled to priority over the application of the defendant Murphy.

McMichael's settlement occurred without resistance or objection and his presence on the land was not unlawful and gave rise to preferential rights if the pending entries were all rejected. He knew of the contest and while he made no effort to enter the land while it was pending he did enter it as soon as he knew they were all disqualified. *Marks* v. *Bray,* 1 L. D. 434; *Banks* v. *Smith,* 2 L. D. 44; *Ward* v. *Gann,* 2 L. D. 630; *Meiszner's Case,* 8 L. D. 227.

In spite of his forcible ejectment McMichael never relinquished the actual possession of part of the land, and never ceased to claim that he was entitled to acquire the whole of it as a homestead. Under these circumstances he was, in contemplation of law, in possession of and a settler upon the land from May 28, 1889, continuously throughout the period covered by the transactions described in his petition. His temporary absence from part of the land, wrongfully compelled by military force and induced by intimidation, did not break the continuity of his residence. *Dorgan* v. *Pitt*, 6 L. D. 616; *Pfister* v. *Boyer*, 19 L. D. 178; *Arnold* v. *Cooly*, 10 L. D. 551; *Smith* v. *Place*, 13 L. D. 214; *Reedhead* v. *Hauenstine*, 15 L. D. 554; *Kinman* v. *Appleby*, 32 L. D. 526.

There was no abandonment by McMichael of any rights that he had gained. McMichael gained the right to enter and acquire the land, and of that right was wrongfully deprived. *Moss* v. *Dowman*, 176 U. S. 413; *Bohall* v. *Dilla*, 114 U. S. 47; *Quimby* v. *Conlan*, 104 U. S. 420; *Stone* v. *Cowles*, 14 L. D. 90; *Hunter* v. *Blodgett*, 20 L. D, 452.

By his contest filed August 31, 1889, by which he attacked the entry of the defendant White and the claims of Blanchard, the plaintiff McMichael acquired preferential rights, and both his application to enter the land in dispute, made at that time and the one made by him on December 4, 1890, were entitled to priority over the application of the defendant Murphy. Section 2, act of May 14, 1880; *Hodges* v. *Colcord*, 193 U. S. 192, distinguished; and see *McClung* v. *Penny*, 189 U. S. 143.

The several frauds, conspiracies, perjuries and other unlawful transactions by which the defendant Murphy secured the legal title to the land in dispute and prevented the plaintiff, McMichael, from securing the same rendered Murphy's title void as against McMichael. All of the defendants, having been either parties to these unlawful transactions, or privy thereto, must be regarded as having taken, and as holding the legal title, as trustees for, and should be compelled to convey the said land to, the heirs of McMichael.

Under the circumstances McMichael's remedy was by petition to a court of equity for the securing and protection of his rights, which were not cognizable by a court of law. He was entitled to have it adjudged that Murphy and his grantees took title as trustees for him; to a decree compelling the defendants to convey the land to him, and to an injunction restraining the execution of the judgments of ejectment. *Johnson* v. *Towsley*, 13 Wall. 72; *Moore* v. *Robbins*, 96 U. S. 513; *Warren* v. *Van Brunt*, 19 Wall. 646; *Re Emblen*, 161 U. S. 52; *Starke* v. *Storrs*, 6 Wall. 402; *Lytle* v. *Arkansas*, 22 How. 193; *Garland* v. *Wynne*, 20 How. 6; *Lindsey* v. *Hawes*, 2 Black, 554; *Brush* v. *Ware*, 15 Pet. 93; *Bodley* v. *Taylor*, 5 Cranch, 191; *Polk* v. *Wendell*, 5 Wheat. 293; *United States* v. *Maxwell*, 121 U. S. 325; *Sanford* v. *Sanford*, 139 U. S. 642.

Frauds, such as those, specifically disclosed, by the petition, vitiate all transactions based thereon and destroy any asserted title to property, no matter in what form the evidence of such title may exist, even though the same be a patent issued by the United States. *United States* v. *Steenerson*, 50 Fed. Rep. 507; *American Mortgage Co.* v. *Hoffer*, 64 Fed. Rep. 558; *United States* v. *Minor*, 114 U. S. 233.

The demurrer to the petition should have been overruled by the District Court of Oklahoma County.

The defense of *res adjudicata* cannot be considered here. On plaintiff's motion defendant's first ground of demurrer was stricken out, and the defendants neither noted an objection nor did they take a cross appeal. The propriety of that ruling was not questioned in the court below. It cannot be questioned here. *Morril* v. *Jones*, 106 U. S. 466, 467; *McLaughlin* v. *Bank*, 7 How. 220; *Fashnacht* v. *Frank*, 23 Wall. 416; *Bradstreet* v. *Potter*, 16 Pet. 317, 318. Again, the defense of *res adjudicata* cannot be raised by demurrer, but only by plea or answer. Statutes of Oklahoma, 1893, §§ 3967, 3969; 9 Am. & Eng. Pleading & Practice, 611.

The judgments obtained by Murphy and White did not deal with the subject matter of this controversy and can have no

effect upon it. 2 Black on Judgments, 693; *Apsden* v. *Nixon*, 4 How. 467. Where a judgment awards remedies in excess of those called for by the verdict it is void. Statutes, Oklahoma, 1893, § 4300; *Everett* v. *Aikens*, 8 Oklahoma, 184; *Commissioners* v. *Moon*, 8 Oklahoma, 205; *Kidd* v. *Territory*, 9 Oklahoma, 450.

Mr. J. H. Everest for defendants in error:

The facts as found by the Secretary in the proceeding before the Interior Department are final, conclusive and binding upon the parties, and the courts will not undertake to retry such questions of fact. *Lee* v. *Johnson*, 116 U. S. 48; *Johnson* v. *Towsley*, 13 Wall. 72; *Marquez* v. *Frisbie*, 101 U. S. 473; *Quinby* v. *Conlan*, 104 U. S. 420; *Baldwin* v. *Starks*, 107 U. S. 463.

A homestead entry once made upon public land of the United States under the provisions of sections 2289 and 2290 of the Revised Statutes of the United States segregates such lands until finally cancelled, except as the act of March 2, 1889, operates to change the ordinary rule. *Chotard* v. *Pope*, 12 Wheat. 586; *Wilcox* v. *Jackson*, 13 Pet. 498; *Carroll* v. *Safford*, 3 How. 441; *Witherspoon* v. *Duncan*, 4 Wall. 210; *Pacific R. R. Co.* v. *Dunemeyer*, 113 U. S. 629; *Hasting &c. R. R. Co.* v. *Whitney*, 132 U. S. 357; *Sturr* v. *Beck*, 133 U. S. 541; *Sioux City &c. R. R. Co.* v. *Griffey*, 143 U. S. 40; *Whitney* v. *Taylor*, 158 U. S. 65. The Land Department has repeatedly held that a homestead entry *prima facie* valid segregates the tract of land therein described, until such entry is cancelled, either by relinquishment or by the Government. *Graham* v. *Hastings & D. R. R. Co.*, 1 L. D. 362; *Whitney* v. *Maxwell*, 2 L. D. 98; *Seary* v. *Manuel*, 12 L. D. 345; *Vidal* v. *Bennis*, 22 L. D. 124; *Cowles* v. *Huff*, 24 L. D. 31. And see *Hodges* v. *Colcord*, 193 U. S. 191, citing and approving the decision of the Secretary in *McMichael* v. *Murphy*, which appellants attack by this proceeding.

One who makes settlement on a tract of land while it is

covered by the homestead entry of another, is a mere intruder, a naked, unlawful trespasser, and no right either in law or equity can be founded thereon. *Atherton* v. *Fowler*, 96 U. S. 513, 520; *Hosmer* v. *Wallace*, 97 U. S. 575; *Quinby* v. *Conlan*, 104 U. S. 420, 427; *Hudson* v. *Docking*, 4 L. D. 501; *Turner* v. *Bumgardner*, 5 L. D. 377; *Dutcher* v. *Tillinghast*, 13 L. D. 209; *Lewis* v. *Nuckolls*, 18 L. D. 326; *Tustin* v. *Adams*, 22 L. D. 266.

To entitle a party to relief in equity against a patent of the Government, he must show a better right to the land than the patentee. It must appear by the law properly administered, that title should have been awarded to the claimant. *Sparks* v. *Pierce*, 115 U. S. 408; *Bohall* v. *Dilla*, 114 U. S. 47; *Lee* v. *Johnson*, 116 U. S. 48.

The filing of a contest confers no vested interest in the land involved. *Parker* v. *Lynch*, 56 Pac. Rep. 1081; *Emblen* v. *Lincoln L. Co. et al.*, 184 U. S. 661, 663.

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

The particular question involved in this case is whether a settlement or entry on public land already covered of record by another entry, valid upon its face, gives the second entryman any right in the land, notwithstanding the first entry may subsequently be relinquished or be ascertained to be invalid by reason of facts dehors the record of such entry.

By virtue of the authority vested in him by acts of Congress, particularly by the Indian Appropriation act of March 2, 1889, 25 Stat. 1004, c. 412, the President by Proclamation dated March 23, 1889, declared that certain lands theretofore obtained from Indians (among which were those in dispute) would "at and after the hour of twelve o'clock, noon, of the twenty-second day of April next, and not before, be open for settlement, under the terms of, and subject to, all the conditions, limitations and restrictions" contained in the above act and in the laws of the United States applicable thereto. 26

Stat. 1544. That Proclamation contains the following clause: "Warning is hereby again expressly given, that no person entering upon and occupying said lands before said hour of twelve o'clock, noon, of the twenty-second day of April, A. D. eighteen hundred and eighty-nine, hereinbefore fixed, will ever be permitted to enter any of said lands or acquire any rights thereto; and that the officers of the United States will be required to strictly enforce the provision of the act of Congress to the above effect." 26 Stat. 1544, 1546.

It may be assumed, for the purpose of this case, that White entered the Territory and occupied the land before noon of April 22, 1889, in violation of the act of Congress and the Proclamation of the President. But his entry did not, on its face or in the papers connected therewith, disclose the fact of his personal disqualification to make a valid entry. While the entry remained uncancelled of record by any direct action of the Land Office or by relinquishment, could another person, by making an entry, acquire a right in the land upon which a patent could be based? If not, then McMichael acquired no right by his entry or application to enter.

The Supreme Court of the Territory held that White's homestead entry was *prima facie* valid, and that so long as White's entry remained uncancelled of record it segregated the tract of land from the mass of the public domain and precluded McMichael from acquiring an inceptive right thereto by virtue of his alleged settlement.

We are of opinion that there was no error in this ruling. It is supported by the adjudged cases. *Kansas Pacific Ry. Co.* v. *Dunmeyer*, 113 U. S. 629; *Hastings &c. R. R.* v. *Whitney*, 132 U. S. 357, 361, 362; *Sioux City &c. Land Company* v. *Griffey*, 143 U. S. 32, 38; *Whitney* v. *Taylor*, 158 U. S. 85, 91–94; *Northern Pacific Railroad Co.* v. *Sanders*, 166 U. S. 620, 631, 632; *Northern Pacific Railway* v. *De Lacey*, 174 U. S. 622, 634, 635; and *Hodges* v. *Colcord*, 193 U. S. 192, 194–196.

In the last named case the question now before us was directly presented and decided. It was there alleged that one

Gayman, who had made a homestead entry, was disqualified by reason of his having entered the Territory of Oklahoma in violation of the above act of Congress and the Proclamation of the President. The court said: "Gayman's homestead entry was *prima facie* valid. There was nothing on the face of the record to show that he had entered the Territory prior to the time fixed for the opening thereof for settlement, or that he had in any manner violated the statute or the Proclamation of the President. This *prima facie* valid entry removed the land, temporarily at least, out of the public domain, and beyond the reach of other homestead entries. . . . Generally, a homestead entry while it remains uncancelled withdraws the land from subsequent entry. Such has been the ruling of the Land Department. . . . The entry of Gayman, though ineffectual to vest any rights in him, and therefore void as to him, was such an entry as prevented the acquisition of homestead rights by another until it had been set aside."

Following the adjudged cases, we hold that White's original entry was *prima facie* valid, that is, valid on the face of the record, and McMichael's entry, having been made at a time when White's entry remained uncancelled, or not relinquished, of record, conferred no right upon him, for the reason that White's entry, so long as it remained undisturbed, of record, had the effect to segregate the lands from the public domain and make them not subject to entry. Upon White's relinquishment they again became public lands, subject to the entry made by Murphy.

In addition, it may be observed that the action of the Land Department under the statutes relating to the public lands has been in line with the above views. This appears from the decision in *Hodges* v. *Colcord*, and from the opinion of the Secretary of the Interior in *McMichael* v. *Murphy*, 20 L. D. 147. It is our duty not to overrule the construction of a statute upon which the Land Department has uniformly proceeded, in its administration of the public lands, except for cogent reasons. *United States* v. *Johnston*, 124 U. S. 236; *United*

States v. *Alabama G. S. R. Co.*, 142 U. S. 615; *United States* v. *Philbrick*, 120 U. S. 52; *United States* v. *Healey*, 160 U. S. 136, 141.

The judgment is

Affirmed.

CHRISMAN *v.* MILLER.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 171. Argued March 8, 1905.—Decided April 3, 1905.

This court does not review questions of fact in cases coming from a state court but accepts the conclusions of the state tribunal as final.

Where an attempted mineral location is a failure by reason of a lack of discovery and all rights have been conveyed to a third party who formally relinquishes them, the land is again open to location and the party so relinquishing may locate it and become entitled thereto by subsequent discovery, and otherwise complying with the law, without waiting until the relinquished location lapsed by failure to do the annual work required by statute.

In controversies between two mineral claimants the rule as to sufficiency of discovery is more liberal than it is in controversies between a mineral claimant and an agricultural entryman, as in the latter the land is sought to be withdrawn from the category of agricultural lands, while in the former the question is merely one of priority.

While the statute does not prescribe what is necessary to constitute a discovery under the mining laws of the United States, it is essential that it gives reasonable evidence of the fact either that there is a vein or lode carrying precious minerals, or if it be claimed as placer ground that it is valuable for such mining; and where there is not enough in what a locator claims to have seen to justify a prudent person in the expenditure of money and labor in exploitation this court will not overthrow a finding of the lower court that there was no discovery.

THIS was an action in the Superior Court of Fresno County, California, to quiet title to certain lands in that county. The complaint by Miller and The Home Oil Company was filed October 14, 1898. The case was tried by the court without

a jury, findings of fact were made, and a decree entered in favor of the plaintiffs below. On appeal to the Supreme Court of the State this decree was affirmed (September 13, 1903). 140 California, 440. Thereafter the case was brought to this court on writ of error. The dispute between the parties was as to the validity of respective locations of the land under the mineral laws of the United States. The mineral found therein, and on account of which the locations were made, was petroleum. From the findings it appears that on June 14, 1895, eight persons, one Barieau being of the number, attempted to make a mineral location upon the tract in controversy, the same being an entire quarter section. Whatever interest they thus acquired was on December 24, 1896, conveyed to E. O. Miller. On December 31, 1896, Miller by his written declaration abandoned and relinquished all rights which he had acquired by this conveyance. On the same day and about four hours thereafter Miller and seven others, duly qualified to make entries, made a mineral location of the entire tract. Subsequently all interests obtained thereby were vested in the plaintiffs, defendants in error. On January 1, 1897, the defendants, plaintiffs in error, attempted to make a location of certain portions of the tract. The tenth, eleventh, fifteenth, seventeenth and eighteenth findings are as follows:

"X. That immediately after going into possession of said northeast quarter of said section 20, the said plaintiff, Home Oil Company, commenced digging, boring and excavating thereon for petroleum and other fluid products, and has expended in such work the sum of more than thirty thousand dollars, and by means of such digging, boring and excavating discovered large quantities of petroleum therein, and there now exists, and did at the commencement of this action, wells of great depth, sunk and excavated upon said property by said Home Oil Company, from which there is a daily flow of large quantities of petroleum of great value.

"XI. That ever since the 17th day of September, 1897, the said plaintiff, Home Oil Company, has been and is now

in the sole and exclusive possession of all of said real property and engaged in working, developing and mining the same and extracting petroleum and other fluid products therefrom."

"XV. That said defendant A. Y. Chrisman never at any time discovered a seepage of petroleum or other mineral oil upon said land or any part thereof, and the defendant H. T. Chrisman never discovered a seepage of petroleum or other mineral oil upon said land or upon any part thereof, and that the only discovery of petroleum or any other fluid produce upon said lands or upon any part thereof is the discovery made by the plaintiff Home Oil Company as in these findings before stated."

"XVII. That on the said 1st day of January, 1897, no part of the said northeast quarter of section 20 was vacant, public mineral land or open to exploration or location for mining purposes, but on the contrary the whole of said northeast quarter of said section 20 was then in the possession of J. A. Hannah, E. O. Miller, W. F. Hall, D. G. Overall, L. E. Hall, Harry Levinson, R. B. Biddle and Charles H. Smith, under and by virtue of their location of said land hereinbefore mentioned.

"XVIII. That the said defendants A. Y. Chrisman and H. T. Chrisman did not make the location for mining purposes hereinbefore mentioned in good faith, and did not nor did either of them enter into the possession thereof or any part of the same for the purpose of working and mining thereon on the 1st day of January, 1897, or upon any other date; and said defendants have not and neither of them has since the first day of January, 1897, or since any day whatever, done and performed upon said land or any part thereof such work and labor or made improvements thereon as is required by the laws of the United States or of the State of California; and that the said defendants have not been and neither of them has been in the exclusive possession of said tracts of land so claimed by them; and said defendants are not, and neither of them is in the possession of said tracts of land so claimed by them or

either of them, or any part thereof; and the said defendants ever since the said 1st day of January, 1897, or since any day whatever or at all have not been nor are they or either of them now entitled to the exclusive or any possession of the tracts of land claimed by them or any part thereof, nor are said defendants entitled, nor is either of them entitled, to the exclusive or any possession whatever of any part of said northeast quarter of said section 20, in township 19 south, range 15 east, Mt. Diablo base and meridian."

Mr. Wm. H. Metson, with whom *Mr. Joseph C. Campbell, Mr. Frank C. Drew* and *Mr. Philip Mansfield* were on the brief, for plaintiffs in error:

The Barieau location, in June, 1895, was a valid location, which divested the land of its status as part of the public domain and appropriated it to private claim and domain until the end of the year 1896. Rev. Stat. §§ 2320, 2324, 2329; act of February 11, 1897, 29 Stat. 526.

The *value* of a mineral deposit is a matter into which the Government does not inquire as between two mineral claimants. Inquiries of this character are confined to controversies between mineral and agricultural claimants. 1 Lindley on Mines, 2d ed., 609; *Tam* v. *Story,* 21 L. D. 440.

In order to except lands from a town site patent they not only must in fact contain minerals, or even valuable minerals, but they must contain mineral of such extent and value as to justify expenditures for the purpose of extracting them. *Deffeback* v. *Hawke,* 115 U. S. 392; *Davis* v. *Weibbold,* 139 U. S. 507; *Dower* v. *Richards,* 151 U. S. 658; *Migeon* v. *Montana, Ry. Co.,* 77 Fed. Rep. 249.

As to what constitutes a discovery of petroleum as between two mineral claimants see Cent. Dict. sub. "Discovery"; Copp's Mineral Lands, 2d ed., 559; *Book* v. *Mining Co.,* 58 Fed. Rep. 106, 120; *McShane* v. *Kenkle,* 44 Pac. Rep. 979; *Railway Co.* v. *Migeon,* 68 Fed. Rep. 811; *Erhardt* v. *Boaro,* 113 U. S. 527, 536; Donahue on Petroleum and Oil, 223; *Nevada Oil Co.* v.

Home Oil Co., 98 Fed. Rep. 673; 1 Lindley on Mines, 2d ed., 779; Book of Job XXIX, 6; H. Höfer Das Erdöl, 1888; Loskiel History, 1788, translated by Ignatius La Trobe, London, 1794; Brannt, Petroleum, 8; O'Neil, Petroleum Industry, 5; Wright's Oil Regions of Pennsylvania; Thompson's Handbook on Petroleum, London, 1901, 3.

The alleged abandonment by Miller in December, 1896, was invalid, inoperative and of no effect because it was made with an intent and for the purpose of relocating the property by himself and others with him, and was not a true abandonment.

The locator of a placer claim, who has allowed his location to lapse by a failure to perform the necessary work, cannot abandon his claim with the intention of immediately making a relocation covering the same ground. As to what abandonment is see *Black* v. *Elkhorn Mining Co.*, 163 U. S. 445, 450; Bouvier, sub. "Abandonment"; *Stevens* v. *Mansfield*, 11 California, 363; *Richardson* v. *McNulty*, 24 California, 339; *St. John* v. *Kidd*, 26 California, 264; *Bell* v. *Bedrock Co.*, 36 California, 214; *McLeran* v. *Benton*, 43 California, 467; *Utt* v. *Frey*, 106 California, 392; *Trevaskis* v. *Pearl*, 111 California, 599; *McCann* v. *McMillan*, 129 California, 350; *S. C.*, 62 Pac. Rep. 31; *Buffalo Zinc Co.* v. *Crump*, 69 S. W. Rep. 572; 1 Lindley on Mines, 729.

Miller's December 31st location was invalid. There was a valid location at the time and the land was not open to exploration. *Belk* v. *Meagher*, 104 U. S. 279; *Souter* v. *McGuire*, 78 California, 545; *Gwillim* v. *Donnellan*, 115 U. S. 45; *Del Monte Min. Co.* v. *Last Chance Mining Co.*, 171 U. S. 55, 78.

It was not based on discovery and was not perfected by a subsequent discovery before plaintiffs in error's location.

Discovery is the source of title to mineral lands and the primary source of the miner's title thereto. Rev. Stat. §§ 2318, 2319, 2320; 1 Lindley on Mines, 2d ed. § 335; DeFooz on the Law of Mines, 26.

A location can rest only upon an actual discovery, and such

discovery must precede the location or be in advance of intervening rights. *Hawswirth* v. *Butcher*, 4 Montana, 299; *Upton* v. *Larkin*, 7 Montana, 449; *North Noonday M. Co.* v. *Orient M. Co.*, 6 Saw. 299; *Ledoux* v. *Forester*, 94 Fed. Rep. 600; *Perigo* v. *Erwin*, 85 Fed. Rep. 904; *Erwin* v. *Perego*, 93 Fed. Rep. 608; *Nevada Sierra Oil Co.* v. *Home Oil Co.*, 98 Fed. Rep. 673; *Olive Land & D. Co.* v. *Olmstead*, 103 Fed. Rep. 568; *Erhardt* v. *Boaro*, 113 U. S. 527, 536.

Mr. L. L. Cory for defendants in error:

All the asserted contentions of the plaintiffs in error are entirely dependent for their solution upon the determination of questions of fact, and the findings of fact of the trial court, affirmed by the Supreme Court of the State, are conclusive upon this court, and are determinative of all the questions raised by the plaintiffs in error. *Minneapolis & St. Louis R. Co.* v. *Minnesota*, 193 U. S. 53, citing *Dower* v. *Richards*, 151 U. S. 658; *Clipper Mining Co.* v. *Eli Mining & L. Co.*, 194 U. S. 220, and cases cited; *Thayer* v. *Spratt*, 189 U. S. 346; *Jenkins* v. *Neff*, 186 U. S. 230; *Bement* v. *Harrow Co.*, 186 U. S. 70; *Egan* v. *Hart*, 165 U. S. 188. It is, therefore, conclusive upon this court that the Barieau location, of June, 1895, was not a valid location, and did not divest the land of its status as part of the public domain, and that the Miller location of December 31st was valid.

The decision of the state court was correct. The Barieau location was void because of lack of discovery. As to what a discovery is see *Harrison* v. *Chambers*, 1 Pac. Rep. 362; *Shreve* v. *Mining Co.*, 28 Pac. Rep. 315; *Book* v. *Mining Co.*, 58 Fed. Rep. 106; *Waterloo Mining Co.* v. *Doe*, 56 Fed. Rep. 685; *King* v. *Mining Co.*, 152 U. S. 227.

The so-called abandonment by Miller was not necessary to open the land to relocation and the question of its validity is immaterial.

Plaintiffs in error are not in position to raise any question as to Miller's location. They have never been in possession,

are trespassers, and have never themselves made any discovery.

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

In cases coming from a state court we do not review questions of fact, but accept the conclusions of the state tribunals as final. *Clipper Mining Co.* v. *Eli Mining & Land Co.*, 194 U. S. 220, and cases cited in the opinion; *Kaufman* v. *Tredway*, 195 U. S. 271; *Smiley* v. *Kansas*, 196 U. S. 447.

By the findings of the trial court the Chrismans, plaintiffs in error, never made any discovery of petroleum or other mineral oil, did not make the attempted location in good faith, and never did any work on the tract. These findings were of date June 24, 1899, nearly two years and a half after their attempted location. It would seem from these facts that they had no pretense of right to the premises.

It is contended, however, that the Supreme Court, in its opinion, practically set aside these findings in one respect, and that is the discovery of petroleum. We do not so understand that opinion. The only reference made to the matter is in these words: "The alleged discovery of defendants under their location may be disposed of in a single sentence. It amounted to no more than the pretended discovery by Barieau;" and in reference to Barieau's alleged discovery the court said:

"Upon the question of discovery the sole evidence is that of Barieau himself. Giving fullest weight to that testimony, it amounts to no more than this, that Barieau had walked over the land at the time he posted his notice and had discovered 'indications' of petroleum. Specifically, he says that he saw a spring, and 'the oil comes out and floats over the water in the summer time when it is hot. In June, 1895, there was a little water with oil and a little oil with water coming out. It was just dripping over a rock about two feet high. There was no pool; it was just dripping a little water and oil, not much

water.' This is all the 'discovery' which it is even pretended was made under the Barieau location."

There is nothing in this language from which it can be inferred that the Supreme Court of the State set aside the finding of the trial court. All that it said was in answer to the contention of the defendants that they had made a discovery, and that contention the Supreme Court repudiated, leaving the finding of fact to stand as it was made by the trial court.

It is further contended that the location made by Barieau and his associates, and conveyed by them to Miller, did not lapse until midnight of December 31, 1896; that then it lapsed by reason of the failure to do the annual work required by statute; that Miller could not prior thereto abandon and relinquish that location, and at the same time make a new one, as he attempted to do on the afternoon of December 31, because the effect of such action would be to continue a possessory right to the tracts without compliance with the statutory requirement of work. Hence, as contended, the only valid location was that made on January 1, 1897, by the defendants. It may be doubted whether, in view of their want of good faith, the defendants can avail themselves of this contention, and, indeed, also doubted whether they could uphold their location by proof of a discovery by some other party. But it has no foundation in fact, for, as found by the trial and held by the Supreme Court of the State, the attempted location by Barieau and his associates in June, 1895, was a failure by reason of a lack of discovery. We have already quoted the declaration of the Supreme Court. The testimony referred to in that quotation, even if true, does not overthrow the finding. It does not establish a discovery. It only suggests a possibility of mineral of sufficient amount and value to justify further exploration.

By chap. 216, 29 Stat. 526, "lands containing petroleum or other mineral oils, and chiefly valuable therefor," may be entered and patented "under the provisions of the laws relating to placer mineral claims." By section 2329, Rev. Stat.,

placer claims are "subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims." By sec. 2320, Rev. Stat., "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located."

What is necessary to constitute a discovery of mineral is not prescribed by statute, but there have been frequent judicial declarations in respect thereto. In *United States* v. *Iron Silver Mining Company*, 128 U. S. 673, a suit brought by the United States to set aside placer patents on the charge that the patented tracts were not placer mining ground but land containing mineral veins or lodes of great value, as was well known to the patentee on his application for the patents, we said (p. 683):

"It appears very clearly from the evidence that no lodes or veins were discovered by the excavations of Sawyer in his prospecting work, and that his lode locations were made upon an erroneous opinion, and not upon knowledge, that lodes bearing metal were disclosed by them. It is not enough that there may have been some indications by outcroppings on the surface, of the existence of lodes or veins of rock in place bearing gold or silver or other metal, to justify their designation as 'known' veins or lodes. To meet that designation the lodes or veins must be clearly ascertained, and be of such extent as to render the land more valuable on that account, and justify their exploitation. Although pits and shafts had been sunk in various places, and what are termed in mining cross-cuts had been run, only loose gold and small nuggets had been found, mingled with earth, sand and gravel. Lodes and veins in quartz or other rock in place bearing gold or silver or other metal were not disclosed when the application for the patents were made."

This definition was accepted as correct in *Iron Silver Company* v. *Mike & Starr Company*, 143 U. S. 394, though in that case there was a vigorous dissent upon questions of fact, in

which Mr. Justice Field, speaking for the minority, said (p. 412): "The mere indication or presence of gold or silver is not sufficient to establish the existence of a lode. The mineral must exist in such quantities as to justify expenditure of money for the development of the mine and the extraction of the mineral." And again (p. 424): "It is not every vein or lode which may show traces of gold or silver that is exempted from sale or patent or the ground embracing it, but those only which possess these metals in such quantities as to enhance the value of the land and invite the expenditure of time and money for their development. No purpose or policy would be subserved by excepting from sale and patent veins and lodes yielding no remunerative return for labor expended upon them."

By the Land Department this rule has been laid down, *Castle* v. *Womble*, 19 L. D. 455, 457:

"Where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met. To hold otherwise would tend to make of little avail, if not entirely nugatory, that provision of the law whereby 'all valuable mineral deposits in lands belonging to the United States . . . are . . . declared to be free and open to exploration and purchase.' "

Some cases have held that a mere willingness on the part of the locator to further expend his labor and means was a fair criterion. In respect to this Lindley on Mines (1st ed.) sec. 336, says:

"But it would seem that the question should not be left to the arbitrary will of the locator. Willingness, unless evidenced by actual exploitation, would be a mere mental state which could not be satisfactorily proved. The facts which are within the observation of the discoverer, and which induce him to locate, should be such as would *justify* a man of ordinary

prudence, not necessarily a skilled miner, in the expenditure of his time and money in the development of the property."

It is true that when the controversy is between two mineral claimants the rule respecting the sufficiency of a discovery of mineral is more liberal than when it is between a mineral claimant and one seeking to make an agricultural entry, for the reason that where land is sought to be taken out of the category of agricultural lands the evidence of its mineral character should be reasonably clear, while in respect to mineral lands, in a controversy between claimants, the question is simply which is entitled to priority. That, it is true, is the case before us. But even in such a case, as shown by the authorities we have cited, there must be such a discovery of mineral as gives reasonable evidence of the fact either that there is a vein or lode carrying the precious mineral, or if it be claimed as placer ground that it is valuable for such mining.

Giving full weight to the testimony of Barieau we should not be justified, even in a case coming from a Federal Court, in overthrowing the finding that he made no discovery. There was not enough in what he claims to have seen to have justified a prudent person in the expenditure of money and labor in exploitation for petroleum. It merely suggested a possibility that the ground contained oil sufficient to make it "chiefly valuable therefor." If that be true were the case one coming from a Federal court *a fortiori* must it be true when the case comes to us from a state court, whose findings of fact we have so often held to be conclusive.

The judgment of the Supreme Court of California is

Affirmed.

IN THE MATTER OF STRAUSS.

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

No. 186. Argued March 1, 1905.—Decided April 3, 1905.

Words in the Constitution of the United States do not ordinarily receive a narrow and contracted meaning, but are presumed to have been used in a broad sense with a view of covering all contingencies.

The word "charged" in Art. IV, § 2, Subd. 2, was used in its broad signification to cover any proceeding which a State might see fit to adopt for a formal accusation against an alleged criminal.

Extradition, or rendition, is but one step in securing the presence of the accused in the court in which he may be tried and in no manner determines the question of guilt, and while courts will always endeavor to prevent any wrong in the extradition of a person to answer a charge of crime ignorantly or wantonly made, the possibility cannot always be guarded against and the process of extradition must not be so burdened as to make it practically valueless.

The extradition of an alleged fugitive from justice against whom a charge of the crime of securing property by false pretences has been made and is pending before a justice of the peace of Ohio, having jurisdiction conferred upon him by the laws of that State to examine and bind over for trial in a superior court, is authorized by Art. IV, § 2, Subd. 2 of the Constitution of the United States, and section 5278, Rev. Stat.

THE petitioner was charged by affidavit before a justice of the peace of Youngstown township, Ohio, with the crime of obtaining four hundred dollars' worth of jewelry at Youngstown, Ohio, by false pretences, contrary to the law of that State. He was arrested as a fugitive from justice and brought before a magistrate of the city of New York, August 11, 1902. The Governor of New York, after a hearing, at which the accused was represented by counsel, issued his warrant, dated August 22, 1902, directed to the police commissioner of New York city, directing him to arrest the accused and deliver him to the duly accredited agent of Ohio, to be taken to that State.

The warrant recites that it has been represented by the

Governor of Ohio that the accused stands charged in that State of the crime of securing property by false pretences, which is a crime under its law, and that he has fled from that State. It also recites that the requisition was accompanied by affidavits and other papers, duly certified by the Governor of Ohio to be authentic, charging the accused with having committed the said crime and with having fled from Ohio and taken refuge in the State of New York.

On August 29, after the arrest of the petitioner, a writ of *habeas corpus* was allowed by the District Court. The police commissioner made return that he held the accused by virtue of the Governor's warrant. On September 16, 1902, the District Court discharged the writ and remanded the accused to the custody of the police commissioner. This order was taken on appeal to the Circuit Court of Appeals of the Second Circuit, which certified the following questions:

"First. Whether the delivery up of an alleged fugitive from justice against whom a complaint for the crime of securing property by false pretences has been sworn to and is pending before a justice of the peace of Ohio having the jurisdiction conferred upon him by the laws of that State is authorized in view of the provisions of Article IV, section 2, subdivision 2, of the Constitution?

"Second. Is section 5278 of the Revised Statutes, in as far as it authorizes the delivery up of an alleged fugitive from justice upon an affidavit of complaint pending before a justice of the peace in Ohio for the crime of securing property by false pretences, which said justice of the peace has the jurisdiction conferred upon him by the laws of the said State, violative of Article IV, section 2, subdivision 2, of the Constitution?"

Article IV, section 2, subd. 2, of the Constitution reads:

"A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime."

Revised Statutes, sec. 5278, so far as is material, is:

"Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the Governor or chief magistrate of the State or Territory from whence the person so charged has fled, it shall be the duty of the executive authority of the State or Territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear."

Mr. Max J. Kohler, with whom *Mr. Moses H. Grossman* was on the brief, for appellant:

The constitutional provision for the delivery up only of persons charged with treason, felony or other crime, to be removed to the State having jurisdiction of the crime, means that the charge must be pending in a court that can try defendant, and not merely before a committing magistrate who can only discharge or hold for another tribunal. *Kentucky* v. *Dennison,* 24 How. 66; Thornton's article on Fugitives from Justice, Cr. Law Mag., vol. 3, 787; *Virginia* v. *Paul,* 148 U. S. 107, 119; *Pennsylvania* v. *Artman,* 5 Philadelphia, 304; *S. C.,* 19 Fed. Cas. No. 10,952; *Virginia* v. *Felts,* 133 Fed. Rep. 85. Where the case is actually triable before the justice it is different. *Virginia* v. *Bingham,* 88 Fed. Rep. 561.

These preliminary proceedings were merely a melioration of the practice of arresting without warrants for crime, to secure presence on indictment to be found. Stephens' History of the Criminal Law, 190; Kinghorn on "The Preliminary In-

vestigation of Crime," in Crim. Law Mag., vol. 3, p. 297; 16 Ency. of Pl. & Pr., 820; 5 Blackstone (Tucker), 300.

The English common law practice authorized removal only after indictment found. *In re Dana*, 68 Fed. Rep. 886, 893.

Oppressive removals to the mother country for trial for alleged crime, was one of the grievances specifically set forth in the Declaration of Independence. Friedenwald: The Declaration of Independence (1904), 249; Winsor: Narrative and Critical History of America, vol. 6, 53; Bancroft: History of the U. S., 1857 ed., vol. 6, 417, 441, 450; *Jack* v. *Martin*, 14 Wend. 507, 525; 20 Am. State Papers, Lowrie & Franklin, 1842, 41.

Gross hardship, entirely unnecessary, would result from permitting rendition on mere complaint before a committing magistrate. *Beavers* v. *Henkel*, 194 U. S. 73, 83; *Lawrence* v. *Brady*, 56 N. Y. 186; Seward's Works, vol. 21, 528; 6 Pa. Law Jour., 413 (1847); *Cockran* v. *Hyatt*, 172 N. Y. 176, 182.

The words "charged with treason, felony or other crime" were used by the framers of the Constitution in the same sense as that in which analogous words are elsewhere used in the same instrument concerning criminal proceedings, and are inapplicable to preliminary examinations.

As to Art. III, § 2, subd. 3, of the Fifth and Sixth Amendments, in this respect, see *Ex parte Siebold*, 100 U. S. 371, 391; *Ex parte* Milligan, 4 Wall. 2; *Ex parte Wilson*, 114 U. S. 417; *Ex parte Bain*, 121 U. S. 1; *In re Dana*, 7 Ben. 1.

The word "charge" in Article IV, sec. 2, subd. 2, where it is connected with the phrase "to be removed to the State having jurisdiction of the crime," is used in the same sense in which the framers of the Constitution, in Article III defined "cases" within the "judicial power of the United States" to be "vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish," and that the former should be construed in the same manner in which the latter have been defined, as excluding mere preliminary examinations before mere committing magis-

trates acting as conservators of the peace. *Robertson* v. *Baldwin*, 165 U. S. 275; *Todd* v. *United States*, 158 U. S. 278.

As to Rev. Stat. 5278 the decisions are to the effect that the charges must be made "in the regular course of judicial proceedings." The affidavit of charge must itself be produced, and an affidavit merely averring that defendant is charged in the other State is not sufficient. *State* v. *Kufford*, 28 Iowa, 391; *Smith* v. *State*, 21 Nebraska, 552; *Forbes* v. *Hicks*, 27 Nebraska, 111, 116; *Ex parte Pfitzer*, 28 Indiana, 450; *Ex parte Lorraine*, 16 Nevada, 63; *Ex parte White*, 49 California, 435; *Ex parte Powell*, 20 Florida, 807; *State* v. *Richardson*, 34 Minnesota, 115; *Ex parte Pearce*, 32 Tex. Civ. App. 301; *Ex parte Hart*, 63 Fed. Rep. 249, 259; *In re Hooper*, 52 Wisconsin, 699; *People* v. *Stockwell*, 97 N. W. Rep. 765 (Minn.); *In re Van Scriever*, 42 Nebraska, 772, 778; *United States* v. *Dominci*, 78 Fed. Rep. 334.

Mr. William Travers Jerome and *Mr. Howard S. Gans* for appellee submitted:

The construction for which the relator contends, involves results so absurd and so detrimental to the public interest as to make it impossible that it should be adopted even if the words of the Constitution were on their face reasonably susceptible of such interpretation. *Prigg* v. *Pennsylvania*, 16 Pet. 539, 612; *In re Chapman*, 166 U. S. 661, 667; *Lau Ow Bew* v. *United States*, 144 U. S. 47, 59; *Holy Trinity Church* v. *United States*, 143 U. S. 457; *Jarrolt* v. *Moberly*, 103 U. S. 580, 586. It would create a chaotic condition in the law, requiring the rendition to one State from another under conditions in which the asylum State would have no reciprocal rights as against the demanding State, and it would favor those States which afford the least safeguards to the accused as against those that afford the greater. It would render the rendition of a fugitive from a sister State more difficult than an extradition from a foreign power, and would create an in-

vidious discrimination in favor of major criminals as against minor ones to the extent of insuring to the major criminal a chance of escape which was denied to his little brother in crime. Nor would it serve as a safeguard to the accused or prevent unwarranted extraditions.

The language of the Constitution does not restrict the right of rendition to cases where the criminal pleading accompanies the demand and such restriction is at variance both with the contemporaneous construction and the history and origin of the provision.

In view of the decisions construing the term "fugitives from justice" as describing all persons in the demanding State at or about the time of the commission of the offense, charged with committing it there, defendants are frequently only "fugitives from justice" by construction, and their removal is sought to States other than that of their domicile. *Roberts* v. *Reilly*, 116 U. S. 80, 197; *Streep* v. *United States*, 160 U. S. 128; *Prigg* v. *Pennsylvania*, 16 Pet. 539, 620; *Kentucky* v. *Dennison*, 24 How. 66, 104; *Ex parte Reggel*, 114 U. S. 642.

As to the construction of the word "charged", see cases cited *supra* and 2 Moore on Extrad. § 546; Spear on Extrad. 266; Bouvier; Blackstone, Bk. IV, ch. 21; Hale's Pleas of the Crown, 1st Am. ed. 108.

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

The Constitution provides for the surrender of a person charged with treason, felony or other crime. The statute prescribes the evidence of the charge to be produced, to wit: "A copy of an indictment found or an affidavit made before a magistrate . . . charging . . . treason, felony, or other crime." The offense for which extradition was sought is under the Ohio statute a felony (Bates' Annotated Ohio Stat. 4th ed. sec. 7076), and subject to trial only upon an

indictment (Art. 1, sec. 10, Bill of Rights, Ohio Constitution), the proceedings in such a case before a justice of the peace being only preliminary and for the purpose of securing arrest and detention. It is contended that the constitutional provision for the extradition of persons "charged with treason, felony or other crime" requires that the charge must be pending in a court that can try the defendant, and does not include one before a committing magistrate, who can only discharge or hold for trial before another tribunal.

But why should the word "charged" be given a restricted interpretation? It is found in the Constitution, and ordinarily words in such an instrument do not receive a narrow, contracted meaning, but are presumed to have been used in a broad sense, with a view of covering all contingencies. In *McCulloch* v. *Maryland*, 4 Wheat. 316, one question discussed was as to the meaning of the word "necessary" as found in the clause of the Constitution giving to Congress power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof." Chief Justice Marshall, speaking for the court, said (p. 415):

"This word, then, like others, is used in various senses; and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view.

"Let this be done in the case under consideration. The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, as far as human prudence could insure, their beneficial execution. This could not be done, by confining the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a Constitution intended to endure for ages to come, and, consequently,

to be adapted to the various crises of human affairs. To have prescribed the means by which Government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances."

Under the Constitution each State was left with full control over its criminal procedure. No one could have anticipated what changes any State might make therein, and doubtless the word "charged" was used in its broad signification to cover any proceeding which a State might see fit to adopt by which a formal accusation was made against an alleged criminal. In the strictest sense of the term a party is charged with crime when an affidavit is filed, alleging the commission of the offense and a warrant is issued for his arrest, and this is true whether a final trial may or may not be had upon such charge. It may be, and is true, that in many of the States some further proceeding is, in the higher grade of offenses at least, necessary before the party can be put upon trial, and that the proceedings before an examining magistrate are preliminary, and only with a view to the arrest and detention of the alleged criminal; but extradition is a mere proceeding in securing arrest and detention. An extradited defendant is not put on trial upon any writ which is issued for the purposes of extradition, any more than he is upon the warrant which is issued by the justice of the peace directing his arrest.

Cases are referred to, such as *Virginia* v. *Paul*, 148 U. S. 107, in which a distinction is made between the preliminary proceedings looking to the arrest and detention of the

defendant and those final proceedings upon which the trial is had. That was a removal case, and, discussing the question, Mr. Justice Gray, speaking for the court, said (p. 119):

"By the terms of section 643, it is only after 'any civil suit or criminal prosecution is commenced in any court of a State,' and 'before the trial or final hearing thereof,' that it can 'be removed for trial into the Circuit Court next to be holden in the district where the same is pending,' and 'shall proceed as a cause originally commenced in that court.'

"Proceedings before a magistrate to commit a person to jail, or to hold him to bail, in order to secure his appearance to answer for a crime or offense, which the magistrate has no jurisdiction himself to try, before the court in which he may be prosecuted and tried, are but preliminary to the prosecution, and are no more a commencement of the prosecution than is an arrest by an officer without a warrant for a felony committed in his presence."

But such decisions, instead of making against the use in this constitutional section of the word "charged" in its broad sense, make in its favor, because, as we have noticed, an extradition is simply one step in securing the arrest and detention of the defendant. And these preliminary proceedings are not completed until the party is brought before the court in which the trial may be had. Why should the State be put to the expense of a grand jury and an indictment before securing possession of the party to be tried? It may be true, as counsel urge, that persons are sometimes wrongfully extradited, particularly in cases like the present; that a creditor may wantonly swear to an affidavit charging a debtor with obtaining goods under false pretences. But it is also true that a prosecuting officer may either wantonly or ignorantly file an information charging a like offense. But who would doubt that an information, where that is the statutory pleading for purposes of trial, is sufficient to justify an extradition? Such

possibilities as these cannot be guarded against. While courts will always endeavor to see that no such attempted wrong is successful, on the other hand care must be taken that the process of extradition be not so burdened as to make it practically valueless. It is but one step in securing the presence of the defendant in the court in which he may be tried, and in no manner determines the question of guilt.

While perhaps more pertinent as illustration than argument, the practice which obtains in extradition cases between this and other nations is worthy of notice. Sections 5270 to 5277, Rev. Stat., inclusive provide for this matter. In none of these sections or in subsequent amendments or additions thereto is there any stipulation for an indictment as a prerequisite to extradition. On the contrary, the proceedings assimilate very closely those commenced in any State for the arrest and detention of an alleged criminal. They go upon the theory that extradition is but a mere step in securing the presence of the defendant in the court in which he may lawfully be tried. In the memorandum issued by the Department of State in May, 1890, in reference to the extradition of fugitives from the United States in British jurisdiction, is this statement (1 Moore on Extradition, p. 335):

"It is stipulated in the treaties with Great Britain that extradition shall only be granted on such evidence of criminality as, according to the laws of the place where the fugitive or person charged shall be found, would justify his apprehension and commitment for trial if the crime or offense had there been committed.

"It is admissible as constituting such evidence to produce a properly certified copy of an indictment found against the fugitive by a grand jury, or of any information made before an examining magistrate, accompanied by one or more depositions setting forth as fully as possible the circumstances of the crime."

And this is in general harmony with the thought underlying extradition.

Entertaining these views, we answer the first question in the affirmative and the second in the negative.

MR. JUSTICE HARLAN did not hear the argument and took no part in the decision of this case.

BISHOP *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 92. Argued March 23, 1905.—Decided April 3, 1905.

An officer in the Navy failing to report at the time ordered, while his vessel was in Japanese waters, in 1865, was placed under arrest for drunkenness and neglect of duty; later, on the same day he was, by order of the rear admiral, restored to duty to await an opportunity to investigate the case. Subsequently the rear admiral convened a court martial consisting of seven officers all of equal or superior rank to accused who was served with charges and arrested, arraigned and tried, found guilty and dismissed. Accused stated he had no objections to any of the court and knew of no reason why it should not proceed with his trial. Subsequently in a suit for salary on ground of illegal dismissal he claimed the first arrest was an expiation of the offense and a bar; that the court was invalid and incompetent and the sentence invalid not having been approved by the rear admiral or the President. *Held*, that:

Par. 1205, Naval Regulations of 1865, providing that the arrest and discharge of a person in the Navy for an offense shall be a bar to further martial proceedings against him for that offense, does not apply to an arrest and temporary confinement not intended as a punishment but as a reasonable precaution for the maintenance of good order and discipline aboard.

Under Article 38 of the law of April 23, 1800, 2 Stat. 50, and Par. 1202, Naval Regulations of 1865, the provision as to service of charges upon the accused at the time that he is put under arrest refers not to the temporary arrest necessary for order and discipline at the time of the commission of the offense but to the subsequent arrest for trial by court martial.

It is a question for the officer convening the court to determine whether more officers could be convened without injury to the service and his action in this respect cannot be attacked collaterally, and if the accused expresses satisfaction with the court martial as constituted, it is a clear waiver of any objection to its personnel.

Under Articles 19 and 20 of the act of July 17, 1862, 12 Stat. 605, the rear admiral convening the court martial was not obliged to confirm the sentence of dismissal.

The approval by the President sufficiently appears where the record shows that the sentence was submitted to the President and his approval appears at the foot of a brief in the case and the Secretary of the Navy writes to the accused that the President has approved the sentence.

THIS is a petition for pay as a Lieutenant Commander from February 8, 1868, when defendant was dismissed from the naval service pursuant to the sentence of a general court-martial, until March 9, 1871, when he was reinstated by special act of Congress. The Court of Claims made a finding of facts, the material parts of which are incorporated in the opinion, and dismissed the petition. 38 C. Cl. 473.

Mr. Irwin W. Schultz for appellant:

The alleged court-martial had no jurisdiction over appellant as he had already been punished for the alleged offense by his arrest and suspension from duty on May 31, 1867. Par. 1205, Nav. Reg. 1865; and see also pars. 455, 1122, 1202, 1210, 1212; Art. 38, laws regulating the Navy, act of 1800, 2 Stat. 50.

The judgment of a court-martial may be collaterally attacked. *Ex parte Watkins*, 3 Pet. 270.

The court-martial was illegally constituted. Art. II, act of 1862, 12 Stat. 603. As to convening courts-martial see *Mills* v. *Martin*, 19 Johns. (N. Y.) 29; *Runkle* v. *United States*, 122 U. S. 543; *Brown* v. *Keene*, 8 Pet. 115; Nav. Reg. 1900, par. 1837. Statutory provisions as to constitution of the court must be observed, otherwise it is fatal. Wells on Jurisdiction, 1880, §§ 15–17, 40–42, 47; *Keyes* v. *United States*, 109 U. S. 136; *Fry* v. *Warden*, 100 N. Y. 26. It is doubtful whether the accused could have waived an objection to the jurisdiction of the court. *Brook* v. *Davis*, 17 Pick. 148; *S. C.*, 22 Pick. 498.

The sentence is void because not affirmed by the rear admiral and the President. Arts. 19, 20, act of 1862, 12 Stat. 600; par. 1239, Nav. Reg. 1865; *Re Sands and Rinker*,

2 Am. St. Papers, War Affairs, 539; 2 Op. Atty. Gen. 19; 1 Winthrop's Mil. Law, 639; 13 Op. Atty. Gen. 459; cases cited *supra.*

Mr. Assistant Attorney General Pradt and *Mr. Assistant Attorney Felix Brannigan* for the United States, submitted.

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

This case depends upon the validity of the findings and sentence of the court-martial, and is brought under an act of Congress approved June 6, 1900, 31 Stat. 1612, nearly thirty years after petitioner was recommissioned as a Lieutenant Commander, which enacted "that the claim of Joshua Bishop for alleged items of pay, due and unpaid to him for services as a Lieutenant Commander . . . be, and the same is hereby referred to the Court of Claims. Jurisdiction is hereby conferred on said court to try said cause, and the statute of limitations shall not apply thereto, and to render final judgment therein, and subject to the right of appeal by either party." Claimant insisted in the court below that this statute was not a mere waiver of limitations, but a recognition that claimant was a Lieutenant Commander during the time referred to in the act, but as this point is not made in the briefs filed in this court, it may be considered as abandoned.

The action of the court-martial in dismissing the petitioner from the service is attacked upon the following grounds:

1. That the court had no jurisdiction over him, because he had already been punished for the offenses charged against him, viz., drunkenness and neglect of duty.

It appears from the findings that Bishop was a Lieutenant Commander in the naval service, attached to the steamer Wyoming, then lying in the harbor of Nagasaki, Japan; that he was ordered by his commanding officer to have his ship ready for sea by daylight on the morning of the thirty-first

of May, 1867, but that he went ashore and did not return until after daylight. On May 31 the following entries appear on the log:

"From 4 to 8 A. M.

"Lieutenant Commander Joshua Bishop was suspended from duty by order of Lt. Commander C. C. Carpenter.

"GEORGE B. GLIDDEN, *Master.*"

"From 6 to 8 P. M.

"At 6.40 Lt. Comdr. Joshua Bishop was restored to duty by order of Rear Admiral H. H. Bell.

"GEORGE B. GLIDDEN, *Master.*"

Upon being placed on trial before the court-martial Bishop pleaded that he was placed under arrest for the offenses specified (drunkenness and neglect of duty), but was ordered released from arrest by Rear Admiral Bell; and in this connection refers the court to paragraph 1205, Navy Regulations of 1865, then in force, as follows:

"An offense committed at any one time, for which a person in the Navy shall have been placed under arrest, suspension or confinement, and subsequently entirely discharged therefrom by competent authority, or for which he shall have been otherwise fully punished, is to be regarded as expiated, and no further martial proceedings against him for the offense itself are ever afterwards to take place," etc.

Conceding that the petitioner was within the letter of the regulations, inasmuch as he was suspended from duty in the morning of May 31 and restored to duty on the evening of the same day, we do not think the case is within its real meaning, which looks to a *punishment* of the offense by such suspension. As it appears that Bishop was intoxicated during the preceding day, and went ashore and failed to report at daylight on the next morning, it would naturally be inferred that his suspension from duty was not intended as a punishment, but as a reasonable precaution for the maintenance of good order and discipline aboard.

That this was the understanding of the Rear Admiral is evidenced from the following letter restoring him to duty:

"U. S. FLAGSHIP HARTFORD,
"NAGASAKI, JAPAN, May 31, 1867.

"Lieut. Comm'd'r C. C. CARPENTER,
"Comm'd'g U. S. S. Wyoming, Nagasaki.

"SIR: Your communication of this date, reporting Lieutenant Commander Bishop to me, is received.

"You will restore Lieutenant Commander Bishop to duty to *await an opportunity for time to investigate the case.*

"I am, sir, very respectfully,
"H. H. BELL,
"*Rear Admiral, Commanding U. S. Asiatic Squadron.*"

It is quite evident that the words "arrest, suspension or confinement," in paragraph 1205, contemplate an action in the nature of a punishment, upon the infliction of which the offense is to be regarded as expiated; but as the order restoring Bishop to duty was on its face merely to give "time to investigate the case," we do not think the order of suspension could have been intended as a punishment in itself, or as an expiation of the previous offense, nor did the order of Admiral Bell "entirely discharge" the accused within the meaning of § 1205 of the Navy Regulations.

2. No further proceedings appear to have been taken until June 21, 1867, when charges and specifications were preferred by Rear Admiral Bell, and on September 5, 1867, the following entry appears upon the log:

"From 4 to 8 A. M.

"Lt. Comdr. Joshua Bishop *placed under arrest* to await trial by court-martial, and *served with copy of charges*, by order of Rear Admiral H. H. Bell, comdg. U. S. Asiatic squadron.

"E. F. CRAWFORD, *Mate.*"

The petitioner cites in this connection Article 38 of the laws regulating the Navy, approved April 23, 1800, 2 Stat. 45, 50, 51, providing that "all charges, on which an application

for a general court-martial is founded, shall be exhibited in writing to the proper officer, and the person demanding the court shall take care that the person accused be furnished with a true copy of the charges, with the specifications, *at the time he is put under arrest*," and insists in this connection that he should have been served with a copy of the charges and specifications on May 31, 1867, when he was suspended. The objection is unfounded.

As already indicated, the first arrest was a temporary precaution for the preservation of good order and for further investigation. There was no opportunity for the preparation of charges and specifications, and evidently this was not the arrest contemplated by the above act.

It is true that paragraph 1202 of the Naval Regulations of 1865 provides that offenders shall be brought to trial within thirty days after notice to the proper authority, empowered to convene such court, or shall be released from arrest and returned to duty, and so remain until a court-martial can be convened to try him, "when he shall be again arrested on the day before the court is convened, so as to undergo his trial before it." As petitioner had been "released from arrest and returned to duty" on May 31, and so remained until September 5, when he was "again arrested" on the day before the court-martial was ordered to convene; and as he was served with a copy of the charges and specifications on the day he was arrested, we see nothing in these proceedings of which he is entitled to complain. The point is completely covered by *Johnson* v. *Sayre*, 158 U. S. 109, 117.

3. Petitioner's contention that the court-martial was illegally constituted rests upon article 11 of the act of July 17, 1862 (12 Stat. 600, 603), providing that "no general court-martial shall consist of more than thirteen nor less than five commissioned officers as members; and as many officers shall be summoned on every such court as can be convened without injury to the service, so as not to exceed thirteen; and the senior officer shall always preside, the others taking place

according to their rank; and in no case, where it can be avoided without injury to the service shall more than one-half the members, exclusive of the president, be junior to the officer to be tried."

The argument is that as the court-martial consisted of only seven officers it had not power or authority to try and sentence petitioner without showing affirmatively that no more could be convened without injury to the service. As the court-martial consisted of more than five commissioned officers, viz., seven, all of whom were of equal or superior rank to the petitioner, it was a question for the officer convening the court to determine whether more could be convened without injury to the service, and we do not think his action or non-action in this particular can be collaterally attacked. The regulations have been recently amended in that particular. As the accused when arraigned said he had no objection to any member of the court, and knew of no reason why the court should not proceed with his trial, it is manifestly too late to raise the objection, in view of our decision in *Mullan* v. *United States*, 140 U. S. 240, in which we held that when the commander-in-chief of a squadron not in the waters of the United States, convenes a court-martial, more than one-half of whose members are juniors in rank to the accused, the courts of the United States will assume, when his action is attacked collaterally, that he properly exercised his discretion, and the trial of the accused by such a court could not be avoided, without inconvenience to the service. The rank and number of the members of a court-martial must necessarily be, and is, left somewhat to the discretion of the officer convening the court. There is nothing in this case to indicate an abuse of discretion, or that a larger number of officers might have been convened without injury to the service, although if the accused had taken prompt advantage of the defect it might have been necessary to show that a larger number could not have been obtained. His expressed satisfaction with the court as constituted was a clear waiver of any objection to its personnel.

4. The objection that the court-martial proceedings are void because its sentence was not approved or confirmed by Rear Admiral Bell, who convened the court, is answered by articles 19 and 20 of the act of July 17, 1862, for the better government of the Navy. 12 Stat. 605. The first of these articles provides that "all sentences of courts-martial which shall extend to the loss of life shall require the concurrence of two-thirds of the members present," as well as confirmation by the President. "All other sentences may be determined by a majority of votes, and carried into execution, on confirmation of the commander of the fleet, or officer ordering the court, except such as go to the dismission of a commissioned or warrant officer, which are first to be approved by the President of the United States." As the sentence in this case extended to a dismissal from the service, no confirmation was necessary by Admiral Bell, whose duty was discharged by forwarding the papers to the President.

Petitioner relies upon article 20 of the same act, which declares that "Every officer who is by this act authorized to convene courts-martial shall have power on revisal of its proceedings to remit or mitigate, but not to commute the sentence of any such court, which by this act he is authorized to approve and confirm." Obviously, this article extends only to such sentences as the convening officer is authorized to approve and confirm, and has no application where the punishment of dismissal is imposed.

5. The last point made is that the court-martial proceedings are void because the sentence was never confirmed by the President of the United States. The record shows that the proceedings of the court-martial were forwarded and submitted to the Secretary of the Navy for the action of the President, under article 19, above quoted; that the papers were submitted to some officer connected with the Navy Department, who made a statement, termed a "brief," of the findings of the court, and added the following: "The evidence in the case is positive and clear, and the findings of the court sustained

thereby. Lieut. Comdr. Bishop produces no witnesses in his behalf, and the statement made by him to the court is lame throughout. There is no recommendation by the court for clemency."

December 3, 1867, the Secretary of the Navy certified that the case was submitted to the President for his action in accordance with article 19 of the above act, to which are added the words: "Approved: Andrew Johnson."

On February 8, 1868, the Secretary of the Navy addressed to the petitioner a letter notifying him of the sentence of court-martial, and added as follows: "The sentence of the court in your case *having been approved by the President,* you are hereby dismissed from the Navy service," etc. It is difficult to see how the personal approval of the President could appear more clearly than in this case. In *United States* v. *Fletcher,* 148 U. S. 84, there appeared only the certificate of the Secretary of War that the proceedings of the court-martial were forwarded to the Secretary of War for the action of the President, and that "the proceedings, findings and sentence are approved;" but it was held that the order was valid, though it did not appear that the President personally examined the proceedings and approved the execution of the sentence. Criticism was made in that opinion of *Runkle* v. *United States,* 122 U. S. 543, upon the ground that the circumstances of that case were so exceptional as to render it an unsafe precedent in any other. It was held in that case that there was no sufficient evidence that the action of the court-martial was approved, and it followed that the officer was never legally dismissed from the service. No such criticism can be made here, as it not only appears from the letter of February 8 that the sentence of the court had been approved by the President, but his approval distinctly appears at the foot of the brief.

We find nothing in this case of which the petitioner has any just reason to complain. The proceedings of the court-martial were conducted with a substantial, if not a literal, conformity

to the law, and we must presume, at least, that there was sufficient evidence to support the sentence. While drunkenness is not ordinarily considered as criminal, the intoxication of a naval officer while on duty is a gross breach of discipline, and liable to be attended by very serious consequences. Congress evidently acted with forbearance and generosity in reinstating petitioner in the service after a lapse of three years, and thereby condoned the offense. But it has never directly or indirectly intimated that petitioner was entitled to pay during the suspension.

The judgment of the Court of Claims is

Affirmed.

McMILLEN *v.* FERRUM MINING COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

No. 185. Argued March 15, 16, 1905.—Decided April 3, 1905.

Where the Federal question is not raised until the petition for rehearing to the highest court of the State, it is too late to give this court jurisdiction under Rev. Stat. § 709, to review a writ of error unless the court grants the rehearing and then proceeds to pass upon the question.

Where in all the state courts the question was treated as one of local law, the fact that the suit was brought under Rev. Stat. § 2326, to try adverse rights to a mining claim, does not necessarily involve a Federal question so as to authorize a writ of error from this court.

By this writ of error it is sought to review a judgment of the Supreme Court of Colorado, affirming a judgment of the District Court of Lake County in favor of the Ferrum Mining Company in a proceeding brought by the plaintiffs in error under Rev. Stat. sec. 2326 to determine the right of possession to certain mining grounds, plaintiffs claiming title as owners of the Eulalia lode mining claim and the defendant claiming title to the same ground as the Golden Rod lode mining claim.

The case was tried before the court and a jury, resulting in a verdict and judgment in favor of the defendant, which was affirmed by the Supreme Court, upon the ground that plaintiffs had not complied with either the Federal or the state statutes in showing a valid discovery of mineral in their location.

Mr. George R. Elder for plaintiffs in error.

Mr. Charles Cavender, with whom *Mr. John A. Ewing* was on the brief, for defendant in error:

No Federal question was raised by plaintiffs in error, either in the trial court or in the Supreme Court of Colorado before the petition for a rehearing, and the question as to the validity of the state statute was not raised in the state court at all. *Bushnell* v. *Mining Co.*, 148 U. S. 682; *Telluride Co.* v. *R. G. West. Ry. Co.*, 175 U. S. 639; *Blackburn* v. *Mining Co.*, 175 U. S. 571; *Mining Co.* v. *Rutter*, 177 U. S. 505.

The decision of the Supreme Court of Colorado in no way brought in question the validity or construction of any Federal statute. The question decided by the Supreme Court of Colorado was whether or not under the statutes of the United States, and of the State of Colorado, the plaintiffs in error had made a valid location prior to the location of the defendant in error or its grantors.

No right or immunity was specially set up or claimed in the case at bar, and no such right was expressly or in effect denied by the judgment. *Roby* v. *Colehour*, 146 U. S. 153.

The question as to the invalidity of the state statute was not raised in the state court, if at all, until the petition was filed for a rehearing in the Supreme Court, which is too late. *Loeber* v. *Schroeder*, 149 U. S. 580; *Tex. & Pac. Ry. Co.* v. *So. Pac. Co.*, 137 U. S. 48; *Butler* v. *Gage*, 138 U. S. 52; *Winona & St. P. R. Co.* v. *Plainview*, 143 U. S. 371; *Leeper* v. *Texas*, 139 U. S. 462; *Sayward* v. *Denny*, 158 U. S. 180; *Pim* v. *St. Louis*, 165 U. S. 273; *Miller* v. *Cornwall R. Co.*, 168 U. S. 131;

Meyer v. *Richmond*, 172 U. S. 82; *Citizens' Savings Bank* v. *Owensboro*, 173 U. S. 636; *Harding* v. *Illinois*, 196 U. S. 78.

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

In their amended complaint the plaintiffs averred that in the location and record of the Eulalia lode mining claim their grantor had complied with the laws of the United States, the laws of Colorado and the rules and regulations of miners in the district, with reference to the discovery, location and appropriation of said Eulalia mining claim. They did not question the validity of the state statutes, which prescribe certain acts as necessary to a valid location, but set up a compliance with them, and contended that the defendant did not establish a valid location.

Plaintiffs did not claim by virtue of a discovery of their own, but by virtue of their knowledge of the existence of a vein within the surveyed limits of that claim, though several hundred feet distant from the discovery shaft of the Eulalia, which he, McMillen, together with his coöwner, had previously discovered in the process of its development; and insisted that this knowledge was equivalent to an actual discovery by him of a vein within the Eulalia location.

The proposition of plaintiffs, as stated by their counsel, was this:

"That Mr. McMillen, as an owner and a locator of the Eulalia lode, knew at the time he placed his stake upon the Eulalia claim on the thirtieth of May, 1893, that he in company with the coöwners of the Pocket Liner claim had discovered ore in the shaft of the Pocket Liner claim; that at the moment that he placed his stake upon that ground, claiming the Eulalia claim as abandoned and unoccupied territory, that theretofore there had been a discovery of mineral within the requirements of the statutes of the United States and of the State of Colorado, and that that knowledge within the mind of

Mr. McMillen constituted a complete, final and perfect location of that mining claim, provided he did the other things requisite under the statutes of the State of Colorado, by sinking a discovery shaft ten feet in depth, etc."

The substance of the plaintiff's argument was that the mere knowledge of the Eulalia locator of the existence of a vein in the Pocket Liner, the previous lode, made his location valid, provided he performed the other things requisite under the statutes of the State of Colorado, besides the actual discovery of mineral. The court did not deny the proposition that, if the locator knew that there had been a discovery of a vein or lode within his location, he might base his location upon it, although he made no discovery himself; but the statutes of Colorado provide (Mills Annotated Statutes, section 3152) certain requirements in addition to those specified in the Revised Statutes, among which were that the discoverer before filing his location certificate shall sink a discovery shaft to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface, or deeper, if necessary, to show a well defined crevice, and shall also post at the point of discovery a notice containing the name of the lode, the name of the locator, and the date of the discovery, and shall also mark the surface boundary of the claim. The court further held that where "the locator himself selects the discovery shaft, as the one in which the discovery of mineral has been made, and there posts his location stake, and bases his location upon such discovery, he may not, after intervening rights have attached, abandon and disregard the same, neglect to comply with such provisions, and select another discovery upon which his location was not predicated."

In this connection the court held that if the plaintiffs relied upon a former discovery they were bound to show that it was claimed by their locator, or adopted by him as the only one upon which the Eulalia lode was made; and that the court was correct in refusing to hear the proof offered, since it did not meet the requirements of the decisions, to the effect that

a former discovery may be made the basis of a valid location. The court, however, found expressly that the plaintiffs not only did not question the validity of the state statutes, which prescribe certain acts as necessary to a valid location, but averred in their complaint that those statutes had been complied with.

After the disposition of the case by the Supreme Court, plaintiffs in error filed a petition for a rehearing, in which, for the first time, they raised the question that, as there had been upon their part a full compliance with the requirements of Rev. Stat. sec. 2320 before any valid adverse rights had intervened, there was a perfect and complete appropriation of this ground, and that court should have so adjudicated. In its opinion the court reiterated what it had previously said, that, admitting that the plaintiffs might have availed themselves of the previous discovery within the Eulalia location, and adopted the same as their own without making a valid discovery for themselves, they had not brought themselves within this principle, since in their offer of proof they merely relied upon a former knowledge of such location. In its opinion the court made no mention of the Federal question, which does not seem to have been pressed upon their attention. Though unnecessary to our decision a recent case upon this subject is instructive. *Butte City Water Co.* v. *Baker*, 196 U. S. 119.

It is sufficient for the purposes of this case to say that no Federal question appears to have been raised until the petition was filed for a rehearing. This was obviously too late, unless at least the court grants the rehearing and then proceeds to consider the question. *Mallett* v. *North Carolina*, 181 U. S. 589; *Loeber* v. *Schroeder*, 149 U. S. 580; *Miller* v. *Texas*, 153 U. S. 535.

In both courts the question was treated as one of local law, and the mere fact that suit was brought under Rev. Stat. sec. 2326 to try adverse rights to a mining claim, does not necessarily involve a Federal question, so as to authorize a writ of error from this court. *Bushnell* v. *Crooke Mining Co.*,

148 U. S. 682; *Telluride Power Co.* v. *Rio Grande Ry. Co.*, 175 U. S. 639; *Blackburn* v. *Portland Gold Mining Co.*, 175 U. S. 571; *Shoshone Mining Co.* v. *Rutter*, 177 U. S. 505.

The writ of error is accordingly dismissed.

CARTER *v.* GEAR.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

No. 442. Submitted March 3, 1905.—Decided April 3, 1905.

The statutes of 1892 of the Territory of Hawaii purporting to confer upon the judges of the several courts, at chambers, within their respective jurisdictions, judicial power not incident or ancillary to some cause pending before a court, are not in conflict with § 81 of the Organic Act of the Territory, approved April 30, 1900, 31 Stat. 141, 157, and the power of the judges to act at chambers was expressly saved by the provision in § 81 continuing the law of Hawaii theretofore in force concerning courts and their jurisdiction until the legislature otherwise ordered, except as otherwise provided in the Organic Act.

In construing the organic act of a Territory the whole act must be considered in order to obtain a comprehensive view of the intention of Congress, and no single section should be segregated and given undue prominence where other sections bear upon the same subject. Whether a petition in a probate proceeding to a court acting as a probate court shall be addressed to, and passed upon by the judge, while sitting in court or at chambers is more a matter of form than of substance.

THIS was a writ of error to review a judgment of the Supreme Court of the Territory of Hawaii denying a writ of prohibition.

The facts of the case are substantially as follows: On July 27, 1904, one Low, as next friend of Annie T. K. Parker, a minor, filed a petition before the defendant, George D. Gear, judge of the First Judicial Circuit, in probate, at chambers, asking for the removal of Alfred W. Carter, plaintiff in error, as guardian of the estate of said minor. He had been originally

appointed such guardian September 29, 1899. The petition was entitled "In the Circuit Court of the First Judicial Circuit, Territory of Hawaii. In Probate. At Chambers," and was in fact filed before the Circuit Judge sitting at chambers. A demurrer was interposed to the petition upon the ground that the Circuit Judge had no jurisdiction of the proceedings, for the reason that the statute conferring judicial powers upon the judges at chambers was in conflict with the Organic Act of the Territory.

The demurrer was overruled and the jurisdiction of the court sustained, apparently with some doubt, by the Circuit Judge.

This petition for a writ of prohibition was then filed by Carter in the Supreme Court of the Territory against the defendant, Gear, as Circuit Judge, and Low, the next friend of Annie T. K. Parker, praying that the said Circuit Judge be prohibited from taking further cognizance of the petition for the removal of Carter, or proceeding therein until the further order of the Supreme Court. After a full hearing the Supreme Court affirmed the judgment of the Circuit Court, and dismissed the petition.

Mr. Joseph J. Darlington and *Mr. William F. Mattingly* for plaintiff in error:

The statutes of the Territory of Hawaii, purporting to confer jurisdiction upon circuit judges at chambers, to hear and determine judicial matters not incident or ancillary to a cause pending in any court, are null and void, being in contravention with § 81 of the Organic Act of the Territory of Hawaii. See decisions under similar constitutional provisions.

Section 81 is practically identical with the constitutional provisions of many States, and under these constitutional provisions similar statutes, purporting to confer upon circuit judges at chambers, judicial power not incident or ancillary to a cause pending in any court, have invariably been declared unconstitutional.

The Organic Act of the Territory takes the place of a constitution as the fundamental law of the local government. *National Bank* v. *County of Yankton*, 101 U. S. 129, 133.

No Hawaiian law, whether previously existing or subsequently enacted, can stand in conflict with that act. 23 Op. Atty. Gen. 539.

The clause is an entire distribution of the judicial power and the legislature cannot vest any portion of it elsewhere. Cooley Const. Lim., 7th ed., 129, *n.* 3, and cases cited; *Water Co.* v. *Vallejo*, 48 California, 70; *Risser* v. *Hoyt*, 53 Michigan, 185; *Railway Co.* v. *Dunlap*, 47 Michigan, 456; *Rowe* v. *Rowe*, 28 Michigan, 353; *Railway Co.* v. *Hurd*, 17 Ohio St. 144; *State* v. *Woodson*, 161 Missouri, 444, 453.

For other statutes in which the word "court" is held not to include circuit judges see 8 Am. & Eng. Ency. of Law, 2d ed., 23; *McKnight* v. *James*, 155 U. S. 685. The cases cited below are distinguishable as the constitutional provisions of the respective State are different from the Organic Act.

Mr. John S. Low, guardian, defendant in error *in propria persona:*

The Supreme Court of Hawaii has held that a judge sitting at chambers in probate is a court of record. *Estate of Brash*, 15 Hawaiian, 372; *Hoare* v. *Allen*, 13 Hawaiian, 257; *Aldrich* v. *First Judge*, 9 Hawaiian, 470.

Under § 83 of the Organic Act the laws of Hawaii relative to the judiciary act, except as amended by the Organic Act itself, are continued in force. The entire act must be considered in construing it.

Independently of the construction which has been placed upon the words "in chambers" in Hawaii, the words "Circuit Courts" mean the courts referred to in the expression "in chambers." *Wilcox* v. *Wilcox*, 14 N. Y. 577; *Presley* v. *Lamb*, 105 Indiana, 171; *Granite Mining Co.* v. *Weinstren*, 7 Montana, 349; *S. C.*, 17 Pac. Rep. 108; *O'Bear* v. *Littler*, 59 Georgia, 584; *Pease* v. *Waggoner*, 20 S. E. Rep. 637; *Stuart* v. *Daggey*, 13

Nebraska, 290. Chambers is only a place where the court sits without a jury. *Commonwealth* v. *McLaughlin*, 122 Massachusetts, 449.

The cases cited by plaintiff in error in opposition to this are controlled by their own peculiar circumstances and do not apply.

It could not have been the intention of Congress to deprive us of a chambers jurisdiction, as provided in our civil laws. Such an intention would be violative of our constitutional guaranty of due process of law. The fact that all the other jurisdictional statutes were specifically repealed makes it conclusive that no such intention existed. There would be anarchy in case the courts of equity and probate were divested of their power. Such an intention would violate the Constitution. See Brannon, Fourteenth Amendment, 1, 64, 97, 147, 285. A proceeding in equity is due process of law. *McLane* v. *Leicht*, 69 Iowa, 401.

The bills of rights in the American Constitutions are conservatory rather than reformatory instruments. *Weimer* v. *Bunbury*, 30 Michigan, 201. The Organic Act must be considered in the same light as a state constitution. In interpreting a constitutional provision, the intent of the framers of the instrument should, if possible, be ascertained and carried out. *Bourland* v. *Hildrith*, 26 California, 161; *People* v. *Leonard*, 73 California, 230; *Hills* v. *Chicago*, 60 Illinois, 86.

Constitutions must be construed if possible so as to give force and effect to each provision. *Cohen* v. *Wright*, 22 California, 293; *French* v. *Teschemaker*, 24 California, 518; *Marye* v. *Hart*, 76 California, 291; *Livesay* v. *Wright*, 6 Colorado, 92; *People* v. *Garner*, 47 Illinois, 246; *Dyer* v. *Bayne*, 54 Maryland, 87; *State* v. *McCornwell*, 8 Nebraska, 28; *Norton* v. *Bradham*, 21 S. Car. 375; *Lastro* v. *State*, 3 Tex. App. 363; *Cordova* v. *Cordova*, 6 Tex. App. 207; *Page* v. *Allen*, 58 Pa. St. 338; *Rutgers* v. *New Brunswick*, 42 N. J. L. 51; *State* v. *Ashley*, 1 Arkansas, 513; *Baltimore* v. *State*, 15 Maryland, 376; *In re Greffin*, Fed. Cas. No. 5815; *Jenkins* v. *Ewin*, 55 Tennessee, 456;

Bandel v. *Isaac*, 13 Maryland, 202; *People* v. *State Treasurer*, 23 Michigan, 499. Contemporaneous legislative construction will be considered in determining the constitutionality of legislative enactments. *Burgoyne* v. *Board of Supervisors*, 5 California, 23; *Livesay* v. *Wright*, 6 Colorado, 92; *Bunn* v. *People*, 45 Illinois, 398; *Collins* v. *Henderson*, 74 Kentucky (11 Bush), 74; *State* v. *Parkinson*, 5 Nevada, 17; *Cordova* v. *State*, 6 Tex. App. 207. Where questions of constitutional construction are doubtful, courts will defer to the construction made by the legislature. *Kendall* v. *Kingston*, 5 Massachusetts, 534; *Jackson* v. *Supervisors*, 34 Nebraska, 680; *S. C.*, 52 N. W. Rep. 169; *Hedgcock* v. *Davis*, 64 N. Car. 650; *McPherson* v. *Secretary of State*, 92 Michigan, 377; *Jenkins* v. *Ewin*, 55 Tennessee (8 Heisk.), 456; *Hills* v. *Chicago*, 60 Illinois, 90; *State* v. *Barnes*, 24 Florida, 29; *State* v. *Gerhardt*, 145 Indiana, 439; *Faribault* v. *Misener*, 20 Minnesota, 396 (Gil. 347); *Moers* v. *Reading*, 21 Pa. St. (9 Harris), 188; *Carson* v. *Smith*, 5 Minnesota, 78 (Gil. 58); *Rumsey* v. *People*, 19 N. Y. 41; *Wallack* v. *New York*, 3 Hun, 84; *Lavery* v. *Commonwealth*, 101 Pa. St. 560; *People* v. *Faucher*, 50 N. Y. 288.

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

The writ of prohibition was demanded upon the ground that there was no cause pending in the Circuit Court of the First Circuit, to which the motion and petition of Low, as next friend, was incidental or ancillary, and that Judge Gear, sitting at chambers, was hearing questions of a judicial nature entirely independent of any cause pending in that court.

The single question presented by the record is whether the statutes of the Territory of Hawaii, purporting to confer upon the judges of the several courts, at chambers, within their respective jurisdictions, judicial power not incident or ancillary to some cause pending before a court, were in conflict with section 81 of the act of Congress approved April 30, 1900,

31 Stat. 141, commonly known as the Organic Act of the Territory. This section, page 157, enacts that "the judicial power of the Territory shall be vested in one supreme court, circuit courts, and in such inferior courts as the legislature may from time to time establish. And until the legislature shall otherwise provide, the laws of Hawaii heretofore in force concerning the several courts and their jurisdiction and procedure shall continue in force except as herein otherwise provided."

At the time the act of Congress was passed there was in force in the Territory of Hawaii an act known as Chapter 57 of the Laws of 1892, the thirty-seventh section of which gave to the judges of the several Circuit Courts, at chambers, very ample powers, in admiralty, equity, bankruptcy and probate causes, among which were proceedings "to remove any executor, administrator or guardian." This act was conceded to be sufficient to justify the action of Judge Gear in removing the guardian in this case. It was substantially reënacted with amendments in 1903.

The argument is made that section 81 of the Organic Act is identical with the constitutional provisions of many States, under which similar statutes purporting to confer judicial powers upon Circuit Judges at chambers, not incident to or ancillary to any cause pending in any court, have usually been declared unconstitutional; citing *Spencer Creek Water Co.* v. *Vallejo*, 48 California, 70; *Risser* v. *Hoyt*, 53 Michigan, 185; *Toledo Ry. Co.* v. *Dunlap*, 47 Michigan, 456; *Rowe* v. *Rowe*, 28 Michigan, 353; *Pittsburg &c. R. R. Co.* v. *Hurd*, 17 Ohio St. 144, 146; *State* v. *Woodson*, 161 Missouri, 444. We are also referred to *McKnight* v. *James*, 155 U. S. 685, in which we held that a writ of error could not go to an order of a judge of a Circuit Court made at chambers.

But conceding the correctness of these decisions under the constitutions of the several States, and also conceding that the Organic Act stands in the place of a constitution for the Territory of Hawaii, to which its laws must conform, does it follow that the laws respecting proceedings at chambers

are in excess of the powers conferred under the Organic Act?

Bearing in mind that section 81 of the Organic Act is but one of a hundred sections, all of which are entitled to equal respect, it is evident that to obtain a comprehensive view of the intention of Congress we are bound to consider the whole act so far as it relates to the disposition of judicial power. To segregate section 81 from all the other provisions of the act must necessarily result in giving it undue prominence.

By section 6, "the laws of Hawaii not inconsistent with the Constitution and laws of the United States or the provisions of this act shall continue in force, subject to repeal or amendment by the legislature of Hawaii, or the Congress of the United States." By section 7 the constitution of the Republic of Hawaii and a large number of its laws, specially enumerated, are repealed, but the statutes giving probate and equity jurisdiction to the Circuit Courts are not mentioned.

By section 10 all actions at law, suits in equity and other proceedings then pending in the courts of the Republic of Hawaii shall be carried on to final judgment and execution in the corresponding courts of the Territory of Hawaii. As petitioner Carter was appointed guardian of the minor's estate in 1899 by the then judge of the First Circuit, and was still proceeding to wind up the estate, we think the petition for his removal was filed in a pending proceeding within the meaning of this section.

Now, as it appears that the powers of judges at chambers had been fixed since 1892, eight years before the Organic Act was passed, that by section 6 and the final clause of section 81 the laws of Hawaii theretofore in force concerning the several courts and their jurisdiction and procedure were continued in force, except as therein otherwise provided, it would seem that these provisions were especially intended to apply to cases like the present, where a system of procedure which had previously existed was recognized as valid and still existing. In *Hawaii* v. *Mankichi*, 190 U. S. 197, a similar provision in the resolu-

tion of annexation was held not to abrogate a system of trials by information and convictions by a non-unanimous jury, as applied to cases prior to the Organic Act of April 30, 1900.

But we do not think it necessary to go further than section 81 itself to find authority for a recognition of the laws previously existing in Hawaii concerning the constitution of its courts and their method of procedure. Whether a petition to a Circuit Court acting as a court of probate shall be addressed to and passed upon by the judge while sitting in court at chambers is, after all, much more a matter of form than of substance. *Commonwealth* v. *McLaughlin*, 122 Massachusetts, 449. The petition for the removal of the guardian in this case is entitled "In the Circuit Court of the First Judicial Circuit, Territory of Hawaii. In Probate. At Chambers." It appears to have been heard by the Circuit Judge without a jury, his decision being entitled "Before a Judge of the Circuit Court, of the First Circuit, Territory of Hawaii." It must doubtless be treated as a proceeding at chambers, but for reasons already given we think the power to act at chambers was saved by section 81 continuing in force the previous laws of Hawaii concerning the courts and their procedure. It would be too narrow a construction to hold that this did not include the procedure before judges of those courts sitting at chambers.

The decree dismissing the writ is

Affirmed.

KEPPEL *v.* TIFFIN SAVINGS BANK.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 116. Argued January 6, 1905.—Decided April 3, 1905.

The word "surrender," as generally defined, may denote either compelled or voluntary action. In § 57*g* of the Bankruptcy Act of 1898, providing that the claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences, it is unqualified and generic and hence embraces both meanings.

A penalty is not to be readily implied and a person subjected thereto unless the words of the statute plainly impose it, and courts will not construe the provision so as to cause the word "surrender," as used in § 57*g* of the Bankruptcy Act, to embrace only voluntary action and thus read into the statute a qualification conflicting with equality of creditors and also creating a penalty not expressly or by implication found in the statute. Such a construction would create a penalty by judicial action alone and would also necessitate judicial legislation in order to define the character and degree of compulsion essential to prevent the surrender in fact from being a surrender within the meaning of the section.

The creditor of a bankrupt, who has received a merely voidable preference, and who has in good faith retained such preference until deprived thereof by the judgment of a court upon a suit of the trustee, can thereafter prove the debt so voidably preferred.

CHARLES A. GOETZ became a voluntary bankrupt on October 12, 1900. George B. Keppel, the trustee, sued the Tiffin Savings Bank in an Ohio court to cancel two real estate mortgages executed by Goetz, one to secure a note for four and the other a note for two thousand dollars. The mortgage to secure the four thousand-dollar note was made more than four months before the adjudication in bankruptcy. The mortgage securing the two thousand-dollar note was executed a few days before the bankruptcy, the mortgagor being at the time insolvent and intending to prefer the bank. The bank defended the suit, averring its good faith and asserting the validity of both the securities. In a cross petition the enforcement of both mortgages was prayed. The court held

the mortgage securing the four thousand-dollar note to be valid and the mortgage securing the two thousand-dollar note to be void. The trustee appealed to a Circuit Court, where a trial *de novo* was had. At such trial the attorney for the bank stated to the court that the bank waived any claim to a preference as to the two thousand-dollar note, but that he could not assent to a judgment to that effect. A judgment was entered sustaining the security for the four thousand-dollar note and avoiding that for the two thousand-dollar note.

The bank subsequently sought to prove that it was a creditor of the estate upon the note for two thousand dollars, and upon two other unsecured notes, aggregating $835. The referee refused to allow the proof, upon the ground that, as the bank had compelled the trustee to sue to cancel the security and a judgment nullifying it had been obtained, the bank had lost the right to prove any claim against the estate. The District Judge, upon review, reversed this ruling. The Circuit Court of Appeals to which the issue was taken, after stating the case as above recited, certified questions for our determination.

Mr. John C. Royer, with whom *Mr. Henry J. Weller* was on the brief for Keppel, trustee:

For definition of "surrender" see Century Dictionary and Bouvier's Dictionary. Congress intended a voluntary surrender. See act of 1867, § 23, 14 Stat. 517; Amendment of 1874, 18 Stat. 178. See cases in which the surrender clause of the act of 1867, prior to its amendment, was construed. *Re Lee*, No. 8179 Fed. Cases; *S. C.*, 14 N. B. R. 89; *Re Richter*, No. 11,803 Fed. Cases; *S. C.*, 1 Dill. 544; *Re Leland*, No. 8230 Fed. Cases; *S. C.*, 7 Ben. 156; *Re Stephens*, No. 13,365 Fed. Cases; *S. C.*, 3 Biss. 137; *Re Drummond*, 4049 Fed. Cases; *S. C.*, 4 Biss. 149; *Re Graves*, 9 Fed. Rep. 816.

While some of the judges allowed a surrender pending litigation, no creditor has been allowed to surrender his preference after judgment against him. See cases under the present act. *Re Owings*, 109 Fed. Rep. 624; *Re Keller*, 109 Fed. Rep. 162; *Re Greth*, 112 Fed. Rep. 978, follow the decisions under the

former law. *Re Richard,* distinguished, the facts being different. The rule may be harsh but these cases show that Congress intended the rule to be harsh.

Mr. George E. Seney, Mr. Milton Sayler and *Mr. John L. Lott* for the Tiffin Savings Bank:

The mortgage having been given by Goetz while insolvent, and within four months of the filing of his petition in bankruptcy, by operation of law alone became absolutely void, and the bank had no preference whatever. Under the law of Ohio the title and possession both remain in the mortgagor until condition broken. *Ely* v. *McGuire,* 2 Ohio St. 372; *Bradfield* v. *Hale,* 67 Ohio St. 316, 323; *Harkrader* v. *Leiby,* 4 Ohio St. 602, 612; *Sun Fire Office* v. *Clark,* 53 Ohio St. 414, 424; *Kernohan* v. *Mauss,* 53 Ohio St. 118, 133.

As to Federal decisions, there is a contrariety of opinion as to what constitutes a preference and as to when it shall be surrendered in order to entitle the person holding it to prove his claims. Most of the cases cited by opposing counsel arose under the act of 1867, and were cases in which there had been an actual payment of money, or the actual receipt or possession of property, or where the person had been a party to an actual fraud, and cannot he held controlling here. For cases bearing on the preference clause under the present law see notes in 1 Fed. Stat. Ann., pp. 664, 665, and see *Pirie* v. *Trust Co.,* 182 U. S. 438, as to whether a payment of money was a transfer of property within the meaning of the law. There was an actual payment and delivery—a completed transaction—a passing of property. *Bank* v. *Massey,* 192 U. S. 138.

The referee held that the bank had not made a voluntary surrender of its so-called preference, and therefore was not entitled to prove its claim. By so holding the referee read into the act something that is not there. The language of the act is surrender, not voluntary surrender. If a referee may inject into the act the word voluntary, it would be but a step further to require that a willing, a cheerful or even a joyful

surrender be made. Webster defines surrender as the giving or delivering possession of anything upon compulsion or demand, and the same definition is to be found in the Standard and Century dictionaries. If the ruling of the referee be correct, then a creditor who, in good faith, has accepted a payment or security, without knowledge of the insolvency of his debtor, must blindly surrender that which he has received, without an opportunity for a determination of the question of insolvency at the time of the receiving of the payment or security, or of the question whether that which he has received constitutes a preference. The creditor is not required to submit to the ruling of the referee, but is entitled to the decision of the court upon the point. Section 57*f*.

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

The following are the questions asked by the Court of Appeals:

"First. Can a creditor of a bankrupt, who has received a merely voidable preference, and who has in good faith retained such preference until deprived thereof by the judgment of a court upon a suit of the trustee, thereafter prove the debt so voidably preferred?

"Second. Upon the issue as to the allowance of the bank's claims was it competent, in explanation of the judgment of the Ohio Circuit Court in favor of the trustee and against the bank in respect to its $2,000 mortgage, to show the disclaimer made in open court by the attorney, representing the bank, of any claim of preference, and the grounds upon which the bank declined to consent to a judgment in favor of the trustee?

"Third. If the failure to 'voluntarily' surrender the mortgage given to secure the $2,000 note operates to prevent the allowance of that note, does the penalty extend to and require the disallowance of both the other claims?"

Before we develop the legal principles essential to the solu-

tion of the first question it is to be observed that the facts stated in the certificate and implied by the question show that the bank acted in good faith when it accepted the mortgage and when it subsequently insisted that the trustee should prove the existence of the facts which, it was charged, vitiated the security. It results that the voidable nature of the transaction alone arose from section 67*e* of the act of 1898, invalidating "conveyances, transfers, or encumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the State, Territory or District in which such property is situate," and giving the assignee a right to reclaim and recover the property for the creditors of the bankrupt estate.

On the one hand it is insisted that a creditor who has not surrendered a preference until compelled to do so by the decree of a court cannot be allowed to prove any claim against the estate. On the other hand, it is urged that no such penalty is imposed by the bankrupt act, and hence the creditor, on an extinguishment of a preference, by whatever means, may prove his claims. These contentions must be determined by the text, originally considered, of section 57*g* of the bankrupt act, providing that "the claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences." We say by the text in question, because there is nowhere any prohibition against the proof of a claim by a creditor who has had a preference, where the preference has disappeared as the result of a decree adjudging the preferences to be void, unless that result arises from the provision in question. We say also from the text as originally considered, because, although there are some decisions under the act of 1898 of lower Federal courts, which are referred to in the margin,[1] denying the right of a creditor

[1] *In re Greth*, 112 Fed. Rep. 978; *In re Keller*, 109 Fed. Rep. 118, 127; *In re Owings*, 109 Fed. Rep. 623.

to prove his claim, after the surrender of a preference by the compulsion of a decree or judgment, such decision rests not upon an analysis of the text of the act of 1898 alone considered, but upon what were deemed to have been analogous provisions of the act of 1867 and decisions thereunder. We omit, therefore, further reference to these decisions as we shall hereafter come to consider the text of the present act by the light thrown upon it by the act of 1867 and the judicial interpretation which was given to that act.

The text is, that preferred creditors shall not prove their claims unless they surrender their preferences. Let us first consider the meaning of this provision, guided by the cardinal rule which requires that it should, if possible, be given a meaning in accord with the general purpose which the statute was intended to accomplish.

We think it clear that the fundamental purpose of the provision in question was to secure an equality of distribution of the assets of a bankrupt estate. This must be the case, since, if a creditor, having a preference, retained the preference, and at the same time proved his debt and participated in the distribution of the estate, an advantage would be secured not contemplated by the law. Equality of distribution being the purpose intended to be effected by the provision, to interpret it as forbidding a creditor from proving his claim after a surrender of his preference, because such surrender was not voluntary, would frustrate the object of the provision, since it would give the bankrupt estate the benefit of the surrender or cancellation of the preference, and yet deprive the creditor of any right to participate, thus creating an inequality. But it is said, although this be true, as the statute is plain, its terms cannot be disregarded by allowing that to be done which it expressly forbids. This rests upon the assumption that the word "surrender" necessarily implies only voluntary actions, and hence excludes the right to prove where the surrender is the result of a recovery compelled by judgment or decree.

The word "surrender," however, does not exclude compelled action, but to the contrary generally implies such action. That this is the primary and commonly accepted meaning of the word is shown by the dictionaries. Thus, the Standard Dictionary defines its meaning as follows: 1. To yield possession of to another upon compulsion or demand, or under pressure of a superior force; give up, especially to an enemy in warfare; as to *surrender* an army or a fort. And in Webster's International Dictionary the word is primarily defined in the same way. The word, of course, also sometimes denotes voluntary action. In the statute, however, it is unqualified, and generic, and hence embraces both meanings. The construction, which would exclude the primary meaning so as to cause the word only to embrace voluntary action would read into the statute a qualification, and this in order to cause the provision to be in conflict with the purpose which it was intended to accomplish, equality among creditors. But the construction would do more. It would exclude the natural meaning of the word used in the statute in order to create a penalty, although nowhere expressly or even by clear implication found in the statute. This would disregard the elementary rule that a penalty is not to be readily implied, and on the contrary that a person or corporation is not to be subjected to a penalty unless the words of the statute plainly impose it. *Tiffany* v. *National Bank of Missouri*, 18 Wall. 409, 410. If it had been contemplated that the word "surrender" should entail upon every creditor the loss of power to prove his claims if he submitted his right to retain an asserted preference to the courts for decision, such purpose could have found ready expression by qualifying the word "surrender" so as to plainly convey such meaning. Indeed, the construction which would read in the qualification would not only create a penalty alone by judicial action, but would necessitate judicial legislation in order to define what character and degree of compulsion was essential to prevent the surrender in fact from being a surrender within the meaning of the section.

It is argued, however, that courts of bankruptcy are guided by equitable considerations, and should not permit a creditor who has retained a fraudulent preference until compelled by a court to surrender it, to prove his debt and thus suffer no other loss than the costs of litigation. The fallacy lies in assuming that courts have power to inflict penalties, although the law has not imposed them. Moreover, if the statute be interpreted, as it is insisted it should be, there would be no distinction between honest and fraudulent creditors, and therefore every creditor who in good faith had acquired an advantage which the law did not permit him to retain would be subjected to the forfeiture simply because he had presumed to submit his legal rights to a court for determination. And this accentuates the error in the construction, since the elementary principle is that courts are created to pass upon the rights of parties, and that it is the privilege of the citizen to submit his claims to the judicial tribunals, especially in the absence of malice and when acting with probable cause, without subjecting himself to penalties of an extraordinary character. The violation of this rule, which would arise from the construction, is well illustrated by this case. Here, as we have seen, it is found that the bank acted in good faith without knowledge of the insolvency of its debtor and of wrongful intent on his part, and yet it is asserted that the right to prove its lawful claims against the bankrupt estate was forfeited simply because of the election to put the trustee to proof in a court of the existence of the facts made essential by the law to an invalidation of the preference.

We are of opinion that, originally considered, the surrender clause of the statute was intended simply to prevent a creditor from creating inequality in the distribution of the assets of the estate by retaining a preference and at the same time collecting dividends from the estate by the proof of his claim against it, and consequently that whenever the preference has been abandoned or yielded up, and thereby the danger of inequality has been prevented, such creditor is entitled to stand

on an equal footing with other creditors and prove his claims.

Is the contention well founded that this meaning, which we deduce from the text of the surrender clause of the present act, is so in conflict with the rule generally applied in bankruptcy acts, and is especially so contrary to the act of 1867 and the construction given to it, that such meaning cannot be considered to have been contemplated by Congress in adopting the present act, and hence a contrary interpretation should be applied?

Without attempting to review the English bankruptcy acts or the provisions contained therein concerning what constituted provable debts, and the decisions relating thereto, it is clear that under those acts, where a debt was otherwise provable and the creditor had acquired a lien to which he was not entitled, the English courts in bankruptcy did not imply a forfeiture by refusing to allow proof of the debt because there had not been a voluntary surrender of the preference. On the contrary, where claims were filed against the estate by one who was asserted to have retained a preference, a well-settled practice grew up, enforced from equitable considerations. The practice in question was followed in the case of *Ex parte Dobson*, 4 Deacon & Chitty English Bankruptcy Reports, 69, decided in 1834, and was thus stated in the opinion of Sir G. Rose (p. 78):

"I apprehend the practice to be settled, where a creditor applies to prove a debt, and claims a right to property to which the Commissioners think he has no lien, that the Commissioners admit the proof, and leave the question to be controlled merely by retention of the dividend. This was settled by the case of *Ex parte Ackroyd* [1 Rose, 391], where the Commissioners had rejected the proof of a creditor, because he had received a portion of his debt, which the assignees contended he was bound to refund; but when the question came before Sir John Leach, as Vice Chancellor, he decided that the proof of the debt was not to be rejected, because there was a question

to be tried between the bankrupt's assignees and the creditor, although it was proper that no dividend should be paid on that proof, until the question was determined."

And Erskine, C. J., p. 78, after assuming that the transaction complained of might have been fraudulent and amounted to an act of bankruptcy, said—italics mine—(p. 75):

"The next part of the prayer is, that the claim should be disallowed. *But though the assignment of the property may be invalid, that will not invalidate the debt of the respondents.* We could not therefore disallow the claim, or expunge the proof, if the claim had been converted into a proof; all that we can do is, to restrain the respondents from receiving any dividends, until they give up the property."

Thus the English rule substantially conformed to the construction we have given to the bankruptcy act before us.

Neither our bankrupt act of 1800, 2 Stat. 19, nor that of 1841, 5 Stat. 440, contained a surrender clause or any provision generally denying the right of a creditor of a bankrupt to prove his debt in the event that he had received a preference. But, under those acts, bankruptcy courts must necessarily have exercised the power of protecting the estate by preventing a creditor having an otherwise provable debt who retained that which belonged to the estate from at the same time taking dividends from it.

The purpose of Congress when a forfeiture or penalty was intended not to leave it to arise from mere construction, but to expressly impose such penalty or forfeiture, is well illustrated by the bankrupt act of 1800, wherein numerous penalties and forfeitures were explicitly declared. Two instances are illustrative. By section 16 it was provided: "That if any person or persons shall fraudulently, or collusively claim any debts, or claim or detain any real or personal estate of the bankrupt, every such person shall forfeit double the value thereof, to and for the use of the creditors." And by section 28 it was provided that a creditor suing out a commission, who subsequently accepted a preference, "shall forfeit and lose, as well

his or her whole debts, as the whole he or she shall have taken and received, and shall pay back, or deliver up the same, or the full value thereof, to the assignee or assignees who shall be appointed or chosen under such commission, in manner aforesaid, in trust for, and to be divided among the other creditors of the said bankrupt, in proportion to their respective debts."

The bankrupt act of 1867, c. 176, 14 Stat. 517, 528, contained the following surrender clause:

"SEC. 23. . . . Any person who, after the approval of this act shall have accepted any preference, having reasonable cause to believe that the same was made or given by the debtor, contrary to any provision of this act, shall not prove the debt or claim on account of which the preference was made or given, nor shall he receive any dividend therefrom until he shall first have surrendered to the assignee all property, money, benefit, or advantage received by him under such preference."

And section 35 of the act conferred power upon the assignee to sue to set aside and recover illegal preferences, transfers, etc., but there was not contained in the section any provision prohibiting the proof of claims after recovery by the assignee. In section 39 of the act, however, which was found under the head of involuntary bankruptcy, there was contained an enumeration of the various acts which would constitute acts of bankruptcy, and following a grant of authority to the assignees to sue for and recover property transferred, etc., by the bankrupt contrary to the act, the section concluded with the declaration that when the recipient had reasonable cause to believe that a fraud on the act was intended, and that the debtor was insolvent, "such creditor shall not be allowed to prove his debt in bankruptcy."

Passing the present consideration of the judicial construction given to the act of 1867, and treating, as we believe should be done, the restriction as to the proof of debts expressed in section 39 as applicable to voluntary as well as involuntary bankruptcy, we think, as a matter of original interpretation, the surrender clause of the act of 1867 not only fortifies but ab-

solutely sustains the construction which we have given to the surrender clause of the act of 1898. Whilst the surrender clause of the act of 1867 changed the method of procedure prevailing under the English rule, and presumptively also obtaining under the acts of 1800 and 1841, by which a creditor holding a preference might prove his claim but was allowed to obtain no advantage from so doing until he had surrendered his preference, it cannot we think in reason be considered that this mere alteration in the practice to be followed was intended in and of itself to impose a penalty upon a creditor who did not voluntarily surrender his preference. And this we think is demonstrated when it is seen that after making the change as to the procedure in the proof of debts by preferred creditors there was subsequently embodied in section 39 an express prohibition, in the nature of a penalty, forbidding the proof of debt by a creditor who came within the purview of the section. Either that provision solely related to proof of debts embraced in the previous surrender clause or it did not. If it did, then the expression of the penalty in section 39 indicates that it was not deemed that the surrender clause contained provision for the penalty, otherwise section 39 would in that regard be wholly superfluous. If, on the other hand, it be considered that section 39 embraced other debts or claims against the estate than those to which the surrender clause related, then the expression of the penalty in section 39, under the rule of *expressio unius*, could not by implication be read into the previous surrender clause. That is to say, if section 23 and section 39 of the act of 1867 be considered as not in *pari materia*, then it follows that the former, the surrender clause, standing alone, did not impose the penalty or forfeiture provided for in the latter. If they were *in pari materia*, then the penalty, whilst applicable and controlling as to both, because of its expression in the later section, cannot be said to have existed alone in and by virtue of an earlier section, wherein no penalty was expressed.

The decisions of the lower Federal courts interpreting the

sections in question, as they stood prior to the amendment of section 39 of the act of 1874, hereafter to be referred to, were numerous, and we shall not attempt to review them in detail. They will be found collected in a note contained in the eleventh edition of Bump on Bankruptcy, pp. 550 *et seq.* Disregarding the discord of opinion shown by those decisions concerning what constituted an involuntary surrender—that is, whether it was involuntary if made at any time after suit brought by the assignee, or was only so after recovery by the force of a judgment or decree—and putting out of view also the differences of opinion which were engendered by the fact that the forfeiture imposed by section 39 was found in that portion of the act of 1867 which related to involuntary bankruptcy, we think the decisions under the act of 1867, prior to the amendment of 1874, may be classified under four headings.

First. The cases which held that the prohibition of section 39 against the proof of debt operated as a bar to such proof, even although there was a voluntary surrender, where the preference had the characteristics pointed out in section 39. These cases were, however, contrary to the great weight of authority under the act, and the construction which they enforced may be put out of view.

Second. Those cases which, whilst treating the surrender clause as giving a creditor an alternative which he might exercise without risk of penalty or forfeiture, yet held that by the operation of section 39 upon the surrender clause the creditor lost the option to prove his claim, when the surrender was compelled by a judgment or decree at the suit of the assignee. The cases enforcing this interpretation constituted the weight of authority, and such construction may, therefore, be said to have been that generally accepted, and, in our judgment, was the correct one.

These cases, which thus held that the loss of the right to prove, after compulsory surrender, arose not from the surrender clause independently considered, but solely from the operation upon that clause of section 39, are exemplified by

the case of *In re Leland*, 7 Ben. 156, opinion of Blatchford, J. In that case, after holding (p. 162) that the prohibition of section 39 applied as well to cases of voluntary as to cases of involuntary bankruptcy, the court came to consider the surrender clause of section 23 as affected by the penalty provided for in section 39, and said:

"This provision is to be construed in connection, and in harmony, with the provision of the twenty-third section, before cited. If, under the twenty-third section, the preferred creditor were allowed to surrender to the assignee the property received in preference, even after it had been recovered back by the assignee, as mentioned in the thirty-ninth section, so as to be able to prove his debt, no creditor taking a preference would ever be debarred from proving his debt. If, under the thirty-ninth section, it were held that the mere taking of a preference by a creditor would debar him from proving his debt, without the precedent necessity for a recovery back by the assignee of the property conveyed in preference, there never could be any scope for the operation of the twenty-third section in respect to a surrender."

Thus clearly pointing out that by the surrender clause alone the creditor would not be debarred from proving his claim if in fact there had been a surrender, whether voluntary or not, but that as a result solely of the prohibition of section 39 the creditor would be barred after recovery by the assignee.

Third. Cases which treated the surrender clause as in and of itself forbidding a surrender after recovery, because the recovery authorized by section 35 was the antithesis of the surrender and precluded a surrender after recovery. This class of cases in effect treated the prohibition expressed in section 39 as unnecessary, *quoad* the subject matters to which sections 23 and 35 were addressed. The cases, however, were few in number, and are illustrated by the case of *In re Tonkin*, 4 N. B. R. 52.

Fourth. Cases which without seemingly considering the incongruity of the reasoning adopted both theories; treated

sections 23, 35 and 39 as *in pari materia*, and hence applied the prohibition of section 39 to the other two sections, and yet reasoned to show that the surrender clause alone prohibited a surrender after recovery by the assignee. This class of cases is illustrated by *In re Richter*, 1 Dill. 544; 4 N. B. R. 221. In that case a creditor, who, in consequence of a recovery by the assignee, had surrendered a preference, sought to prove his claim against the estate, and his right to do so was resisted. Analyzing the act and stating the different constructions of which it was susceptible, the court expressly declared that the correct view was to construe sections 23, 35 and 39 together, and that the result of so doing would be to annex to both sections 35 and 23 the penalty provided in section 39. The surrender clause was then noticed, it being said:

"It is urged by the claimants that this refusal was erroneous because they had, before the time when they made their motion, surrendered to the assignee all property received by them under the preference. This devolves upon us the duty of interpreting the meaning of the word *surrender*, as it is here used. And it is our opinion, that a creditor who receives goods by way of fraudulent preference, and who refuses the demand therefor which the assignee is authorized to make (section 15), denies his liability, allows suit to be commenced by the assignee, defends it, goes to trial, is defeated and judgment passes against him, which he satisfies on execution, cannot be said within the meaning of the statute, to have surrendered to the assignee the property received by him under such preference. He has surrendered nothing."

As an alternative, however, to this view, and treating the sections referred to as *in pari materia*, it was reiterated that section 23 was limited and controlled by the penalty provided in section 39.

We need not further notice the cases under the act of 1867, because of the action of Congress on the subject. In 1874, 18 Stat. 178, section 39 of the act of 1867 was amended and reënacted. That amendment consisted of omitting the for-

feiture clause as originally contained in the section and substituting in its stead the following proviso:

"*Provided*, . . . and such person, if a creditor, shall not, in cases of actual fraud on his part, be allowed to prove for more than a moiety of his debt; and this limitation on the proof of debts shall apply to cases of voluntary as well as involuntary bankruptcy."

Plainly, this amendment not only abolished the penalty provided in section 39 as originally enacted, since it allowed a creditor to prove his claim for the whole amount thereof after recovery against him if he had not been guilty of actual fraud, and even in case of actual fraud after recovery permitted him to prove for a moiety. The amendment clearly also was repugnant to that construction of the act of 1867 given in some of the cases to which we have referred under the third classification, wherein in the reasoning employed it was assumed that a forfeiture or penalty might be implied alone from the terms of the surrender clause, irrespective of the operation of section 39. This results from the very words of the amendment, which says, and this *limitation on the proof of debts* shall apply, etc., showing that the restriction on the right to prove after a compulsory yielding up of a preference was deemed by Congress to result, not from the surrender clause, but from the limitation expressly declared by section 39 as amended, which operated a qualification of the broad terms of the surrender clause. It manifestly also arises from the fact that whilst Congress plainly intended by the amendment to make a change in the rigor of the rule previously obtaining, the phraseology of the surrender clause as originally found in the act was not altered.

After the adoption of the amendment of 1874 it is true that in one or two instances it was held that the amendment, instead of mitigating the severity of section 39 as it stood before the amendment, had increased it by adding an additional limitation, viz., prohibiting a preferred creditor who had been guilty of actual fraud from proving for more than one-half of his claim, even where he had voluntarily surrendered his

preference. But these were isolated cases, since practically the otherwise universal construction was that the amendment was remedial and intended by Congress to mitigate, even in cases of actual fraud, the severity of the prohibition of section 39 as originally enacted.

The import of the amendment was tersely stated by Mr. Justice Clifford in *In re Reed*, 3 Fed. Rep. 798, 800, as follows:

"Beyond doubt the question must depend upon the true construction of the act of Congress, and I am of opinion that Congress intended to moderate the rigor of the prior rules and to allow the creditors, after payment back of the preference, whether by suit or otherwise, to prove their whole debt, in case they had been guilty of no actual fraud."

And such construction was also expounded in the following cases: *In re Currier* (1875), 2 Lowell, 436; *Burr* v. *Hopkins*, (1875) 6 Biss. 345, per Drummond, J.; *In re Black* (1878), 17 N. B. R. 399, per Lowell, J.; *In re Newcomer* (1878), 18 N. B. R. 85, per Blodgett, J.; *In re Kaufman* (1879), 19 N. B. R. 283, per Nixon, D. J.; *In re Cadwell* (1883), 17 Fed. Rep. 693, per Coxe, J.

The meaning of the amendment of 1874 was considered by the Court of Appeals of New York in the case of *Jefferson County National Bank* v. *Streeter*, 106 N. Y. 186. The New York court expressly adopted the construction given in the cases to which reference has just been made, and its action in so doing was affirmed by this court in *Streeter* v. *Jefferson County Bank*, 147 U. S. 36.

It follows that the construction which we at the outset gave to the text of the act of 1898, instead of being weakened, is absolutely sustained by a consideration of the act of 1867, both before and after the amendment of 1874, and the decisions construing the same, since in the present act, as we have said, there is nowhere found any provision imposing even the modified penalty which was expressed in the amendment of 1874. The contention that because the act of 1898 contains a surrender clause, therefore it must be assumed that

Congress intended to inflict the penalty originally imposed by section 39 of the act of 1867 must rest upon the erroneous assumption that that penalty was the result of the surrender clause alone. But this, as we have seen, is a misconception, since from the great weight of judicial authority under the act of 1867, as well as by the express enactment of Congress in the amendment of 1874 and the decisions which construed that amendment, it necessarily results that the penalty enforced under the act of 1867 arose not from the surrender clause standing alone, but solely from the operation upon that clause of the express prohibition contained in section 39 of that act. When, therefore, Congress in adopting the present act omitted to reënact the provision of the act of 1867, from which alone the penalty or forfeiture arose, it cannot in reason be said that the omission to impose the penalty gives rise to the implication that it was the intention of Congress to reënact it. In other words, it cannot be declared that a penalty is to be enforced because the statute does not impose it.

And, irrespective of this irresistible implication, a general consideration of the present act persuasively points out the purpose contemplated by Congress in refraining from reënacting the penalty contained in section 39 of the act of 1867. Undoubtedly the preference clauses of the present act, differing in that respect from the act of 1867, as is well illustrated by the facts of this case, include preferences where the creditor receiving the same acted without knowledge of any wrongful intent on the part of the debtor and in the utmost good faith. *Pirie* v. *Chicago Title & Trust Co.*, 182 U. S. 438, 454. Having thus broadened the preference clauses so as to make them include acts never before declared by Congress to be illegal, it may well be presumed that Congress, when it enacted the surrender clause in the present act, could not have contemplated that that clause should be construed as inflicting a penalty upon creditors coming within the scope of the enlarged preference clauses of the act of 1898, thereby entailing an unjust and unprecedented result.

Our conclusion, therefore, is that the first question propounded must be answered in the affirmative, and that the two other questions require no response.

And it is ordered accordingly.

MR. JUSTICE DAY, with whom JUSTICES HARLAN, BREWER and BROWN concurred, dissenting.

I am unable to agree with the construction given to the sections of the bankruptcy act under consideration, and because of the importance of the questions involved have deemed proper a statement of the conclusions reached.

Notwithstanding the first question propounded by the Court of Appeals presupposes that the $2,000 mortgage was a preference within the meaning of the bankrupt act, it is argued on behalf of the creditors that although the mortgage, made a few days prior to the bankruptcy proceedings and when the bankrupt was insolvent, was void under section 6343 of the Revised Statutes of Ohio, as amended April 26, 1898, 93 Ohio Laws, p. 290, read in connection with section 67, paragraph *e*, of the bankruptcy act, it did not constitute a preference which must be surrendered, preliminary to proof of the creditor's claim, because there was no actual transfer of any property to the creditor, and the only thing obtained was a void mortgage.

The Ohio statute makes provision, among other things, as to sales, etc., in trust or otherwise, in contemplation of insolvency, or with a design to prefer one or more creditors to the exclusion, in whole or in part, of others, and sets forth:

"And every such sale, conveyance, transfer, mortgage or assignment made, . . . by any debtor or debtors, in the event of a deed of assignment being filed within ninety (90) days after the giving or doing of such thing or act, shall be conclusively deemed and held to be fraudulent, and shall be held to be void as to the assignee of such debtor or debtors, whereupon proof shown, such debtor or debtors was or were actually insolvent at the time of the giving or doing of such act

or thing, whether he or they had knowledge of such insolvency or not. . . ."

By section 67, paragraph *e*, of the bankrupt act, it is provided:

"And all conveyances, transfers, or encumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the State, Territory, or District in which such property is situate, shall be deemed null and void under this act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt."

Under section 60 of the bankruptcy act of 1898 it was provided:

"*a*. A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class.

"*b*. If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition and before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person."

In section 1, paragraph 25, of the act of 1898, a "transfer" is defined to include the sale and every other and different mode of disposing of or parting with the property or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift or security.

This definition of a transfer covers a mortgage given for the

security of a debt in express terms, and section 60 provides that preferences shall include transfers, the effect of the enforcement of which would be to enable any one of the bankrupt's creditors to obtain a greater percentage of his debt than other creditors of the same class.

It is true that if the mortgage is void, it can have no effect to diminish the estate of the bankrupt, but upon its face the mortgage is good as against the bankrupt and the creditors of the estate.

It is said that the mortgage being void, the creditor had nothing to surrender, but this assumes the invalidity of the security. Until set aside or voluntarily surrendered it is a good encumbrance upon the property, whether regarded as a conditional conveyance or as a mere security for the debt. It could be set aside by the trustee upon proof of insolvency of the bankrupt and other conditions named in the act at the time of giving it; otherwise it would stand as a valid security, unless the creditor should elect to surrender it and make proof of his claim as a general creditor.

There seems to be no question that, upon its face, though void in the light of the facts found, this mortgage was one of the transfers of property which was invalidated by the act, it being given within the time limited, and at a time when the bankrupt was in fact insolvent, and expressly made void by the Ohio statute when read with the bankrupt act of 1898.

The answer to the first question requires a consideration of paragraph 57*g* of the act of 1898, which, as it stood prior to the amendment of February 5, 1903, read: "The claims of creditors, who have received preferences shall not be allowed unless such creditors shall surrender their preferences." May a creditor who has received a preference, voidable by the act, contest the validity thereof, and if it is declared invalid, still prove his debt upon surrender of his preference as though no contest had been had?

It was held by this court in *Pirie* v. *Chicago Title & Trust Company,* 182 U. S. 438, that a creditor who had received a

preference, although he did not have reason to believe that one was intended, could only keep the property transferred upon condition of refraining from proof of the balance of his debt.

It was pointed out in that case, in the opinion of the court by Mr. Justice McKenna, that section 60 in its various provisions permitted a creditor, who had innocently received a preference, to hold it if he chose, and it could only be recovered by the trustee in the event that he had reasonable cause to believe that a preference was intended, in which case the trustee might recover the property or its value. But the innocent creditor might keep the property transferred to him, although a preference within the definition of the act, upon terms of non-participation in the bankruptcy estate in the general distribution to the creditors.

Section 23 of the bankruptcy act of 1867 provided: " . . . Any person who, after the approval of this act shall have accepted any preference, having reasonable cause to believe that the same was made or given by the debtor, contrary to any provision of this act, shall not prove the debt or claim on account of which the preference was made or given, nor shall he receive any dividend therefrom until he shall first have surrendered to the assignee all property, money, benefit or advantage received by him under such preference." Section 57*g* of the present act, prior to the amendment of February 5, 1903, required broadly that claims of creditors who have received preferences shall be surrendered, and that the same shall not be allowed unless this is done.

Under the former act the surrender was required of creditors who had accepted preferences, having reasonable cause to believe the same contrary to the provisions of the act, and such creditor could not receive any dividend until he had first surrendered the preference. In passing the act of 1898, Congress doubtless had before it prior legislation on the subject, and particularly the act of 1867, the most recent enactment on the subject.

Section 57*g* provides that all preferences, whether innocent

or otherwise, shall be surrendered before the creditor can prove his claim, and the right of proof is not postponed *until* the surrender, but claims are not to be allowed *unless* creditors shall surrender their preferences. The element of time is indicated in the word "until," which means to the time of, or up to, while the use of "unless" more emphatically denies the right of proving the claim, save or except upon terms of relinquishing the preference.

In view of the purpose of the bankruptcy act to make an equal distribution of the bankrupt's estate among creditors of the same class and to avoid preferences made within four months, I think, having in view the first question put by the Circuit Court of Appeals, that the sections of the law in question must be construed to put a creditor who has received a merely voidable preference, which could be recovered from him by the trustee, to his election between striving to retain that which he has received, and voluntarily surrendering his preference, and filing his claim that he may participate with other unsecured creditors in the general distribution of the estate.

The law looks to a prompt, equal and inexpensive distribution of the estate among those entitled thereto, and I do not think it was intended to permit a creditor to take the chances of litigation with the trustee, and when defeated still have the right to "surrender" his preference and participate in the distribution of the general estate. I think the surrender contemplated by the law is not the capitulation which comes after unsuccessful resistance, but is intended to require the creditor, who must be presumed to know the law, to make a prompt election and to stand or fall upon the choice made. In other words, it was not intended to permit a creditor who holds security liable to defeat under the law to keep it if he can maintain it by successful contest and, if not, to have the same right and privilege as to proof of his debt that he would have if he promptly availed himself of the privilege of surrender which the law gives to one who would place himself upon a general equality with other creditors of the estate.

These conclusions are sustained by a consideration of the terms of the law under discussion, as well as the adjudicated cases which have arisen under it. The act of 1898 made important changes when compared with the bankrupt law of 1867. As we have already seen, section 23 of the latter act limited the requirement as to the surrender of preferences to those made or given contrary to the provisions of the act. Section 35 of the same law gave the right to the assignee in bankruptcy to set aside illegal preferences, and section 39, after enumerating certain transactions which should amount to acts of bankruptcy, including fraudulent conveyances as therein described, provided that whenever the beneficiary had reasonable cause to believe that a fraud upon the act was intended, or the debtor was insolvent, the assignee might recover the property, and the creditor should not be allowed to prove his debt in bankruptcy. In 1874, 18 Stat. 178, section 39 of the act was amended, and, instead of prohibiting a creditor who had received a conveyance in fraud of the act from proving his debt, it was provided that such creditor should not, in case of actual fraud on his part, be allowed to prove for more than a moiety of his debt, and this limitation should apply to cases of voluntary as well as involuntary bankruptcy.

It will not, in my view, aid in the determination of the proper construction of the act of 1898 to review the numerous and conflicting decisions made under the act of 1867 as to the effect of these various provisions upon the right of the creditor to prove his claim. The great weight of authority is that one who had a voidable preference under the act could not be permitted to prove his claim after a judgment had been rendered against him in a contest with the trustee.

Presumably with the provisions of the act of 1867 before it, providing that in certain cases of fraudulent conveyance the creditor could not prove his claim in bankruptcy, first as to the whole, and later as to a half of the debt, and the limitations of the requirement to surrender preferences to those made in violation of the act, Congress laid aside these requirements,

and broadly provided in section 57*g* of the act of 1898 that all preferences must be surrendered as a condition of proof of claims against the estate. The innocent holder of a preference could not be deprived of his right of election between proof of his debt and the surrender of his preference. He who had a voidable preference might surrender it and prove his debt. If he did not "surrender," the trustee could recover the preference, and the privilege of proof which was conditioned upon surrender no longer existed.

Prior to the amendment of 1903 this court, in the case of *Pirie* v. *Trust Company*, already referred to, decided that the requirement extended to all manner of preferences, whether innocently received or otherwise, and this was the law until the amendment of 1903.

Therefore the sole question here is: What is meant by the term "surrender" as used in the act of 1898?

We have been referred to four cases decided under this law before the passage of the amendment of 1903. Before passing to them I may refer to a decision of Judge Dillon at the circuit, *In re Richter*, 1 Dill. 544, rendered in 1870 under the act of 1867, but in defining the word "surrender" and pointing out its meaning, the language of the learned judge is as pertinent now as it was then. Having before him the construction of the term "surrender" as used in section 23 of the act of 1867, and speaking of the right of a creditor to prove the balance of a claim which had been illegally preferred, the judge said:

"The statute is that they shall not prove up the debt or claim on account of which the preference was given. It was this precisely which, by the motion under consideration, they sought to have done, and which the court refused to allow.

"It is urged by the claimants that this refusal was erroneous because they had, before the time when they made their motion, surrendered to the assignee all property received by them under the preference. This devolves upon us the duty of interpreting the meaning of the word *surrender*, as it is here used. And it is our opinion that a creditor, who receives

goods by way of fraudulent preference, and who refuses the demand therefor which the assignee is authorized to make (section 15), denies his liability, allows suit to be commenced by the assignee, defends it, goes to trial, is defeated and judgment passes against him, which he satisfies on execution, cannot be said within the meaning of the statute, to have surrendered to the assignee the property received by him under such preference.

"He has surrendered nothing. He accepted a fraudulent preference and defended it to the last. Paying a judgment which he stoutly resisted, and from which he could not escape, is not such a surrender as the statute contemplates. To hold that it was would be against the spirit of the statute, which is to discourage preferences. Such a holding would manifestly encourage them, for if the transaction should be upheld the creditor would profit, if overthrown, he would lose nothing, and stand upon an equal footing with those over whom he had attempted to secure an illegal advantage, and whom he has, by litigation, delayed in the collection of their claims."

The question, under the act of 1898, came before the United States District Court for the Northern District of Iowa, in the case of *In re Keller*, 109 Fed. Rep. 118; 6 Am. B. R. 334, where the subject is discussed by Judge Shiras. Summing up the matter, the learned judge said:

"It would certainly be wholly inequitable to hold that a creditor who has received a preference from an insolvent debtor can refuse to account therefor, and after causing the other creditors the delay, cost, and expense of litigation, after being defeated therein, can still prove up his claim, and take an equal share in the proceeds of the estate after depleting the same in the manner stated. Contesting the claim of the trustee, and paying back the preference in obedience to the process of the court, is not a surrender, within the meaning of clause '*g*' of section 57. Therefore there is this difference between a preferred creditor who surrenders the preference and a preferred creditor from whom the preference is recovered by the trustee:

The former, having voluntarily surrendered the preference received, is entitled to prove up his entire claim, and share with the other creditors. The latter, having refused to surrender, cannot prove the claim or share in the estate."

To the same effect is *In re Owings*, 109 Fed. Rep. 623, and in *In re Greth*, 112 Fed. Rep. 978; 7 Am. B. R. 598, the cases are reviewed and the same conclusion reached.

In Collier on Bankruptcy, third edition, section 319, that author says:

"The question what constitutes a surrender has received much discussion. It is admitted by all that if the assignee is compelled to bring an action to invalidate a transfer, and if he recovers and enters up a judgment, no subsequent payment of that judgment by the preferred creditor and no subsequent compliance by him with its terms can be considered a surrender. By his judgment the trustee has 'recovered' the property. In legal effect the transferee no longer has anything to surrender."

And in the fifth edition of the same work, p. 420, it is said:

"What is a surrender.—Here the doctrines declared under the law of 1867 seem at least somewhat applicable. The phrasing of that statute undoubtedly colored some of the decisions under it. But, under well-recognized principles of law, a surrender that is compulsory is not a surrender. The element of fraud is usually present, but may be lacking; the test is: was the act a voluntary one? Each case turns on its own facts and there is some conflict, but the weight of decision under the present law supports this view."

The only case, decided under the act of 1898, which has come to my attention sustaining a contrary view is *In re Richard*, 94 Fed. Rep. 633; 2 Am. B. R. 506, in which it was decided that, notwithstanding the preference was set aside, after a fruitless fight with the trustee, the creditor might prove his claim.

We are cited to *Streeter* v. *Jefferson County Bank*, 147 U. S. 36, as sustaining the contrary view of the meaning of the term

"surrender" as used in this act. The case was under the act of 1867. But in that case the contest was over a stock of goods, and the creditor, the bank, had consented through its attorneys to the appointment of a special receiver, who was ordered to sell the goods and pay the proceeds into court. Of this feature of the case Mr. Justice Shiras, who delivered the opinion of the court, said (p. 45):

"To sustain the contention that the bank did not surrender its preference, it is urged that the bank did not at once, on demand of the assignee, turn over the goods levied on, but litigated the matter with the assignee in both the District and the Circuit Courts, and that the proceeds of the executions were not relinquished until final judgment was entered against the bank.

"It was the opinion of the state court that, as the sheriff, having custody of the goods seized on execution was, with the consent of the bank's attorneys, appointed special receiver, and was ordered to sell the goods and pay the proceeds into court, to await the result of the litigation between the bank and the assignee in bankruptcy, and that as the proceeds were finally turned over to the assignee, and thus became subject to distribution as bankruptcy assets, the transaction amounted to a surrender under section 5084. In so holding we think the state court was right."

We are also cited to the meaning of the word "surrender" as given in the Standard Dictionary:

"1. To yield possession of to another upon compulsion or demand, or under pressure of a superior force; give up, especially to an enemy in warfare; as to *surrender* an army or a fort."

This definition is given in support of the contention that a surrender may sometimes be made involuntarily. This is doubtless true, and obviously the term may have different meanings when used in different connections. It may be that an army may surrender a fort after a most vigorous contest, while there is still the choice between further resistance and

yielding the fortress to an enemy, but the most liberal meaning of the term could hardly describe as a surrender the occupation which a victorious army has gained of a fort after it has ejected the enemy from its walls and is securely intrenched therein without leave of those who have been forcibly driven out.

The bankrupt law contemplates that a secured creditor, who holds a security voidable under the law and which he should put into the common fund as a condition of the right to participate with other unsecured creditors in the division of the estate, must make his choice while he has yet something to give for the privilege of being taken from the class of those who have a security which may be taken from them, and placed in a class, always favored in the bankrupt law, who shall share in the equal distribution of the bankrupt's estate, freed from fraudulent conveyances and voidable preferences.

The complete answer to the argument that one who has received a preference which he must give up before proof as a general creditor has the right to try out with the trustee the question of the validity of the preference and then surrender, is that when the judgment of the law has taken the preference from him he has nothing left to surrender, and if then so disposed the creditor cannot surrender a thing which has been wrested from him by the strong hand of the law.

In this case the Ohio statutes, when read with the bankrupt law, distinctly avoid preferences, and the trustee, by bringing the action, diminished the estate and delayed its distribution. The creditor, before the litigation, had his election as to the course he would pursue. While he had something to surrender he might give it up, prevent costs, delay and litigation, and aid the speedy and equal distribution of the bankrupt's estate. After two judgments against him, and when he had absolutely nothing to give up to the bankrupt's estate, it is, in our view, too late to "surrender."

I think the construction here given comports with the purposes and carries into effect the design of the act as expressed

by its terms. It is true that in the present case, after resisting the attack upon the $2,000 mortgage in the Court of Common Pleas, and when the judgment had gone against the bank it did not appeal, and its counsel in the Circuit Court disclaimed intention to insist upon the preference of the $2,000 mortgage, but even then refused consent to a decree against the mortgage, and in our opinion the time of election was before judgment in the court of original jurisdiction wherein the mortgage was contested and defeated. It is unnecessary to consider whether an election to surrender the preference can be made after issued joined and before judgment. In this case a trial was had upon the merits. The judgment rendered was vacated by the appeal and in the appellate court, notwithstanding the qualified disclaimer of counsel for the bank, a final judgment was rendered against the mortgage.

These considerations lead to the conclusion that the first and second questions should be answered in the negative.

The importance of the ruling just made is shown in its application not only to the act of 1898 as it originally stood, but to the act as it now stands since the amendment of February 5, 1903, which only requires a surrender of preferences when the same are in violation of subdivision *b* of section 60, or void or voidable under § 67, subdivision *e*. The reasoning of the majority of the court permits the holder of a preference, no matter how fraudulent, to contest with the trustee when his preference is attacked, and when convicted of fraud and an intention to defeat the purposes of the law to "surrender" that which the law has declared he cannot hold, and prove his debt as a general creditor. To permit this seems to me to defeat the purpose of the act and to encourage the very thing the surrender clause was intended to promote—a prompt and inexpensive distribution of the estate. The fraudulent transferee, although he has lost his suit, has taken no risk, and may still prove his claim on an equality with unpreferred creditors over whom he has sought an illegal advantage. I cannot agree

with this construction, and therefore dissent from the judgment and reasoning of the majority of the court.

I am permitted to state that MR. JUSTICE HARLAN, MR. JUSTICE BREWER, and MR. JUSTICE BROWN concur in this dissent.

UNITED STATES *v.* SMITH.

APPEAL FROM THE COURT OF CLAIMS.

No. 184. Argued March 15, 1905—Decided April, 3, 1905.

The word "arrest" as employed in Article 43 of § 1624, Rev. Stat., requiring service of the charge on which the accused is to be tried by court martial, does not relate to the preliminary arrest or detention of an accused person awaiting the action of higher authority to frame charges and specifications and order a court-martial, but to the arrest resulting from preferring the charges by the proper authority, and the convening of a court-martial.

The provision in Article 38 of § 1624, Rev. Stat., that no commander of a fleet or squadron shall convene a general court-martial without express authority from the President was enacted in 1862 and will be construed as intending to apply to waters within the continental limits of the United States, and not to waters in the territory beyond the seas acquired since the passage of that act, and the acquisition whereof was not contemplated at that time.

ON May 26, 1899, John Smith was serving under enlistment as a fireman of the first class on board the United States naval vessel Yorktown, then at anchor in Iloilo harbor, Philippine Islands. On the date named Smith was reported to the commanding officer of the Yorktown as having refused to do duty, and consequently such officer ordered him "put under sentries as a prisoner in single irons for safekeeping to await trial by a general court-martial." Subsequently, on June 30, 1899, Rear Admiral Watson, the Commander in Chief of the United

States naval force on the Asiatic station, convened a general court-martial, to meet on July 3, 1899, for the purpose of trying accused persons who might be legally brought before the court, and on the same day a charge was preferred against Smith, by the Rear Admiral, accompanied with a specification, for refusing to obey a lawful order of his superior officer. Smith, who as already stated had been placed under arrest on May 26, 1899, was served on July 1, 1899, with a copy of the charge and specification which had been preferred against him and an extra watch was put over him as well as over other prisoners who were being held for trial. On July 5, 1899, Smith was sent under guard before the court-martial. He was tried, found guilty and sentenced "To be confined in such place as the Secretary of the Navy may direct for a period of one year, to perform extra police duties during such confinement, to lose all pay that may become due him during such confinement, except the sum of three dollars ($3.00) per month for necessary prison expenses, and a further sum of twenty dollars to be paid him at the expiration of his term of confinement, when he shall be dishonorably discharged from the United States Navy."

The term of imprisonment prescribed in the sentence was somewhat mitigated by the Secretary of the Navy. Thereafter, on being released, Smith sued in the Court of Claims to recover the pay which would have been earned by him had he been entitled to receive the same during the period covered by the sentence. The right to recover was based on the averment that a copy of the charge had not been served on Smith when he was originally put under arrest on May 26, 1899, it being claimed that for this reason the judgment of the court-martial was void. After finding the facts as above recited the Court of Claims concluded, as matter of law, that the claimant was entitled to recover, and from the judgment entered upon such finding the Government appealed.

Mr. Edwin P. Hanna, Solicitor of the Navy Department,

and *Mr. Assistant Attorney General Pradt*, with whom *Mr. Special Attorney Felix Brannigan* was on the brief, for the United States:

The delivery to the prisoner on July 1, 1899, of the true copy of the charge and specification of the offense committed on May 26, 1899, and for which he was tried, convicted and sentenced on July 5, 1899, by a general court-martial, was a sufficient compliance with Article 43 of the articles which govern the Navy of the United States. Rev. Stat. § 1624.

The judgment appealed from is founded upon an unreasonable interpretation of Article 43. "It rests upon a construction which is too literal." *United States* v. *Finnell*, 185 U. S. 236, 242. It well illustrates the maxim, "*Qui hæret in litera, hæret in cortice.*"

The Court of Claims has no jurisdiction whatever to review the lawful sentence of any duly convened court-martial, nor to impugn by doubts the verity of its record or justice of its sentence. In this country courts-martial are courts of record —so far, at least, as the statute requires records to be made and preserved. Like our inferior courts they derive their jurisdiction from and are regulated by Congress, *Dynes* v. *Hoover*, 20 How. 65, 82; and no civil court can review their proceedings or sentences, *Ex parte Watkins*, 3 Pet. 193. They have general jurisdiction of all military offenses. The act of Congress, passed more than a hundred years ago, requires the president of every court-martial to administer an oath to the judge advocate that he will "*keep a true record of the evidence given to and the proceedings of this court; . . .*" Art. 36, 2 Stat. 50; Art. 40, p. 283, Rev. Stat; *Davis* v. *Township of Delaware*, 41 N. J. L. 55.

As to time within which charges should be delivered before court-martial see *United States* v. *Insurgents*, 2 Dall. 334, 341; *United States* v. *Wood*, 3 W. C. C. 440; *United States* v. *Curtis*, 4 Mason C. C. 232; *Johnson* v. *Sayre*, 158 U. S. 109, 118. Court-martial jurisdiction cannot be inquired into on collateral proceedings. *Ex parte Walkins*, 3 Pet. 193, 201; *Keyes* v. *United States*, 15 C. Cl. 532, 541; *S. C.*, 109 U. S. 336; *Johnson* v.

Sayre, supra; Carter v. *McClaughry,* 183 U. S. 365; *Swain* v. *United States,* 165 U. S. 553, 565.

Neither the sentences of these military courts, nor the action of the Admiral or the Secretary of the Navy or of the President upon them, should ever be regarded as void by that civil court, except perhaps upon the very clearest jurisdictional grounds when the court-martial case was *coram non judice. Wise* v. *Withers,* 3 Cr. 331, 337. When general courts-martial are convened by the Secretary of the Navy, or by the Commander in Chief of a fleet or squadron, in contemplation of law they are convened by the President himself as Commander in Chief of the Navy. *Wilcox* v. *Jackson,* 13 Pet. 498, 513; *Eliason* v. *United States,* 16 Pet. 291, 302; *Williams* v. *United States,* 1 How. 290, 297. He alone is "the court of last resort," and all officers and seamen may appeal to him.

The prisoner was tried according to immemorial usage. Art. 5, Reg. & Inst. His Majesty's Service, 1772, p. 46; Rules for Reg. of Navy of United Colonies, Nov. 28, 1775; Act of Government of Navy, 1799, 1 Stat. 709; Genl. Reg. Navy, 1841, Arts. 479, 482; 3 Am. Archives, 1775, 4th series, p. 1930; Navy Reg. Art. 1077.

The provision in the statute relied upon by appellee that the court-martial could not be convened because in waters of the United States except by authority of the President does not apply. Art. 38, act of 1862, was passed before the acquisition of the Philippines was thought of and the statute must be construed as intended by Congress. *Smith* v. *Townsend,* 148 U. S. 494; *Platt* v. *Un. Pac. R. R.,* 99 U. S. 64; *Hadden* v. *Collector,* 5 Wall. 112. The act was not intended to apply to such remote waters. *Irwin* v. *United States,* 38 C. Cl. 87; *United States* v. *Thomas,* 195 U. S. 418; *Downes* v. *Bidwell,* 182 U. S. 244.

Mr. John Spalding Flannery, with whom *Mr. Frederic D. McKenney* was on the brief, for appellee:

Johnson v. *Sayre,* 158 U. S. 109, does not apply. Under

Article 43 "the person accused shall be furnished with a true copy of the charges, with the specifications, at the time he is put under arrest; and no other charges than those so furnished shall be urged against him at the trial." This rule was therefore inexcusably violated. It necessarily follows that if the accused can be tried only upon the charge furnished at the time of his arrest, if no charges were furnished him at the time of his arrest for trial, on May 26, 1899, there were none in existence upon which he could have been legally tried on July 5, 1899. Section 1034, ch. 23, Naval Regulations, 1896; *Dynes* v. *Hoover*, 20 How. 65, 81; *McClaughry* v. *Deming*, 186 U. S. 49, 62; *Keyes* v. *United States*, 109 U. S. 336, distinguished. See *Ex parte Reed*, 100 U. S. 13, 23; *Runkle's Case*, 122 U. S. 543, 555; Art. 43, § 1624, Rev. Stat. § 2, Art. 1778; § 4, Art. 1805; § 6, Art. 1819, Nav. Reg. 1896.

There was no waiver of any jurisdictional defect. *Bennecke* v. *Insurance Co.*, 105 U. S. 359; Cooley's Const. Lim., 7th ed., 252.

As to meaning of charges and arrest in § 43 see British Art. of War, 1765, §§ 15–18; Massachusetts Articles, 1775; American Articles, 1775, 1776, 1786; Winthrop's Military Law, 1896, 1475, 1483, 1500, 1506.

The court-martial was held in waters of the United States and could not be convened except by order of the President. Art. 38, § 1624, Rev. Stat.

Under the decisions in the Insular cases it seems that there can be no doubt that after the ratification of the treaty of peace between the United States and Spain, on April 11, 1899, the Territory of Porto Rico and the Philippines ceased to be foreign land and became territory of the United States. *De Lima* v. *Bidwell*, 182 U. S. 1; *Dooley* v. *United States*, 182 U. S. 222, 234; *S. C.*, 183 U. S. 151; *Fourteen Diamond Rings* v. *United States*, 183 U. S. 176; *Huns* v. *Steamship Co.*, 182 U. S. 392; *Gonzales* v. *Williams*, 192 U. S. 1, 14; Nav. Reg., 1896, § 4, Art. 1064; § 1, Art. 1720; § 1, Art. 1773; Art. 67, Rev. Stat. 1342; November issue, 1902, Green Bag, 502;

Military Laws Doc. 545, H. R. 56th Cong., 2d Sess., 677; Doc. 244, H. R. 1st Sess., 26th Cong.; Sen. Rep. 1442, 57th Cong., 1st Sess.; Sen. Rep. 805, 58th Cong., 2d Sess.

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

Article 43 of section 1624 of the Revised Statutes, upon which the Court of Claims based its legal conclusion that the action of the court-martial in question was void because the charge and specification were not served upon the claimant at the time of the original arrest, reads as follows: "The person accused shall be furnished with a true copy of the charges, with the specifications, at the time he is put under arrest."

It is conceded by the findings that at once when the charge and specification were formulated by Rear Admiral Watson and the court-martial was ordered to be convened, a copy of the charge and specification was served upon Smith. It is also established by the findings that no objection as to tardiness of service was made at the time of trial. Conceding, *arguendo* solely, and without so deciding, that under these circumstances the objection as to the lateness of the service was jurisdictional and could be collaterally inquired into, we think the contention is wholly devoid of merit. Nearly ten years before the trial in question was had, in the year 1890, the Secretary of the Navy submitted to the Attorney General the question of whether the arrest referred to in Article 43 related to the preliminary arrest which might be consequent upon the commission of an offense, or applied to the arrest made after charges had been formulated and as court-martial ordered. The Attorney General advised that the word arrest as employed in Article 43 did not relate to the preliminary arrest or detention of an accused person awaiting the action of higher authority to frame charges and specifications and order a court-martial, but to the arrest resulting from the preferring of the charges by the proper authority and the conven-

ing of a court-martial. 19 Opinions of Attorney General, 472. The reasoning by which the Attorney General reached the conclusion just stated we think was absolutely conclusive. Doubtless the opinion became the rule of practice in the Navy, and the construction affixed by the Attorney General to the statute was sanctioned by this court in *Johnson* v. *Sayre*, 158 U. S. 109, and such construction has been reiterated in an opinion announced this day. *Bishop* v. *United States*, 197 U. S. 334.

Whilst these considerations dispose of the contentions raised and passed on below, a new ground for reversal was urged at bar, founded on Article 38 of section 1624 of the Revised Statutes. That Article reads as follows:

"Art. 38. General courts-martial may be convened by the President, Secretary of the Navy, or the Commander in Chief of a fleet or squadron; but no commander of a fleet or squadron in the waters of the United States shall convene such court without express authority from the President."

Although it is not denied that Rear Admiral Watson was a commander of a fleet within the meaning of that expression as employed in Article 38, it is insisted that as he convened the court-martial while in Manila Bay, about six weeks after the treaty with Spain by which the Philippine Islands were acquired by the United States, therefore the fleet or squadron under his command was "in the waters of the United States," within the meaning of those words as employed in the enactment in question, and there was no power in the Commander in Chief to convoke a court-martial without express authority from the President, which is not found to have been given. This objection, if well taken, is jurisdictional, but in our judgment it is without merit; and we reach this conclusion wholly irrespective of the status of the Philippine Islands.

The clause in question was originally enacted in 1862, before even the acquisition of Alaska, and was intended, we think, to apply to those waters within what was termed by Congress in the act of March 3, 1901, 31 Stat. 1107, 1108, the continental

limits of the United States. In other words, the provision in question did not take into view the dominion or sovereignty of the United States over territory beyond the seas and far removed from the seat of government, but contemplated waters within the United States in the stricter and popular sense of the term. Looking to the language used, in the light of the surrounding circumstances and the purpose which it was intended to accomplish, *Platt* v. *Union Pacific R. R.*, 99 U. S. 48, 64, it is, we think, manifest that the prohibition against the convocation by the commander of a fleet or squadron of a general court-martial, without the previous authorization of the President, was intended to be operative only when the fleet or squadron was in a home port, as above defined. That is to say, that Congress contemplated the necessity of an order from the President when the circumstances supposed to require the convening of the court-martial could be with facility submitted to the President for his action in the premises. To give a broad meaning to the expression "waters of the United States," as employed in Article 38, by construing those words as referring not only to the home waters but to far distant waters, would, we think, defeat the plain purposes of Congress and seriously impair, if not destroy, an important power vested in the commander of a fleet or squadron when at distant stations, remote from the home country. Certainly, if the remoteness from the continental limits of the United States is immaterial and the restriction of Article 38 is applicable to the commander when his fleet or squadron is within waters thousands of miles removed from the boundaries of the United States, in the restricted sense of that term, no good reason is apparent why the commander of a fleet or squadron should not have been forbidden, without the leave of the President, to convoke a general court-martial, irrespective of where his fleet or squadron might be situated.

Judgment reversed.

MIDDLETOWN NATIONAL BANK *v.* TOLEDO, ANN ARBOR AND NORTHERN MICHIGAN RAILWAY COMPANY.

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

No. 167. Argued March 7, 1905.—Decided April 3, 1905.

Article XIII, § 3, of the constitution of Ohio of 1851, providing that dues from corporations be secured by individual liability of the stockholders as may be prescribed by law to a further sum over and above their stock at least equal to the amount of such stock, is not so far self-executing that it may be enforced outside of the jurisdiction of that State without compliance with the requirements of the state statute fixing the amount of the liability and the method of enforcing it.

Under § 3260, Rev. Stat., Ohio, the remedy must be pursued in the courts of that State and a creditor, who has not commenced any action in the Ohio courts, cannot obtain the relief given by the statute, in the Circuit Court of the United States in another State, against stockholders resident therein.

THIS case comes here by virtue of a certificate from the United States Circuit Court of Appeals for the Second Circuit, which sets forth the following facts:

The case came before the Circuit Court of Appeals by appeal from the decree of the United States Circuit Court for the Southern District of New York, sustaining demurrers to the bill of complaint and dismissing the bill. The complainant in the bill was a creditor of the railway company (the defendant), which is a corporation created under the laws of the State of Ohio, and complainant recovered a judgment against the defendant railway company in the Supreme Court of the State of New York, upon which execution was issued and returned unsatisfied. The complainant then brought its bill in equity in the United States Circuit Court for the Southern District of New York, for the benefit of itself and other creditors against numerous stockholders of the railway company, defendant, residing in the district, to enforce the liability of those

stockholders for the debts of the railway company, under the laws of Ohio, and that company was made a party defendant.

The constitution of Ohio (1851), Article 13, section 3, is as follows:

"Dues from corporations shall be secured, by such individual liability of the stockholders, and other means, as may be prescribed by law; but, in all cases, each stockholder shall be liable, over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum, at least equal in amount to such stock."

In pursuance of this provision of the constitution the legislature of Ohio adopted statutory provisions with respect to the stockholders of certain corporations which appear in the Revised Statutes of 1880, section 3258, in the following form:

"The stockholders of a corporation which may be hereafter formed, and such stockholders as are now liable under former statutes, shall be deemed and held liable, in addition to their stock, in an amount equal to the stock by them subscribed, or otherwise acquired, to the creditors of the corporation, to secure the payment of the debts and liabilities of the corporation."

Section 3260 of the Revised Statutes of 1880, as amended in 1894, provided as follows:—

"A stockholder or creditor may enforce such liability by action jointly against all the holders or owners of stock, which action shall be for the benefit of all the creditors of the corporation, and against all persons liable as stockholders; and in such actions there shall be found and determined the amount payable by each person liable as stockholder on all the indebtedness of the corporation, in which adjudication no costs shall be taxed to nor collected of any stockholder to an amount which, together with the amount to be paid on said indebtedness, will exceed the amount of the stock on which he is liable, provided, that in any such action the plaintiff may file in the court a sworn statement that a stockholder or stockholders or the legal representatives of a deceased stockholder have not

been summoned, giving their residence if known, and that it is impracticable to secure service of summons upon such stockholders or such legal representatives of a stockholder, and remitting from the claims of the plaintiff or of other creditors consenting, so much as may be found payable by such stockholders not served with summons except those who may be insolvent or non-resident of the State, and judgment shall be rendered against the stockholders who have been served with summons for the *pro rata* amount for which they would be liable if all solvent stockholders resident of the State were served with summons; and when a creditor has prosecuted against a corporation an action of (at) law begun before any action to enforce the stockholders' liability, and has recovered final judgment only after such an action to enforce the stockholders' liability has been prosecuted to a final decree in the court in which the action was commenced, such judgment creditor may bring a like action against the stockholders of the corporation to enforce such judgment at any time within four years after the recovery of his said judgment, but the stockholders shall not be liable for any amount in excess of that provided in section 3258."

As so amended this section stood at the time when this suit was begun. Afterwards, in 1900, but before the filing of the second amended bill of complaint, the section, as further amended and supplemented, provided as follows:

"SEC. 3260. Whenever any creditor of a corporation seeks to charge the directors, trustees, or other superintending officers of a corporation, or the stockholders thereof, on account of any liability created by law, he may file his complaint for that purpose in any common pleas court which possesses jurisdiction to enforce such liability.

"SEC. 3260*a*. The court shall proceed thereon, as in other cases, and, when necessary, shall cause an account to be taken of the property and obligations due to and from such corporation, and may appoint one or more receivers.

"SEC. 3260*b*. If, on the coming in of the answer or upon

the taking of such account, it appears that such corporation is insolvent, and has not sufficient property or effects to satisfy such creditor, the court may proceed to ascertain the respective liabilities of the directors, officers and stockholders, and enforce the same by its judgment, as in other cases.

"SEC. 3260*c*. In all cases in which the directors or other officers of a corporation, or the stockholders thereof, are made parties to an action in which a judgment is rendered, if the property of such corporation is insufficient to discharge its debts, the court shall give notice to non-resident stockholders, as provided in sections 5048, 5049, 5050, 5051 or 5052 of the Revised Statutes, and shall first proceed to compel each stockholder to pay in the amount due and remaining unpaid on the shares of stock held by him, or so much thereof as is necessary to satisfy the debts of the company.

"SEC. 3260*d*. If the debts of the company remain unsatisfied, the court shall proceed to ascertain the respective liabilities of the directors or other officers and of the stockholders, and to adjudge the amount payable by each, and enforce the judgment, as in other cases. The court may authorize and direct the receiver to prosecute such action in his own name as receiver, as may be necessary, in other jurisdictions to collect the amount found due from any officer or stockholder.

"SEC. 3260*e*. Whenever any action is brought against any corporation, its directors or other superintending officers, or stockholders, according to the provisions of this chapter, the court, whenever it appears necessary or proper, may order notice to be published, in such manner as it shall direct, requiring all the creditors of such corporation to exhibit their claims and become parties to the action, within a reasonable time, not less than six months from the first publication of such order, and, in default thereof, to be precluded from all benefit of the judgment which shall be rendered in such action, and from any distribution which shall be made under such judgment.

"SEC. 3260*f*. Upon a final judgment in any such action against an insolvent corporation, the court shall cause a just and fair distribution of the property and assets of such corporation or the proceeds thereof to be made among its creditors.

"SECTION II. That said section 3260 be, and hereby is repealed.

"SECTION III. This act shall apply to pending actions, and shall take effect and be in force from and after its passage."

The court below sustained the demurrer on the following ground:

"It is thought that the question raised by this demurrer should be decided upon the assumption that the action is the one provided for by sec. 3260, Rev. Stat. Ohio, as it stood after the amendment of 1894. Inasmuch as that section expressly provides for an action jointly against all the stockholders, including such as are out of the jurisdiction or for other causes cannot be served, and the complaint avers that there are stockholders who have not been made parties, there is a lack of parties defendant and the demurrer is sustained. If, moreover, the amendments of the statute passed in 1900 are to be considered, the position of the demurrants is even stronger. Manifestly this action is not the one thereby provided for."

Mr. Frederick C. McLaughlin, with whom *Mr. Harvey Scribner* was on the brief, for appellant:

Article XIII, § 3, of the Ohio constitution is self-executing to the extent of declaring a general contractual obligation and a general rule as to property rights. *Whitman* v. *Bank*, 176 U. S. 559; *Willis* v. *Mabon*, 48 Minnesota, 140; *Ohio* v. *Sherman*, 22 Ohio St. 411; *Brown* v. *Hitchcock*, 36 Ohio St. 667; *Kirtley* v. *Holmes*, 107 Fed. Rep. 1; *Harpold* v. *Stobart*, 46 Ohio St. 397.

Section 3260, Rev. Stat. Ohio, as originally enacted and as amended in 1894, was declaratory merely of rules of chancery

practice long previously followed by Ohio courts. *Umsted* v. *Buskirk*, 17 Ohio St. 113; *Smith* v. *Newark &c. R. R. Co.*, 8 Ohio C. C. Rep. 583.

The remedy, therefore, is nothing more than the appropriate remedy in equity for the enforcement of a proportionate, collateral liability and such remedy, from its very origin and nature, is transitory. *Kirtley* v. *Holmes*, 107 Fed. Rep. 1, 5.

This general, contractual obligation is enforceable in any United States Circuit Court having jurisdiction of the parties indispensable to a decree. Const. U. S., Art. III, §§ 1, 2, establishes the right to have it enforced where diverse citizenship exists. *Smith* v. *Railroad Co.*, 99 U. S. 398; *Reynolds* v. *Bank*, 112 U. S. 405, 410; *Railway Co.* v. *Whitton*, 13 Wall. 270, 286; *Suydam* v. *Broadnax*, 14 Pet. 67; *Smith* v. *Reeves*, 178 U. S. 442; Foster's Fed. Prac., 3d ed., §§ 6, 7.

The statutory origin of the obligation is immaterial. *Dennick* v. *Railroad Co.*, 103 U. S. 11; *Whitman* v. *Bank*, *supra*. The United States Circuit Court can and will enforce it. *American File Co.* v. *Garrett*, 110 U. S. 288; *Smith* v. *Railroad Co.*, *supra;* the Federal courts in New York take judicial notice of Ohio law. *Owings* v. *Hull*, 9 Peters, 607, 624; *Hanley* v. *Donoghue*, 116 U. S. 1, 6, and cases cited. The Federal courts will frequently enforce an obligation that the courts of a State in which it is sitting do not enforce. *Barrow S. S. Co.* v. *Kane*, 170 U. S. 100.

Considerations which have influenced certain state courts in refusing to enforce this liability have no weight in a Federal court, where jurisdiction is based upon diverse citizenship. *Hale* v. *Harden*, 95 Fed. Rep. 747, 751; compare *State Nat. Bank* v. *Sayward*, 91 Fed. Rep. 443, with *Erickson* v. *Nesmith*, 15 Gray, 221; *N. H. Horse Nail Co.* v. *Linden*, 142 Massachusetts, 349; *Post & Co.* v. *Railroad Co.*, 144 Massachusetts, 341.

Complainant seeks to enforce this liability precisely as it is enforced in Ohio. *Fourth Nat. Bank* v. *Francklyn*, 120 U. S. 747, 758; *Pollard* v. *Bailey*, 20 Wall. 520; *Slater* v. *Mex. Nat.*

R. R., 194 U. S. 210; *Davis* v. *Mills*, 194 U. S. 451; *Harpold* v. *Stobart*, 46 Ohio St. 397.

An Ohio corporation may be found and sued in the Circuit Court of the United States for the Southern District of New York. *St. Louis Railway* v. *McBride*, 141 U. S. 127; *Central Trust Co.* v. *McGeorge*, 151 U. S. 129; *Interior Construction Co.* v. *Gibney*, 160 U. S. 217; *In re Keasbey & Mattison Co.*, 160 U. S. 221, 229; *Life Ins. Co.* v. *Woodworth*, 111 U. S. 138, 146, and cases cited.

Upon the certificate in this case the corporation is joined and served and before the court.

This fact of joinder and service of the corporation distinguishes this case from every other in the books where Federal courts have refused to enforce this liability extraterritorially.

All parties indispensable to a decree are before the court and all limitations and conditions upon the right are complied with.

No large question of judicial policy is involved.

The power of the Ohio legislature over the liability declared by the constitution is limited to a reasonable control of an adequate remedy for its enforcement in Ohio courts.

The decision of the court below resulted from an erroneous legal presumption based upon the false premise that the legislature created and controlled the right. *Whitman* v. *Ox. Bank*, 28 C. C. A. 404.

The said requirements of § 3260, Rev. Stat. Ohio, do not govern in a court of another jurisdiction unless they limit and qualify the right declared by the Ohio constitution. The *lex loci contractus* governs as to the substance or obligation of a contract, while the *lex fori* governs the form of action or procedure. Kent's Commentaries, 14th ed., 461, and cases cited; R. C. Minor in 14 Harv. L. Rev. 262, and cases cited.

This is true whether the origin of the liability be in the statute or the common law and whether the remedy be stat-

utory or otherwise. *Dennick* v. *Railroad*, and *Davis* v. *Mills*, *supra; Blair* v. *Newbegin*, 65 Ohio St. 425.

Section 3260 does not limit or qualify the substantive right declared by the constitution. It relates to form, not to substance.

Section 3260 is not literally the exclusive remedy for the enforcement of stockholders' liability under Ohio law which had accrued prior thereto. It is wholly inadequate against non-resident stockholders. *Hale* v. *Allinson*, 188 U. S. 56. It therefore violates the Constitution of the United States. *Hawthorn* v. *Calef*, 2 Wall. 10. It is an arbitrary and unreasonable exercise of legislative control over remedy. *Davis* v. *Mills*, 194 U. S. 451, 456, 457. It violates Art. XIII, § 3, Ohio constitution. It violates Art. 3, § 2, Constitution of the United States. *Insurance Co.* v. *Morse*, 20 Wall. 445; *Barron* v. *Burnside*, 121 U. S. 186. It cannot be the exclusive remedy against non-resident stockholders because it is no remedy against them at all.

Every condition and limitation imposed upon the substantive right has been complied with and there is no defect of parties defendant in equity. *Shields* v. *Barrow*, 17 How. 139; *Ribon* v. *Railroad Co.*, 16 Wall. 446; *Cameron* v. *McRoberts*, 3 Wheat. 591; U. S. Sup. Ct. Rules in Equity, 22, 47, 48.

The Ohio legislature neither created this liability nor prescribed the remedy for its enforcement.

Mr. Lucius H. Beers and *Mr. Joseph Fettretch*, with whom *Mr. John G. Milburn*, *Mr. Arthur Cosby*, *Mr. Charles N. Judson*, and *Mr. William B. Hale* were on the brief, for respondents:

Whether or not a constitutional provision is self-executing depends upon the intention of the framers. A provision will be held to be self-executing only where there is a manifest intention that it shall go into immediate effect without the aid of any ancillary legislation. 6 Am. & Eng. Ency. Law,

2d ed., 912; *Groves* v. *Slaughter*, 15 Pet. 449; *Fusz* v. *Spaunhorst*, 67 Missouri, 265; *Morley* v. *Thayer*, 3 Fed. Rep. 740.

Section 3 of Art. XII, Ohio Const., is not in terms self-executing. As to its construction by the Ohio legislature and courts see *Bank* v. *Wright*, 6 Ohio St. 318, 328; Ohio Convention Debates, 1850, vol. 1, pp. 369–427. These debates can be referred to, *State* v. *Kennon*, 7 Ohio St. 546, 563, and under *Edwards' Lessee* v. *Darby*, 12 Wheat. 206, are entitled to great weight. As to stockholders' liability in Ohio see also *State* v. *Sherman*, 22 Ohio St. 411; *Ryder* v. *Fritchey*, 49 Ohio St. 285; *Brown* v. *Hitchcock*, 36 Ohio St. 676. As to construction of similar constitutional provisions in other States see *French* v. *Teschemaker*, 24 California, 518; *Jerman* v. *Benton*, 79 Missouri, 148; *Agricultural Association* v. *Insurance Co.*, 70 Alabama, 120; *Woodworth* v. *Bowles*, 61 Kansas, 569; *Tuttle* v. *Bank*, 161 Illinois, 497; *Marshall* v. *Sherman*, 148 N. Y. 9; *Bank* v. *Sayward*, 86 Fed. Rep. 45; *Bank* v. *Farnum*, 176 U. S. 640; *Flash* v. *Conn*, 109 U. S. 371; *Willis* v. *Mabon*, 48 Minnesota, 140, distinguished. And see also *Platt* v. *Wilmot*, 193 U. S. 602, 612; Cooley's Const. Lim., 7th ed., 121; *Barnes* v. *Wheaton* 80 Hun (N. Y.), 8; *Cleveland* v. *Kent*, 87 Hun (N. Y.), 329; *Nimick* v. *Iron Works*, 25 W. Va. 184; *Henly* v. *Stevenson*, 72 Pac. Rep. 518; *Fowler* v. *Samson*, 146 Illinois, 478.

The construction which has been placed on this clause of the Ohio constitution by the highest courts of Ohio is controlling in this court. *Luther* v. *Borden*, 7 How. 1, 40; *Post* v. *Supervisors*, 105 U. S. 667; *Butcher* v. *Cheshire R. R. Co.*, 125 U. S. 555, 581, 584; *Burgess* v. *Seligman*, 107 U. S. 20, 133; *Great Southern Hotel Co.* v. *Jones*, 193 U. S. 532, distinguished.

The highest court of Ohio has held that section 3 of Article XIII of the Ohio constitution is not self-executing. *Ohio* v. *Sherman*, 22 Ohio St. 411; *Ryder* v. *Fritchey*, 49 Ohio St. 285; *Bank* v. *Wright*, 6 Ohio St. 318.

For other similar provisions see New York Const., 1846, Art. VIII; Illinois Const., 1848, Art. X; Indiana Const., 1851,

Art. XI; North Carolina Const., 1868, Art. VIII; South Carolina, Art. XII, §§ 4, 5; California Const., 1849, Art. IV, §§ 32, 36; Const., 1879, Art. XII; Missouri Const., 1865, Art. VIII, § 6; Const., 1875, Art. XII, § 9; Alabama Const., 1867, Art. XIII; Const., 1875, Art. XIII, § 8; Kansas Const., 1858, Art. XIV; Const., 1859, Art. XII; Nevada Const., 1864, Art. VIII, § 3; West Virginia Const., 1872, Art. XI.

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

The questions propounded by the Circuit Court of Appeals are the following:

First. Whether Article 13, section 3, of the constitution of Ohio is so far self-executing that it may be enforced outside of the jurisdiction of said State without compliance with said requirements of section 3260 of the Revised Statutes of said State as amended in 1894.

Second. Whether Article 13, section 3, of the constitution of Ohio is so far self-executing that it may be enforced outside of the jurisdiction of said State without compliance with said requirements of section 3260 of the Revised Statutes of said State as amended in 1900.

The counsel for the complainant contends that the article of the Ohio constitution, above set forth, is self-executing to the extent of declaring the general contractual obligation and the general rule as to property rights, and it is insisted that the liability of the stockholders in the railway corporation may be enforced by the courts of another jurisdiction without compliance with the requirements of any of the statutes which have been passed by the legislature of Ohio in regard to the enforcement of the liability provided for in the constitution. These statutes, it is said, refer only to the form and mode of procedure in local courts, and neither of them contains any limitation or condition imposed upon the substantive right declared by the constitution, as construed and enforced by

the Ohio courts for many years prior to the statutory enactments.

We have not been referred to any decision of the Ohio Supreme Court directly involving the question whether the provision of the constitution referred to is self-executing or not. If there were any such decision we should follow it. That court has, however, regarded the liability of stockholders as statutory in its nature, as is seen from its decisions in the cases hereinafter cited.

The question has arisen in some of the other States regarding this same provision, and it has been held to be not self-executing. *Barnes* v. *Wheaton*, 87 Supreme Court Reports of New York (80 Hun, 8). In that case it was held by the then General Term that it was obvious that the provision was not self-executing, but its purpose was to confer upon the legislature the power and impose upon it the duty of securing dues from corporations by imposing upon the stockholders of such corporations as are organized under the laws of that State an individual liability, and by such other means as, in its discretion, it should deem proper, but limiting such power and discretion by the provision that each stockholder should be made liable to an amount at least equal to the amount of stock held by him. This provision was not regarded as imposing a liability independent of the statute, nor as conferring upon the plaintiff any right to maintain the action then before the court. It has been held substantially to the same effect in *Nimick & Co.* v. *Mingo Iron Works Co.*, 25 W. Va. 184.

But whether the constitutional provision might be regarded as, to a certain extent, self-executing in the absence of any statute on the subject, we find that the legislature of Ohio has passed statutes to enforce such liability. The cases of *Wright* v. *McCormack*, 17 Ohio St. 86, and *Umsted* v. *Buskirk*, 17 Ohio St. 113, were both brought under a statute enacted to provide a method for enforcing the constitutional liability, and in the former case the court speaks of the liability of the stockholders, as a "statutory liability," and of the statute itself as a "statute

under which the liability arises." That was an early statute, passed not long after the adoption of the constitutional provision, and for the purpose of executing it. 50 Ohio L. 296, passed May 1, 1852. *Wright* v. *McCormack* was approved in *Umsted* v. *Buskirk, supra.* Subsequent statutes were passed for the same purpose of enforcing the liability of stockholders, and those set out in the record not only definitely state the liability, but give the procedure and provide the remedy in order to enforce it. It will be seen that the constitutional provision refers in terms to the securing of dues from corporations by the individual liability of stockholders and by such other means as may be prescribed by law. The constitution evidently looks to the legislature for providing means. A statute which is passed in pursuance of such a provision and which itself provides for the procedure and states the remedy, even though imposing no limit or conditions in regard to such liability other than such as are found in the constitutional provision itself, is, nevertheless, a statute providing a remedy which is to be followed within the principle sustained by the authorities cited below. The statute under such circumstances may be said to so far provide for the liability and to create the remedy, as to make it necessary to follow its provisions and to conform to the procedure provided for therein. See *Pollard* v. *Bailey,* 20 Wall. 520, 526; *Fourth National Bank* v. *Francklyn,* 120 U. S. 747, 756, 758; *Evans* v. *Nellis,* 187 U. S. 271; *Morley* v. *Thayer,* 3 Fed. Rep. 737, Circuit Court, District of Massachusetts; *Cleveland &c. Ry. Co.* v. *Kent,* 94 N. Y. Supreme Court Reports (87 Hun), 329; *Nimick* v. *Mingo Iron Works Co., supra.* In *Bank* v. *Francklyn, supra,* Mr. Justice Gray, speaking for this court, said: "In all the diversity of opinion in the courts of the different States, upon the question how far a liability, imposed upon stockholders in a corporation by the law of the State which creates it, can be pursued in a court held beyond the limits of that State, no case has been found, in which such a liability has been enforced by any court, without a compliance with the conditions

applicable to it under the legislative acts and judicial decisions of the State which creates the corporation and imposes the liability. To hold that it could be enforced without such compliance would be to subject stockholders residing out of the State to a greater burden than domestic stockholders." In order to comply with the conditions of the statute of Ohio it seems plain from the provisions of the statute that the action must be brought in that State.

In the case now before us the complainant has paid no attention to the statutes of Ohio, so far as bringing suit in that State is concerned, and therefore has not followed the provisions contained in them. It has commenced no action in the State of Ohio, but, on the contrary, assumes to ask the Federal Circuit Court in New York State to administer the relief asked for in its bill, against stockholders who are residents of New York, the same as if the suit had been commenced in Ohio. This, we think, the complainant could not do. By the terms of the Ohio statute, properly construed, the remedy must be pursued in the courts of that State. The case of a plaintiff failing to obtain satisfaction of his judgment by following, in Ohio, the remedies given by the Ohio statute, is not before us, and we need not determine the character of any other remedy, or where it may be enforced.

We therefore answer the first question in the negative. It is unnecessary to answer the second question. The answer will be certified to the Circuit Court of Appeals for the Second Circuit.

So ordered.

PENNSYLVANIA LUMBERMEN'S MUTUAL FIRE INSURANCE COMPANY *v.* MEYER.

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

No. 182. Argued March 14, 15, 1905—Decided April 3, 1905.

In order that a Federal court may obtain jurisdiction over a foreign corporation, the corporation must, among other things, be doing business within the State.

To obtain such jurisdiction in New York, personal service of the summons upon, and a delivery to, the defendant must be made in the manner designated by § 432 of the Code of Civil Procedure of that State, and if the corporation has no property in the State and service cannot be made on the president, treasurer or secretary, and no person has been designated, such service can only be made on a director or person specified in subdivision 3 of that section, in case the cause of action arose within the State.

A fire insurance company which issues its policies upon property in another State, is engaged in its business in that State when its agents are there, under its authority, adjusting the losses covered by its policies.

Where an insurance company, after loss has occurred on property insured by it in another State, fails to make the payment, or to build or repair, as required by the policy involved in this action, it fails to comply with the terms of the contract, and out of that failure the cause of action arises in the State where the loss occurs.

In this case as the company was doing business in New York and the cause of action arose in New York, service under subdivision 3 of § 432 of the Code of Civil Procedure, on a director of the company residing in New York was sufficient to give the Circuit Court of the United States, in New York, jurisdiction of a Pennsylvania corporation.

MEYER, the plaintiff below, recovered judgment in the United States Circuit Court for the Western District of New York, against the corporation defendant, for five thousand and some odd dollars, upon policies of fire insurance issued by it upon certain buildings (and the machinery therein) in the city of Rochester, in the State of New York. The corporation sought to obtain a review of the judgment and to that end sued out a writ of error, and the case was brought before

the Court of Appeals for the Second Circuit, which has certified certain facts upon which it desires the opinion of this court. These facts are as follows:

The action was commenced in the Supreme Court of the State of New York by service of the summons on Samuel H. Beach, at the city of Rome, N. Y., a director of the company, who resided in that city, and on application of the company, appearing specially, the case was removed into the United States Circuit Court for the Western District of New York, because of diverse citizenship of the parties. By motion, on special appearance, to set aside the service, by plea, exception and assignment of error, the question as to whether jurisdiction of the company had been obtained by such service has been properly raised.

The defendant in error is, and at the time of the commencement of this action was, a citizen and resident of the State of New York. The plaintiff in error is a fire insurance corporation organized under the laws of the State of Pennsylvania, and its office is in Philadelphia. Written applications were duly made to it for the issuance of the policies in suit, and were mailed from Rochester, N. Y., to the company at Philadelphia, Pennsylvania. The policies were made out and executed by it at Philadelphia and were sent to the insured at Rochester, N. Y., where he received the same. All transactions between the company and said insured, subsequent to the issuance of said policies and until after the destruction of said property by fire, were by correspondence, in writing, from Philadelphia to him at Rochester, and he writing from Rochester to it in Philadelphia.

Three of the said company's thirteen directors reside in the State of New York, but the only act done by them for it is to attend from time to time the meetings of the board of directors, which are held in the city of Philadelphia, and there to give such advice and take such action in connection with its business as may seem to them proper. They perform no duties and do no acts for the company in the State of New York and never

have. The company has no agents or officers within that State and has not had at any time. It has no office within that State, has never been authorized or licensed by the insurance department thereof to do business therein, and has not taken the steps required by law for that purpose. At the date of the service of the summons, as aforesaid, the said company had and now has about nine hundred thousand dollars ($900,000) outstanding insurance on property within the State of New York, which is something less than one-third of its total risks. The applications therefor were made by mail, addressed to it at Philadelphia, and the policies were executed and issued at that city and sent by mail from there to the insured within the State of New York.

Ever since the plaintiff in error was incorporated it has been engaged in the business of insuring property located in the State of New York and other States against loss by fire, and has sent by mail circulars from Philadelphia into said State soliciting business. In the prosecution of its business and for the purpose of increasing it the company sends its general manager to the different conventions of lumbermen held in the State of New York, for the purpose of urging upon those attending upon such conventions the advantages of insuring with it. It sends its adjusters into the State of New York when a loss by fire occurs there to property insured by it, for the purpose of adjusting the amount of such loss. It originally placed insurance upon the property covered by the policies in question after its manager had pointed out the advantage of insuring in the company, the conversation being had at the city of Rochester, in that State.

Mr. Frank P. Prichard for plaintiff in error:

The corporation was not carrying on business.

In order to give a Federal court jurisdiction in a suit against a corporation foreign to the State within whose borders the suit is brought the corporation must be carrying on business within the State, and be properly brought into court by service

upon an officer or agent who can fairly be said to be its representative agent within the State.

Both conditions must be shown. *St Clair* v. *Cox*, 106 U. S. 350; *Conn. Mut. Life Ins. Co.* v. *Spratley*, 172 U. S. 602.

The corporation in this case was not doing business in New York. Issuing a policy is not doing business. *Allgeyer* v. *Louisiana*, 165 U. S. 578. A citizen within a State may make a contract without the State. *United States* v. *Am. Bell Telephone Co.*, 29 Fed. Rep. 17; *Marine Ins. Co.* v. *Railway Co.*, 41 Fed. Rep. 643; *Sullivan* v. *Sheehan*, 89 Fed. Rep. 247. For New York decisions as to what is doing business within the State see *Hyde* v. *Goodnow*, 3 Comstock, 266; *Huntley* v. *Merrill*, 32 Barbour, 626; *Cummer Lumber Co.* v. *Insurance Co.*, 67 App. Div. N. Y. 151; *S. C.*, 173 N. Y. 633. And see also *Seamans* v. *Knapp Stout Co.*, 89 Wisconsin, 171; *Insurance Company* v. *Huron &c. Co.*, 31 Michigan, 346; *New Orleans* v. *Rhenish Lloyds*, 31 La. Ann. 781; *State* v. *Williams*, 46 La. Ann. 922; *People* v. *Gilbert*, 44 Hun, 522; *French* v. *People*, 6 Col. App. 311; *Carpenter* v. *Westinghouse Air Brake Co.*, 32 Fed. Rep. 434; *Conley* v. *Mathieson Alkali Co.*, 190 U. S. 406.

Even if doing business in New York there was no proper service. N. Y. Code Civil Pro. §§ 432, 1780. There was no designated agent of the company in New York. The cause of action did not arise in New York, and the resident director upon whom service was made had no duties and performed no acts for the corporation. *Pope* v. *Terre Haute Car Co.*, 87 N. Y. 137; *Schmidlaff* v. *La Confiance Ins. Co.*, 71 Georgia, 246; Clark & Marshall on Corp. § 690; *Goldey* v. *Morning News Co.*, 156 U. S. 518; *Conley* v. *Mathieson Alkali Co.*, 190 U. S. 406.

Service upon a person not the representative of the company in the State is not due process of law, and is so "contrary to natural justice and to the principles of international law" that a Federal court is not bound either to take or to recognize jurisdiction of such a suit against the corporation; and further, that even if the court could hold that a corporation could

waive in advance its right to due service of the writ in a suit against it, such waiver ought never to be implied. *St. Clair* v. *Cox*, 106 U. S. 350; *Barrow S. S. Co.* v. *Kane*, 170 U. S. 100. For limitations in this respect upon the power of the States see *Cable* v. *U. S. Life Ins. Co.*, 191 U. S. 288; *Barron* v. *Burnside*, 121 U. S. 186; *Frawley* v. *Casualty Co.*, 124 Fed. Rep. 259.

Mr. Heman W. Morris for defendant in error:

The cause of action arose in New York. The money was to be paid in New York where the creditor resided. *Sanderson* v. *Bower*, 14 East. Rep. 517; *Hale* v. *Patton*, 60 N. Y. 233; *Dockham* v. *Smith*, 113 Massachusetts, 330; Wood on Fire Ins., 2d ed., 322; *Lafayette Ins. Co.* v. *French*, 18 How. 404; *Paul* v. *Virginia*, 75 U. S. 168; *Childs* v. *Harris Mfg. Co.*, 104 N. Y. 477; *Ithaca Fire Dept.* v. *Beecher*, 99 N. Y. 429; *Greiser* v. *Mass. Ben. Assn.*, 39 N. Y. St. R. 1; *Fidelity &c. Assn.* v. *Fieklin*, 21 Atl. Rep. 680; *Burckle* v. *Eckart*, 3 N. Y. 132.

As to whether service of process issued by a state court will be deemed sufficient under the laws of that State, the decisions of the highest courts of the State on that point will be regarded as controlling upon the Federal courts. *Ex parte Schollenberger*, 96 U. S. 369; *N. W. Mut. Ins. Co.* v. *Woodworth*, 111 U. S. 146; *Amy* v. *Watertown*, 130 U. S. 301.

The plaintiff in error was doing business in the State of New York at the time the cause of action accrued, and also at the time the action was commenced. Section 1780, Code Civ. Pro.; *Conn. Mut. Ins. Co.* v. *Spratley*, 172 U. S. 602; *Railroad Co.* v. *Koontz*, 104 U. S. 10. As to what are the duties of an appraiser see *Mayor* v. *Hamilton Ins. Co.*, 39 N. Y. 45. To enable a foreign corporation to carry on business it is not necessary to have local agents. *B. & L. Association* v. *Denson*, 189 U. S. 408; *New Haven &c. Co.* v. *Downington Mfg. Co.*, 130 Fed. Rep. 605; *Firemen's Ins. Co. Case*, 155 Illinois, 204; *Barrow S. S. Co.* v. *Kane*, 170 U. S. 100.

The essential conditions having been shown to exist, the state court obtained jurisdiction of the plaintiff in error by

service of process on one of its directors within the State. *St. Clair* v. *Cox*, 106 U. S. 353; Code Civ. Pro. N. Y. §§ 431, 432; *Hiller* v. *Railroad Co.*, 70 N. Y. 223; *Childs* v. *Harris Mfg. Co.*, 104 N. Y. 477; *Insurance Co.* v. *Woodworth*, 111 U. S. 146; *Amy* v. *Watertown*, 130 U. S. 301.

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

Upon the facts thus certified the Circuit Court of Appeals asks the question: "Had the Circuit Court jurisdiction of the plaintiff in error?"

In addition to the facts contained in the foregoing certificate the counsel for the respective parties stipulated upon the argument in this case before this court that a copy of one of the policies on which suit was brought in this case was correctly set out in the printed record in the Circuit Court of Appeals, and that this court might consider and decide the case with the same effect as if in the statement of facts accompanying the question certified by the Circuit Court of Appeals that court had found and certified the additional fact that the record in the Circuit Court of Appeals contained a true copy of one of the policies, and that the others sued upon were in the same form and language as the one set out in that record.

The policies in suit were issued upon a two-story frame sawmill building, and additions, and also upon engines and boilers and other machinery placed in that building, situated on Monroe avenue in the city of Rochester, State of New York. The policies provide that the company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and that such loss or damage is to be ascertained or estimated according to such actual cash value, with proper deduction for depreciation, however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; the assessment or estimate is to be made by the in-

sured and the company; if they differ as to the amount of loss, the same is to be ascertained by two competent and disinterested appraisers, the insured and the company each selecting one, and the two so chosen are to select a competent and disinterested umpire; the appraisers together are to estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, they are to submit their differences to the umpire; and the award in writing of any two shall determine the amount of the loss. After the amount of the loss or damage has been thus determined, the sum for which the company is liable is payable in sixty days. It is optional with the company to repair, rebuild or replace the property lost or damaged, with other of like kind and quality, within a reasonable time as provided for in the policy.

In order that a Federal court may obtain jurisdiction over a foreign corporation the corporation must, among other things, be doing business within the State. *St. Clair* v. *Cox*, 106 U. S. 350; *Goldey* v. *Morning News*, 156 U. S. 518; *Barrow Steamship Company* v. *Kane*, 170 U. S. 100; *Connecticut Mutual Life Insurance Company* v. *Spratley*, 172 U. S. 602.

To obtain jurisdiction of a foreign corporation under the Code of New York, personal service of the summons upon and a delivery to the defendant must be made in the manner designated by section 432 of the Code of Civil Procedure of that State. Subdivision (1) of that section provides for the service of the summons on and its delivery to the president, treasurer or secretary; subdivision (2) provides for like service upon and delivery to a person designated for the purpose by the corporation. The service was made in this case under subdivision (3) of that section, which reads as follows:

3. "If such a designation is not in force, or if neither the person designated nor an officer specified in subdivision first of this section can be found with due diligence, and the corporation has property within the State, or the cause of action arose therein; to the cashier, a director, or a managing agent of the corporation, within the State."

It does not appear that the company had any property within the State, and therefore in order to come within subdivision (3) of the section the cause of action must have arisen therein and the summons must have been served within the State upon one of the officers named in that subdivision, viz., the cashier, a director or a managing agent of the corporation.

(1) Was the company doing business in New York State? Nearly one-third of the amount of its total fire risks was in that State when these policies were issued and when the loss occurred. If it be conceded that the contract was made in Philadelphia, it does not follow that all its business was therefore done in the State of Pennsylvania. The contract was an insurance policy issued upon real estate and machinery in a building situated in the city of Rochester, in New York. The contract was to pay the amount of loss, which might be sustained by fire, as specified in the policy. The policy provides for the manner of determining the amount of this loss, either by agreement between the company and the owner, or, in case of disagreement, then by the appraisers as already stated. The provisions of the contract clearly contemplate the presence of an agent of the company at the place of the loss after it has occurred, for the purpose of determining its extent and adjusting, if possible, the amount payable by the company to the owner. If no such adjustment can be made the policy provides in terms for the appointment of appraisers, one by the company and one by the owner, and that they disagreeing, an umpire shall be appointed, and the agreement of any two shall be binding. After that, the loss is payable to the owner by the company within sixty days. As the policy insures against loss, it of course contemplates that such loss may occur; and it also contemplates that the company shall send to the place where the loss occurred, that is, to New York, its agent, for the purpose stated. When, under the terms of the contract, the company sends its agent into the State where the property was insured and where the loss

occurred, for the purpose of adjustment, it would seem plain that it was then doing the business contemplated by its contract, within the State. A fire insurance company which issues its policies upon real estate and personal property situated in another State is as much engaged in its business when its agents are there under its authority adjusting the losses covered by its policies as it is when engaged in making contracts to take such risks. If not doing business, in such case, what is it doing? It is doing the act provided for in its contract, at the very place where, in case a loss occurred, the company contemplated the act should be done; and it does it in furtherance of the contract and in order to carry out its provisions, and it could not properly be carried out without this act being done; and the contract itself is the very kind of contract which constituted the legal business of the company, and for the purpose of doing which it was incorporated. This is not a sporadic case, nor the contracts in suit the only ones of their kind issued upon property within the State of New York. Many contracts of the nature of the one in suit were entered into by the company covering property within the State. We think it would be somewhat difficult for the defendant to describe what it was doing in New York, if it was not doing business therein, when sending its agents into that State to perform the various acts of adjustment provided for by its contracts and made necessary to carry them out.

We have no difficulty in concluding that the defendant was doing business in the State of New York during all the time of the existence of these policies.

(2) Did the cause of action arise within that State? Although the contract may have been a Pennsylvania contract, yet it does not follow that all its provisions were to be carried out in that State. The policy of insurance was, as we have said, upon real estate within the State of New York, and upon machinery contained in the buildings insured. After the defendant and the owner had either agreed upon the amount of loss, or the same had been estimated and determined upon by

the appraisers, as provided for in the policy, the defendant, by the terms of that instrument, promised to pay to the owner the amount thus arrived at, within sixty days. The policy does not state in so many words where such payment is to be made, but it is a general rule that, in the absence of any such provision, or of any language from which a different inference may be inferred, the right of the creditor to demand payment at his own domicile exists, and it is the duty of the debtor to pay his debt to the creditor in that way. It is stated in the opinion of this court, by Mr. Justice Field, in *State Tax on Foreign-held Bonds*, 15 Wall. 300, 320: "All the property there can be in the nature of things in debts of corporations, belongs to the creditors, to whom they are payable, and follows their domicile, wherever that may be. Their debts can have no locality separate from the parties to whom they are due. This principle might be stated in many different ways, and supported by citations from numerous adjudications, but no number of authorities, and no forms of expression could add anything to its obvious truth, which is recognized upon its simple statement." It is stated in 2 Parsons on Contracts, 8th edition, 702, as follows: "All debts are payable everywhere, unless there be some special limitation or provision in respect to the payments; the rule being that debts as such have no "*locus* or *situs*, but accompany the creditor everywhere, and authorize a demand upon the debtor everywhere." See also *Chicago, Rock Island &c. Railway* v. *Sturm*, 174 U. S. 710. In *Hale* v. *Patton*, 60 N. Y. 233, 236, Andrews, J., in delivering the opinion of the court, said: "In general a debtor, who is indebted on a money obligation, is bound, if no place of payment is specified in the contract, to seek the creditor and make payment to him personally. But this rule is subject to the exception that if the creditor is out of the State when payment is to be made, the debtor is not obliged to follow him, but readiness to pay within the State in that case will be as effectual as actual payment to save a forfeiture. (Co. Litt. 304, 2; *Smith* v. *Smith*, 25 Wend. 405; *Allshouse* v. *Ramsey*, 6 Whart.

331; *Southworth* v. *Smith*, 7 Cush. 391; *Tasker* v. *Bartlett*, 5 Cush. 359.)" And the same views in *Dockham* v. *Smith*, 113 Massachusetts, 320. The exception as to the creditor being out of the State, spoken of by Judge Andrews, refers to the subsequent absence of the creditor from the State, which was his domicile when the contract was there made.

In some other of the cases above cited, it is said the debtor need not follow the creditor out of the State where the contract was made in order to pay or make tender of payment of the debt. That depends upon the contract and what inference of the place of payment may be drawn from its contents when it does not state in so many words where payment is to be made. Where the debtor is a fire insurance company and makes such a contract as the policies in suit, and it is engaged in doing business by insuring property outside the State of its creation, and makes provision such as is made in this case for payment or for rebuilding or repairing, we think the place of payment in contemplation of the parties, and to be inferred from the facts set forth, is at the domicile of the creditor in the State where the property insured was situated.

Instead of making payment for the loss sustained by fire, the defendant had the option of repairing or rebuilding. If it availed itself of that right, of course it would have to rebuild at the place where the loss occurred. So far as appears from the statement of facts, the defendant has failed to make payment, and has also failed to avail itself of its option to rebuild. The payment, we think, was to be made at the same place where the rebuilding was to be done, in case the defendant availed itself of its right to rebuild, that is, within the State of New York, where the loss occurred. Failing to make payment, or failing to build or repair, it failed to comply with the terms of its contract, and out of that failure the cause of action arose in the State of New York.

(3) We think the service of the summons within the State of New York upon a director residing in that State was, under the facts of this case, a good service. As is seen, the company

was doing business within the State and the cause of action arose therein, and in such a case service upon a director residing in the State was sufficient. There is nothing in the cases of *Conley* v. *Mathieson Alkali Works*, 190 U. S. 406, and *Geer* v. *Mathieson Alkali Works*, 190 U. S. 428, to the contrary. The first of the above cited cases seems rather to assume that if the company were doing business in the State, the service on a resident director would have been good. Although it is stated in the case at bar that the duties of a director of this defendant were to be performed at Philadelphia, where the board of directors met, yet that fact is not material in this case. A foreign fire insurance corporation doing business within another State, and voluntarily electing a part of its directors from among those who are residents of such State, may be said from that very fact to add to the confidence of possible insurers with the company in that State, and in that way to secure more business therein than would otherwise be the case. Although doing no particular act in the State for this company, such directors are, nevertheless, members of and policyholders therein, and are a part of the governing body of the company, and are by their position so far representative thereof as, in our judgment, to render service of process upon them in the State of their residence, when the company is doing business therein, a good service upon the company itself. Service upon them it may be assumed would certainly result in notice to the company itself, which is at least one of the reasons for holding a service on an agent good.

It would be most unwise to hold, upon the facts herein stated, that a person who suffered loss under a policy of insurance could only obtain redress, when refused by the company, in the courts of the State where the company was incorporated. It is not unreasonable for the State, under such facts, to endeavor to secure to its citizens a remedy in the domestic forum upon this very important class of contracts. *Lafayette Insurance Co.* v. *French*, 18 How. 404, 407. And we have no doubt that if it were generally understood by

policyholders in States other than the State where the company was created that resort for the enforcement of their rights must in all cases be had to the courts of the State of the creation of the company, even though the company did business in such other States, the number of policyholders in the other States would seriously fall off.

The service of the summons was, in our judgment, a good service on the company, and we therefore answer the question of the Circuit Court of Appeals in the affirmative; and it is

So ordered.

MR. JUSTICE HARLAN took no part in the decision of this case.

LINCOLN *v.* UNITED STATES.

WARNER, BARNES AND COMPANY, LIMITED, *v.* UNITED STATES.

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

APPEAL FROM THE COURT OF CLAIMS.

Nos. 149, 466. Argued March 3, 1905.—Decided April 3, 1905.

The order of the President of July 12, 1898, directing the levying of duties on goods landed in the Philippine Islands, was a regulation for and during the then existing war with Spain, referred to as definitely as if it had been named, and was not a power for any other military occasion. The right to levy duties thereunder on goods brought from the United States ceased on the termination of the war by the exchange of ratifications of the treaty of peace with Spain on April 11, 1899. *Dooley* v. *United States*, 182 U. S. 222.

After the title to the Philippine Islands passed to the United States by the exchange of ratifications of the treaty of peace, there was nothing in the Philippine insurrection of sufficient gravity to give to the islands the character of foreign countries within the meaning of a tariff act. *Fourteen Diamond Rings*, 183 U. S. 176.

Under the act of Congress of July 1, 1902, 32 Stat. 691, ratifying the action of the President and the authorities of the government of the Philippine

Islands, the ratification is confined to those acts which were in accordance with the provisions of the order of July 12, 1898, and not to the collection of duties after April 11, 1899, which were within such provisions.

THE facts are stated in the opinion.

Mr. Henry M. Ward, Mr. Frederic R. Coudert and *Mr. Paul Fuller* for plaintiffs in error in No. 149 and appellant in No. 466:

The facts stated in the answer of the United States which was demurred to are not admitted by the demurrer and the facts found by the court are not binding, where such facts are contrary to facts publicly known, of which this court takes judicial notice. *Jones* v. *United States,* 137 U. S. 215; *The Three Friends,* 166 U. S. 63; *Underhill* v. *Hernandez,* 168 U. S. 253.

After the ratification of the treaty of cession the Philippines ceased to be hostile territory. The possession and sovereignty of the United States was complete. *DeLima* v. *Bidwell,* 180 U. S. 1; *Dooley* v. *United States,* 182 U. S. 222; *Fourteen Diamond Rings,* 183 U. S. 176.

The power of the President as Commander in Chief to levy duties on goods coming into the Philippines ceased with the ratification of the treaty.

The language of the President's order of July 12, 1898, did not authorize the collection of duties in the Insular possessions after the ratification of the treaty. *Dooley* v. *United States,* 182 U. S. 235.

The situation of affairs in the Philippines is not assimilated to the condition of the insurrectionary States during the War of the Rebellion. The territory of those States was held in possession by an organized hostile and belligerent power, while the insurrection in Manila never took on the proportions of a territorial war and the insurgents never became formidable enough to be recognized as belligerents. *The Prize Cases,* 2 Black, 673; *Coleman* v. *Tennessee,* 97 U. S. 517; Birkhimer on Military Government & Martial Law, 53; *United States* v. *Rice,* 4 Wheat. 246, 254; *United States* v. *Heywood,* 26 Fed. Cas. No. 15,336, p. 246.

There is a clear distinction between the suppression of a political revolt by force of arms—which was the situation in the Philippines, and hostilities with a *de facto* belligerent power, recognized as such,—which was the situation during the Rebellion. *The Three Friends,* 166 U. S. 1.

The operation of the treaty of peace was not suspended or superseded by military law on account of the insurrection in the Philippines. The sovereignty of the United States Government in the Islands was established and the treaty was effective. The Government was simply preserving order and suppressing insurrection in its own territory. Proclamation of Gen. McArthur, Dec. 20, 1900; War Dept. Report, June 30, 1901; President's Order, December, 1899, pp. 44–52; Report of Sec. of War, 1899, pp. 6–12.

The act of Congress, July 1, 1902, 32 Stat. 692, is not a ratification of the collection of duties under military order after ratification of the treaty. The order has been so construed in *Dooley* v. *United States,* 182 U. S. 236.

A reënactment by Congress of a former statute already judicially construed is presumed to conform to and adopt the judicial construction of the former act. *Dorr* v. *United States,* 195 U. S. 138. Any ratification of Congress is inoperative to divest claimants of their vested right to recover moneys illegally collected of them. *De Lima* v. *Bidwell,* 182 U. S. 199.

By leave of the court *Mr. Hilary A. Herbert* and *Mr. Benjamin Micou* filed a brief on behalf of certain claimants in suits pending in the Court of Claims and whose interests are similar to those of appellants in No. 466.

The *Solicitor General* for the United States:

The situation in the Philippines was not ordinary revolt or mere insurrection; it was settled and serious rebellion. It was civil war so far as extent and duration are concerned. For the distinctions see section 10, Lieber's Instructions for the Government of Armies in the Field; *The Prize Cases,* 2 Black,

635, 666. It is of no consequence that at one time the warfare seemed to be dying out. It was soon renewed, and after defeat in many open engagements, the *insurrectos* systematized guerilla warfare. Although reports and messages of the Executive during the war show encouragement and satisfaction at the progress of our arms and the gradual extension of civil government, it is certain that the Executive, and Congress as well, before the later authorizing and ratifying statutes, determined that war existed. A state of war prevailed and the exercise of the war power was necessary.

The power of an executive government in the field is absolute. It may totally forbid all commercial intercourse, or restrict it. It may exact military contributions as indemnity and to defray current expenses. Such charges are devoted to military needs and civil administration of the country. The Executive may exact conditions for trading with hostile territory. Importation under such circumstances is not a right but a privilege to be exercised solely upon the conditions imposed. These doctrines apply equally to foreign and civil wars. In a domestic war the United States exercises belligerent as well as sovereign rights. It is for the commander who is dealing with the actual, critical situation to determine what the necessities demand. If the Executive, when engaged in war, determines a certain measure to be necessary, judicial conjectures as to reasons and motives are not material. *The Prize Cases*, 2 Black, 635; *Hamilton* v. *Dillin*, 21 Wall. 73; *Lamar* v. *Browne*, 92 U. S. 187; *New Orleans* v. *Steamship Co.*, 20 Wall. 393; *Mrs. Alexander's Cotton*, 2 Wall. 404; 1 Halleck Int. Law, 527; 2 Halleck Int. Law, 445, 449; *Matthews* v. *McStea*, 91 U. S. 7; 1 Kent's Com. 66; *The Reform*, 3 Wall. 617; *United States* v. *Grossmayer*, 9 Wall. 72; *Rose* v. *Himely*, 4 Cranch. 241.

The Filipino insurgents proclaimed their independence and proclaimed war formally. They attacked us at Manila, and wherever they were throughout the region of which Manila is the center there were "lines of bayonets." Manila was our

military as well as civil headquarters. Beneath its ultimate firm control and apparent peace, sedition, plotting and the active propagandism of revolt were going on, with all sorts of secret correspondences with the enemy. Such a place in such territory, although domestic and occupied by us, is none the less hostile so as to justify war measures. *Hamilton* v. *Dillin*, and *Lamar* v. *Browne, ut sup.* The logical result of the opposite view is that we could not call a particular place in belligerent territory hostile unless it were actually occupied by the enemy. If we did not hold it at all, of course we could not levy duties there. The claimants fail to realize the distinction between captured territory and hostile territory.

The *Dooley case*, 182 U. S. 222, which suggests that a military commander occupying a southern port during the Civil War could not impose duties upon merchandise arriving from northern ports, also shows that the power would extend as far as the necessities. There were obvious reasons why they did not extend that far during our Civil War. Congress, as well as the Executive, was in immediate touch with all the conditions, was exercising its power and legislating constantly for the prosecution of the war, and did not need to commit the conduct of operations wholly to the Executive's instant knowledge and power of prompt action on the spot. But if at New Orleans, for example (which our forces occupied and administered municipally from 1862 to 1865), there had been active correspondence between the port and the city and the Confederate forces outside, with importing and trading and banking for their benefit among native and foreign sympathizers, could not an embargo have been placed on all commerce, and, *a fortiori*, could not the less rigorous thing have been done, viz., the laying of a tariff upon all merchandise arriving by sea from loyal States as well as abroad? In that situation the President and Congress did not deem such action necessary. But here the case was otherwise, and the tariff and port regulations were considered by the Executive an essential part of the military necessities. In this way inter-

course was controlled, shipments were scrutinized and consignees known and all sorts of correspondences with the hostile forces were traced. The war power should not be curtailed because it avails of ordinary duties; because its strength gives port control and permits the commander to open a port to the commerce of the world. It is no answer to say that everything done was valid except the collection of duties on merchandise from the United States. Revenue and strategical demands alike may have designated those duties as the most important. That is for the commander to determine. If the tariff on American imports must fall in such case, all might go. We were under obligation to Spain to treat her ships and goods like our own, and other nations would then certainly have invoked the most favored nation clause.

Hamilton v. *Dillin, supra,* determined that similar charges were valid on three grounds, viz.: that because there was war, the Executive alone possessed authority; that Congress possessed power to authorize in advance, and power to ratify afterwards. That case also determined that under such circumstances payments are voluntary; there is no compulsion to trade. The notion of valid rights of recovery which vested before the ratifying act of Congress was passed cannot be sustained. If there were doubt as to the competence of the war power acting alone, the subsequent approval and ratification by Congress in the Spooner Amendment of March 2, 1901, and the act of July 1, 1902, must be viewed as fully legalizing the action of the Executive. *The Prize Cases* and *Hamilton* v. *Dillin, supra.* Clearly, it is not a case of an unconstitutional delegation of legislative authority. The maxim is that every subsequent ratification has a retroactive effect and is equivalent to a prior mandate. The test always is, does the legislative body which ratifies possess authority to do the act or confer power to do it in the first instance? *Marsh* v. *Fulton Co.,* 10 Wall. 676; *Norton* v. *Shelby Co.,* 118 U. S. 451; *Grenada Co.* v. *Brogden,* 112 U. S. 261; *Brown* v. *Mayor,* 63 N. Y. 239; *Mattingly* v. *District of Columbia,* 97 U. S. 687; *Thomson* v. *Lee Co.,* 3 Wall.

327; *Gelpcke* v. *Dubuque*, 1 Wall. 175; *Fleckner* v. *United States Bank*, 8 Wheat. 338. Here the question is: Did Congress possess authority after the ratification of the treaty to impose customs duties on goods entering from the United States? The answer must be in the affirmative. *Downes* v. *Bidwell*, 182 U. S. 244; "*The Second Dooley Case*," 183 U. S. 151.

The intervening grant of power by Congress and the final ratification authorized and approved the President's acts within the rule. Congress, where it might have accomplished the result by its legislation, can ratify by legislation what was done without legislation. There can be no doubt that on April 11, 1899, Congress might have imposed and continued the military tariff as it did by the act of March 8, 1902. Such legislation by Congress constitutionally authorizes the President, not to legislate, but to continue to act. The ultimate act of ratification legitimately related back and affected the situation in precisely the same way. The legislative approval turned the valid power of the Executive to legislate up to the date of ratification into the equally valid power of the Executive to continue to execute thereafter in accordance with that legislation. By the enactments of March, 1901, and March and July, 1902, Congress accomplished as of the earlier date what it might have accomplished on the earlier date. It acted *nunc pro tunc* and ratified with the effect of a previous authority or previous act of its own. The stress of the Civil War brought a plain determination of this point without dialectics, as follows: "Whatever view may be taken as to the precise boundary between the legislative and executive powers in reference to the question under consideration, there is no doubt that the concurrence of both affords ample foundation for any regulations on the subject." *Hamilton* v. *Dillin*, *ut sup.*, 88.

The propositions on which the Government stands are as follows: When there is an imperative necessity for the exercise of the war power, it must itself determine reasons, degree of

necessity and what particular compulsions will meet the requirements. The courts will not usurp that function.

The *De Lima case* simply determined that Porto Rico was domestic territory. The war power was not involved.

The first *Dooley case* determined that after ratification the military tariff was invalid because we had title and peaceful possession and there was no military necessity. The war power was not involved there, but the door was left open in case it were.

The *Diamond Rings case* decided that the Philippines were domestic territory, notwithstanding the insurrection, in title and in possession. Our own tariff was involved, but the war power was not involved.

Here the Philippine military tariff is presented, war was flagrant, military necessities existed, the Executive determined that this provision was demanded and that determination is within the scope of its constitutional authority and will not be reviewed by the courts. The war power was involved.

The *Dooley case* is a true correlative of the *De Lima case*, but the present cases are not the correlative of the *Diamond Rings case*, and there is the fallacy in the claimant's logic. If what was done when we were at war and the necessities were so vital is invalid, and the approval of Congress has no effect, then we are impotent as a Nation. The constitutional authorities are acting together and in harmony, yet before rebellion may be suppressed and anarchy averted, all details of revenue and administration must be referred back to Congress on the other side of the globe, in session only a portion of the time, formal war must be declared, and every step must be prescribed and authorized by a statute in advance. The Constitution was never intended to leave the National power in war and other grave emergencies so cramped and bound, and we do not think it can be construed to have that result. The solemn inquiry before the court is this: when the Nation is struggling with war, is surrounded with difficulties and perils, will the courts assume to say that the combined action

of the Executive and legislature went beyond the necessities, although there was no tyrannical aggression and no violation of sacred guaranties? This question, of the scope of the war power, its competence and independence, once involved the very existence of the nation, and may do so again.

MR. JUSTICE HOLMES delivered the opinion of the court.

These are suits to recover duties exacted from the plaintiffs in error and appellants upon merchandise shipped by them from New York to Manila, and landed at the latter port between April 11, 1899, the date when the ratifications of the treaty with Spain were exchanged and October 25, 1901. The duties were levied under an order of the President dated July 12, 1898. The case of Peabody & Co. was decided on demurrer to the answer of the United States, which set up that during the time mentioned there existed an armed insurrection in the Philippine Islands of such size as to call for military operations by the United States; that, although Manila was in our possession, it was held only by force of arms as a part of hostile territory, and that the President's order was a lawful exercise of the war power of the United States. The District Court overruled the demurrer and dismissed the suit. (Not reported.) The case of Warner, Barnes & Co. was decided on a finding of facts by the Court of Claims, and that court also dismissed the petition. (C. Cl. Not yet reported.) These facts mainly concern the magnitude of the insurrection and need not be stated.

It will be observed that the President's order relied upon was an order issued during the war with Spain, nine months before the treaty of peace was made. It was a measure taken with reference to that war alone, and not with reference to the insurrection of the native inhabitants of the Philippines, which did not happen until much later. Aguinaldo declared hostilities on February 4, 1899. The natural view would be that the order expired by its own terms when the war with Spain

was at an end. The order directs that "upon the occupation of any forts and places in the Philippine Islands by the forces of the United States," the duties shall be levied and collected "as a military contribution." Of course, this was not a power in blank for any military occasion which might turn up in the future. It was a regulation for and during an existing war, referred to as definitely as if it had been named. See *Dooley* v. *United States*, 182 U. S. 222, 234, 235.

However this may be, we are of opinion that the cases before us are governed by the decision in *Fourteen Diamond Rings*, 183 U. S. 176, 180, 181. In that case it was decided that after the title passed to the United States there was nothing in the Philippine insurrection of sufficient gravity to give to the Islands the character of foreign countries within the meaning of a tariff act. That means that there was no such "firm possession" by an organized hostile power as made Castine a foreign port in the war of 1812. *United States* v. *Rice*, 4 Wheat. 246, 254. Whatever sway the Philippine government may have had in Luzon we suppose that probably at any time the United States could have sent a column of a few thousand men to any point on the island, as was stated by the Secretary of War in his report in 1899, and as the United States was willing that the Court of Claims should find. In the language of the above mentioned decision: "If those in insurrection against Spain continued in insurrection against the United States, the legal title and possession of the latter remained unaffected."

Apart from the question of the duration of the President's order, it plainly was an order intended to deal with imports from foreign countries only and Philippine ports not in the actual military control of the United States. But even had it been intended to have a wider scope we do not perceive any ground on which it could have been extended to imports from the United States to Manila, a port which was continuously in the possession as well as ownership of the United States from the time of the treaty with Spain. Manila was not like Nashville during the Civil War, a part of a State recognized as

belligerent and as having impressed a hostile status upon its entire territory. *Hamilton* v. *Dillin*, 21 Wall. 73, 94–96. The fact that there was an insurrection of natives not recognized as belligerents in another part of the island, or even just outside its walls, did not give the President power to impose duties on imports from a country no longer foreign. See *Dooley* v. *United States*, 182 U. S. 222, 234.

We see no sufficient ground for saying that the collection of these duties has been ratified by Congress. The only act needing mention is that of July 1, 1902, c. 1369, § 2, 32 Stat. 691, 692. That act ratifies the action of the President "heretofore taken by virtue of the authority vested in him as Commander in Chief of the Army and Navy, as set forth in his order of July twelfth, 1898" etc., together with the subsequent amendments to that order. "And the actions of the authorities of the government of the Philippine Islands, taken in accordance with the provisions of said order and subsequent amendments, are hereby approved." Without considering how far the first part of the section extends, the approval of the action of the authorities is confined to those which were in accordance with the provision of the order, which, as we already have intimated, the collection of these duties was not. See further *De Lima* v. *Bidwell*, 182 U. S. 1, 199, 200.

Judgments reversed.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY *v.* BARBER ASPHALT PAVING COMPANY.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 170. Argued March 7, 8, 1905.—Decided April 3, 1905.

In determining whether an improvement does, or does not, benefit property within the assessment district, the land should be considered simply in its general relations and apart from its particular use at the time; and an assessment, otherwise legal, for grading, paving and curbing an adjoining street is not void under the Fourteenth Amendment because the lot is not benefited by the improvement owing to its present particular use.

A system of delusive exactness should not be extracted from the very general language of the Fourteenth Amendment in order to destroy methods of taxation which were well known when the Amendment was adopted, and which no one then supposed would be disturbed.

THE facts are stated in the opinion.

Mr. Helm Bruce, with whom *Mr. James P. Helm* and *Mr. T. K. Helm* were on the brief, for plaintiff in error:

The only constitutional basis for taxation by special assessment upon selected property, as distinguished from general taxation, is special benefits to the property assessed from the improvement. 2 Dillon Mun. Corp. § 761; *Barnes* v. *Dyer,* 56 Vermont, 469; *McCormack* v. *Patchin,* 56 Missouri, 33; *State* v. *Mayor,* 37 N. J. Law, 415; *Hammett* v. *Philadelphia,* 65 Pa. St. 146, 153; *King* v. *Portland,* 38 Oregon, 402; *S. C.,* 184 U. S. 61, 69; *Preston* v. *Roberts,* 12 Bush, 587; *Norwood* v. *Baker,* 172 U. S. 269; *French* v. *Asphalt Co.,* 181 U. S. 324, 345.

Where it is patent that the plan or method adopted results in imposing a burden in substantial excess of the benefits or disproportionate within the district as between owners the assessment will not be upheld. *King* v. *Portland, supra; Voight* v. *Detroit,* 184 U. S. 115; *Schaefer* v. *Werling,* 188 U. S. 516; *Adams* v. *Shelbyville,* 154 Indiana, 467; *Lathrop* v. *Racine,* 119

Wisconsin, 461; *White* v. *Tacoma*, 109 Fed. Rep. 32; *S. C.*, 53 Cent. Law. Jour. 281; *Sears* v. *Boston*, 173 Massachusetts, 71; *Hutchison* v. *Storrie*, 92 Texas, 685; *Schroder* v. *Overman*, 61 Ohio St. 1; *Kersten* v. *Milwaukee*, 106 Wisconsin, 200; *Smith* v. *Worcester*, 182 Massachusetts, 232.

The property involved is peculiar; it belongs to a class by itself, it is a railway right of way and is not, in fact, cannot be benefited and hence should not be assessed. *Alleghany* v. *West Penna. R. R. Co.*, 138 Pa. St. 375; *C., M. & St. P. Ry. Co.* v. *Milwaukee*, 89 Wisconsin, 506; *Detroit &c. Ry. Co.* v. *Grand Rapids*, 106 Michigan, 13; *N. J. R. R. Co.* v. *Elizabeth*, 37 N. J. Law, 330; *Chicago &c. Ry. Co.* v. *Ottumwa*, 112 Iowa, 300; *N. Y. &c. Ry. Co.* v. *New Haven*, 42 Connecticut, 279; *Northern Indiana Ry. Co.* v. *Connelly*, 10 Ohio St. 159; *Peru &c. Ry. Co.* v. *Hanna*, 68 Indiana, 567; and *Ill. Cent. R. R. Co.* v. *Decatur*, 147 U. S. 190, distinguished.

Mr. William Furlong and *Mr. A. E. Richards*, with whom *Mr. Benjamin F. Washer* was on the brief, for defendants in error:

French v. *Asphalt Co.*, 181 U. S. 324, put at rest all discussion as to the scope of *Norwood* v. *Baker*, 172 U. S. 269, and affirmed the validity of those systems of taxation in which the legislature, determining finally and conclusively the question of benefits, prescribes the tax territory to meet the cost of local improvements. See also cases in 181 U. S. following *French* v. *Asphalt Co.*, and *King* v. *Portland*, 184 U. S. 61; *Chadwick* v. *Kelley*, 187 U. S. 540; *Seattle* v. *Kelleher*, 195 U. S. 351.

This court has sustained the Kentucky method of assessment in *Walston* v. *Nevin*, 128 U. S. 578. There is nothing in the fact that the lot involved in this case is a railroad right of way which differentiates it from other property in the district. It is property. *Keener* v. *Union Pacific*, 31 Fed. Rep. 128; *Ludlow* v. *Railroad Co.*, 78 Kentucky, 357, and cases cited; *Cicero* v. *Chicago R. R. Co.*, 176 Illinois, 501; *Railroad Co.* v. *Paving Co.*, 54 N. E. Rep. 1076; *Railroad Co.* v. *Passaic*, 54

N. J. Law, 341; Smith on Modern Law of Mun. Corp. § 1239; *Ill. Cent. R. R. Co.* v. *Decatur*, 147 U. S. 190.

Mr. Justice Holmes delivered the opinion of the court.

This is a proceeding under the Kentucky Statutes, § 2834, to enforce a lien upon a lot adjoining a part of Frankfort avenue, in Louisville, for grading, curbing and paving with asphalt the carriageway of that part of the avenue. The defendant, the plaintiff in error, pleaded that its only interest in the lot was a right of way for its main roadbed, and that neither the right of way nor the lot would or could get any benefit from the improvement, but on the contrary rather would be hurt by the increase of travel close to the defendant's tracks. On this ground it set up that any special assessment would deny to it the equal protection of the laws, contrary to the Fourteenth Amendment of the Constitution of the United States. It did not object to the absence of the parties having any reversionary interest, but defended against any special assessment on the lot. The answer was demurred to, judgment was rendered for the plaintiff, and this judgment was affirmed by the Kentucky Court of Appeals. 76 S. W. Rep. 1097. A writ of error was taken out, and the case was brought to this court. It will be noticed that the case concerns only grading, curbing and paving, and what we shall have to say is confined to a case of that sort.

The State of Kentucky created this lien by a statute entitled "An act for the government of cities of the first class." Louisville is the only city of the first class at present in Kentucky, and the general principles of the act are taken verbatim from the part of the charter of Louisville which was considered and upheld by this court in *Walston* v. *Nevin*, 128 U. S. 578. But we take the statute as a general prospective law and not as a legislative adjudication concerning a particular place and a particular plan such as may have existed in *Spencer* v. *Merchant*, 125 U. S. 345, and as was thought to exist in *Smith*

v. *Worcester*, 182 Massachusetts, 232, referred to at the argument.

The law provides in the case of original construction, such as this improvement was, that it shall be made at the exclusive cost of the adjoining owners, to be equally apportioned according to the number of feet owned by them. In the case of a square or subdivision of land bounded by principal streets, which the land including the defendant's lot was held to be, see *Cooper* v. *Nevin*, 90 Kentucky, 85; *Nevin* v. *Roach*, 86 Kentucky, 492, 499, the land is assessed half way back from the improvement to the next street. Acts of 1898, c. 48. Ky. Stat. § 2833. A lien is imposed upon the land and "the general council, or the courts in which suits may be pending, shall make all corrections, rules, and orders to do justice to all parties concerned." Section 2834. The principle of this mode of taxation seems to have been familiar in Kentucky for the better part of a hundred years. *Lexington* v. *McQuillan*, 9 Dana, 513.

The argument for the plaintiff in error oscillates somewhat between the objections to the statute and the more specific grounds for contending that it cannot be applied constitutionally to the present case. So far as the former are concerned they are disposed of by the decisions of this court. There is a look of logic when it is said that special assessments are founded on special benefits and that a law which makes it possible to assess beyond the amount of the special benefit attempts to rise above its source. But that mode of argument assumes an exactness in the premises which does not exist. The foundation of this familiar form of taxation is a question of theory. The amount of benefit which an improvement will confer upon particular land, indeed whether it is a benefit at all, is a matter of forecast and estimate. In its general aspects at least it is peculiarly a thing to be decided by those who make the law. The result of the supposed constitutional principle is simply to shift the burden to a somewhat large taxing district, the municipality, and to disguise rather than to answer the theoretic

doubt. It is dangerous to tie down legislatures too closely by judicial constructions not necessarily arising from the words of the Constitution. Particularly, as was intimated in *Spencer* v. *Merchant*, 125 U. S. 345, it is important for this court to avoid extracting from the very general language of the Fourteenth Amendment a system of delusive exactness in order to destroy methods of taxation which were well known when that Amendment was adopted and which it is safe to say that no one then supposed would be disturbed. It now is established beyond permissible controversy that laws like the one before us are not contrary to the Constitution of the United States. *Walston* v. *Nevin*, 128 U. S. 578; *French* v. *Barber Asphalt Paving Co.*, 181 U. S. 324; *Webster* v. *Fargo*, 181 U. S. 394; *Cass Farm Co.* v. *Detroit*, 181 U. S. 396; *Detroit* v. *Parker*, 181 U. S. 399; *Chadwick* v. *Kelley*, 187 U. S. 540, 543, 544; *Schaefer* v. *Werling*, 188 U. S. 516; *Seattle* v. *Kelleher*, 195 U. S. 351, 358.

A statute like the present manifestly might lead to the assessment of a particular lot for a sum larger than the value of the benefits to that lot. The whole cost of the improvement is distributed in proportion to area, and a particular area might receive no benefits at all, at least if its present and probable use be taken into account. If that possibility does not invalidate the act it would be surprising if the corresponding fact should invalidate an assessment. Upholding the act as embodying a principle generally fair and doing as nearly equal justice as can be expected seems to import that if a particular case of hardship arises under it in its natural and ordinary application, that hardship must be borne as one of the imperfections of human things. And this has been the implication of the cases. *Davidson* v. *New Orleans*, 96 U. S. 97, 106; *Mattingly* v. *District of Columbia*, 97 U. S. 687, 692; *Parsons* v. *District of Columbia*, 170 U. S. 45, 52, 55; *Detroit* v. *Parker*, 181 U. S. 399, 400; *Chadwick* v. *Kelley*, 187 U. S. 540, 544.

But in this case it is not necessary to stop with these general considerations. The plea plainly means that the improve-

ment will not benefit the lot because the lot is occupied for railroad purposes and will continue so to be occupied. Compare *Chicago, Burlington & Quincy R. R.* v. *Chicago,* 166 U. S. 226, 257, 258. That, apart from the specific use to which this land is devoted, land in a good-sized city generally will get a benefit from having the streets about it paved, and that this benefit generally will be more than the cost, are propositions which, as we already have implied, a legislature is warranted in adopting. But, if so, we are of opinion that the legislature is warranted in going one step further and saying that on the question of benefit or no benefit the land shall be considered simply in its general relations and apart from its particular use. See *Illinois Central R. R.* v. *Decatur,* 147 U. S. 190. On the question of benefits the present use is simply a prognostic, and the plea a prophecy. If an occupant could not escape by professing his desire for solitude and silence, the legislature may make a similar desire fortified by structures equally ineffective. It may say that it is enough that the land could be turned to purposes for which the paving would increase its value. Indeed, it is apparent that the prophecy in the answer cannot be regarded as absolute, even while the present use of the land continues—for no one can say that changes might not make a station desirable at this point; in which case the advantages of a paved street could not be denied. We are not called on to say that we think the assessment fair. But we are compelled to declare that it does not go beyond the bounds set by the Fourteenth Amendment of the Constitution of the United States.

Judgment affirmed.

Mr. Justice Harlan, not having been present at the argument, took no part in the decision.

Mr. Justices White and Peckham dissent.

STILLMAN *v.* COMBE.

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

No. 174. Argued March 10, 13, 1905.—Decided April 3, 1905.

All the parties to an action in the United States Circuit Court, to determine title to land, united in an agreement that judgment be entered in favor of two of the parties who were to convey the property to a purchaser and to deposit the purchase price in a bank to the credit of arbitrators, who were to determine the exact rights of all the parties and distribute the fund accordingly; judgment was entered and never appealed from or otherwise attacked. *Held* that: The parties in whose favor judgment is entered are not trustees of the court, nor is the purchase price received by them a fund of, or under the control of the court; and a suit brought against them to compel them to account for the purchase money is not ancillary to the original action and the final judgment rendered therein, and jurisdiction of the Circuit Court cannot be maintained on that ground alone.

The appeal to this court on the ground that the Circuit Court had no jurisdiction by a defendant who had not appeared generally is not affected by the fact that one of the defendants has appealed to the Circuit Court of Appeals.

THE facts are stated in the opinion.

Mr. John A. Garver and *Mr. James M. Beck* for appellant:

The sole ground of jurisdiction was that the case was ancillary to the action at law; as the United States Circuit Court is of statutory and limited jurisdiction the presumption must always be that the court is without jurisdiction, unless the contrary affirmatively appears from the record. *Turner* v. *Bank,* 4 Dall. 8; *Bors* v. *Preston,* 111 U. S. 252; *Mansfield &c. R. Co.* v. *Swan,* 111 U. S. 379, 383; *Lehigh &c. Co.* v. *Kelly,* 160 U. S. 327, 337. The appellant has not waived his right to object to the jurisdiction, by having served an answer after his plea to the jurisdiction under a limited appearance has been overruled. *Harkness* v. *Hyde,* 98 U. S. 476; *So. Pac. Co.* v. *Denton,* 146 U. S. 202; *Mexican R. Co.* v. *Pinkney,* 149 U. S. 194.

A suit is ancillary when supplemental to, and connected with, a previous suit so as to form an incident to, and substantially continues it. *Barrow* v. *Hunton*, 99 U. S. 80; *Marshall* v. *Holmes*, 141 U. S. 589, 597; *Raphael* v. *Trask*, 194 U. S. 272, 278.

Ancillary suits fall into two general classes: Where the court has possession of a fund derived from the previous litigation. Where the court is asked to take some action with reference to a previous judgment or decree rendered by it or to an action at law still pending and undetermined, either to assist in carrying the previous judgment into effect or to correct or modify the judgment. None of those elements exist in this case.

In this case there was no jurisdiction at law or in equity, and the title vested in Stillman and Carson was not a trust.

Mr. Fred Beall and *Mr. J. D. Childs*, with whom *Mr. C. L. Bates* was on the brief, for appellees:

In order to constitute a consent judgment, it is not necessary that the agreement to enter it by consent should be filed as a paper in the cause, or brought to the attention of the court, or made to appear in any manner upon the record. The consent of parties is a fact to be proved, like any other fact. *Campbell* v. *Railroad Co.*, 1 Woods, 368.

The agreement and judgment created an express, active, special trust; Fort Brown Reservation was designated as the trust estate; defendants Stillman and Carson were constituted the trustees; the title to the trust estate was by the consent judgment vested in the trustees; the agreement declared the trust, defined its purpose, which was to convert the trust estate into money, by conveying it to the United States, collecting the purchase price, and depositing it to the credit of arbitrators, to be disbursed according to the rights of the parties. *Salinas* v. *Stillman*, 66 Fed. Rep. 677; *Carson* v. *Combe*, 86 Fed. Rep. 202; Pomeroy's Eq. Jur. § 1159; Perry on Trusts, §§ 18, 24, 81, 82, 448; Lewin on Trusts and Trustees, *56, *108.

The Circuit Court in which the consent judgment was rendered is vested with ancillary jurisdiction to entertain this suit

in equity for the purposes of granting to the other parties to the former suit and their privies equitable relief against the unjust, inequitable and fraudulent use of that judgment and the process of the court that rendered it, and to prevent the violation of said contract, and the breach of said trust, and to determine the conflicting claims of the parties to said fund, and to compel appellant to account for the trust fund converted by him and pay the same over to the parties found to be entitled to it, and to secure to the parties the fruits, benefits and advantages of the proceedings and judgment in the former suit, and to regulate the operation of said judgment by engrafting a trust upon it. *Krippendorf* v. *Hyde*, 110 U. S. 276, 287; *Pacific R. Co.* v. *Missouri P. R. Co.*, 111 U. S. 505; *New Orleans* v. *Fisher*, 180 U. S. 185, 199; *Pennock* v. *Coe*, 23 How. 117; *Clark* v. *Mathewson*, 12 Pet. 164; *Dunn* v. *Clark*, 8 Pet. 1; *Jones* v. *Andrews*, 10 Wall. 327; *Root* v. *Woolworth*, 150 U. S. 401; *Freeman* v. *Howe*, 24 How. 450; *Milwaukee &c. R. R. Co.* v. *Soutter*, 2 Wall. 609, 645; *Hatch* v. *Dorr*, 4 McLean, 112; *Babcock* v. *Millard*, Fed. Cas. 699; *Dunlap* v. *Stetson*, 4 Mason, 349; *Cortez Co.* v. *Tannhauser*, 9 Fed. Rep. 226; *Bank* v. *Leland*, Fed. Cas. 9452; *Thompson* v. *McReynolds*, 29 Fed. Rep. 657; *Lamb* v. *Ewing*, 54 Fed. Rep. 272; *Bank* v. *Turnbull*, 16 Wall. 190; *Carey* v. *H. & T. C. Ry. Co.*, 161 U. S. 113.

Besides this suit is ancillary, and the court has possession of and gave the orders which secured the *res*, this, therefore, draws to the lower court all controversies concerning the *res*. *Byers* v. *McAuley*, 149 U. S. 614; *Hayes* v. *Pratt*, 147 U. S. 570; *Green* v. *Creighton*, 23 How. 90; *Chambers* v. *Cannon*, 62 Texas, 293; *Eckford* v. *Knox*, 67 Texas, 205; *Patton* v. *Gregory*, 21 Texas, 513.

Mr. Justice Holmes delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court, upon the single question of the jurisdiction of that court. The jurisdiction was sustained *de bene*, on appeal from a preliminary

injunction, by the Circuit Court of Appeals. 86 Fed. Rep. 202; *S. C.*, 29 C. C. A. 660. It is certified that jurisdiction was entertained solely upon the ground that this cause is ancillary to an action at law and the final judgment rendered therein. If that ground fails it is apparent from the record and is not disputed that there is no other. To decide the case it is not necessary to consider anything except the allegations of the bill, and a large part of those may be laid on one side as not material to the question here.

The purpose of the bill is to reach and distribute to the parties found entitled to the same the proceeds of a sale to the United States of land which the defendants Stillman, the appellant, and Carson, as administrator, recovered in the above-mentioned action at law. The land was occupied without right by the United States as part of the Fort Brown military reservation, and on March 3, 1885, Congress appropriated $160,000 to pay for the land and its use and occupation, but not until a complete title should be vested in the United States, the full amount of the price to be paid directly to the owners of the property. The next year certain claimants brought suit for the land, in a state court, against Colonel Kellogg, the officer in command of the reservation. The suit was removed to the United States Circuit Court, the United States intervened, and for the purpose of settling the title set up outstanding rights in third persons. Other known claimants, including Stillman and Carson as administrator, each of whom claimed an undivided half, became or were made parties. By the local practice the respective shares of the parties might have been determined in the action as well as the principal question of the right of all or some of them to recover from Colonel Kellogg. But on July 13, 1887, most, although not all, of the claimants, including Stillman and Carson, made an agreement on which the jurisdiction in the present cause is based.

This agreement recited that the case was likely to be tried the next day, that it was apprehended that unless a perfect

title could be adjudged to some of the parties there was danger of losing the appropriation, that in the time available there was little chance of an accurate adjudication of all rights, that it was primarily desirable to have a judgment which would be satisfactory to the department at Washington, and secondarily to agree on a method of working out the exact rights of the parties, after judgment, conveyance to the Government by those adjudicated to be owners and payment of the money. It also recited the claims of others not parties to the agreement, and the belief of the contractors that those claims would fail at the trial. Therefore it was agreed that the parties to the contract would unite in procuring a judgment for the whole property in favor of Stillman and Carson administrator, that upon its being procured a conveyance should be made by the said owners to the Government and a warrant for the price upon the Treasurer of the United States obtained from the Secretary of War. After a preliminary payment the rest of the money was to be deposited in a named bank in Galveston to the credit of three arbitrators, also named. The parties to the agreement submitted their claims to these arbitrators, with somewhat blind provisions for substitution, and the arbitrators were to give their checks upon the fund to those whom they found entitled for the sums found due.

The next day after this agreement was made, on July 14, 1887, a verdict was rendered for Stillman and Carson administrator, one undivided half to each, and judgment was entered upon the same, both, it is alleged, by consent of parties. But the next steps contemplated by the agreement did not follow as quickly as anticipated. Without any fault of Stillman and Carson they did not get their pay and deliver the deed until April, 1895, nearly eight years later. At that time, according to Stillman's answer, at all events before June 14, 1897, when this bill was filed, according to the allegations of the bill, one of the arbitrators named was dead, and another refused to act, so that the arbitration agreed upon was impossible in its original form. It also appears from the decree

that Stillman had expended large sums in collecting the money from the United States. The bill alleges that Stillman and Carson fraudulently appropriated to their own use the whole fund of $160,000 received from the United States. It further alleges that they are conspiring fraudulently to prevent a decision by arbitration, as agreed, and fraudulently are using the judgment to deprive the true owners of their rights. On these allegations the bill seeks not to have the arbitration carried out but to obtain a distribution of the fund by the court.

We are somewhat at a loss to add anything to a statement of the case to show how utterly without foundation is the claim of jurisdiction over the bill as an ancillary suit. The bill does not seek either to disturb the judgment or to have anything done towards carrying it out. The judgment was satisfied, and the functions of the court in the former case were at an end when the land was recovered. Stillman and Carson cannot be using it fraudulently or in any other way. Its uses all are over. The court had nothing to do with the subsequent sale of the land, and still less with the distribution of the purchase money when the sale was made. There neither was nor ought to have been any fund in court. It may be that the judgment would not have been the same but for the agreement of some of the parties upon those matters. But the bill does not allege that it was obtained by fraud, and, as we have said, does not seek to set it aside. The agreement no doubt put Stillman and Carson in a position of trust, but, no matter to whom it was known, it did not make Stillman and Carson trustees of the court, as they are called in the bill. It did not extend the duties of the court beyond the recovery of the land to seeing that the parties who recovered it, in case of a subsequent sale, should pay over in due proportion to those equitably entitled. The parties gave up their right to have the court decide who had rights in the land and the extent of their shares, and substituted a contract and a decision out of court. They still rely upon the contract, and they must be left to their remedy upon it.

It is suggested that the affirmance by the Circuit Court of Appeals of an interlocutory decree appointing a receiver and issuing a preliminary injunction against Stillman and Carson using the judgment for the purpose of depriving the other parties in interest of their rights in the $160,000, in some way prejudices the present appeal. It is enough to say that the action of the Circuit Court of Appeals was on the appeal of Carson alone, Stillman not having appeared in the action.

Decree reversed, with directions to make restitution to the appellant and to dismiss the bill.

H. HACKFELD AND COMPANY *v.* UNITED STATES.

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

No. 164. Argued March 6, 1905.—Decided April 3, 1905.

Section 10 of the act of March 3, 1891, 26 Stat. 1084, which imposes upon one who has brought immigrants into the United States not permitted to land here, the duty of returning them to the place from whence they came, with a penalty in case the duty is neglected, is a highly penal statute and must be strictly construed; the word "neglect" cannot be construed so as to make the shipowner or master an insurer of the absolute return of the immigrant at all hazards, but it does require him to take every precaution to prevent the immigrant from escaping and holds him to the care and diligence required by the circumstances.

Where in an action under § 10 of the act of March 3, 1891, the Attorney General and the other party have stipulated the facts as to the escape of immigrants and that the escape did not occur by reason of any negligence or want of proper care on the part of the master or officers of the vessel, the court cannot regard the stipulation as to lack of negligence a mere conclusion of law and find that there was negligence on the evidentiary facts as stipulated. It will presume that the Attorney General has done his duty and not stipulated away any of the rights of the prosecution, and the defendant is entitled to have the case tried upon the assumption that the ultimate fact of lack of negligence stipulated into the record was established as well as the specific facts recited.

THIS case is here on writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit, to review a judgment of that court, affirming a judgment of the District Court for the District of Hawaii, in which the petitioner, Hackfeld and Company, was adjudged guilty of a violation of section 10 of the act of March 3, 1891, 26 Stat. 1084, and to pay a fine of $600, for neglecting to return to the port from whence they came, Yokohama, Japan, two certain Japanese immigrants unlawfully in the United States, in violation of the act of Congress. The conviction was upon information filed and trial had to the court, a jury having been waived, and was upon a stipulated finding of facts, agreed upon by the attorney for the United States and the petitioner. After statements as to the corporate character of the defendant company, and that it was the agent of the steamship Korea, a vessel plying between the State of California and the Empire of Japan, it is stipulated that the vessel brought into the port of San Francisco in the United States two certain Japanese immigrants from Yokohama, Japan, on October 28, 1902; that on the following day, October 29, 1902, the said Japanese were denied admission into the United States by the board of special inquiry at the port of San Francisco, and the said board, being duly appointed and authorized in the premises, ordered the deportation of the said Japanese immigrants. That on the seventh day of November, 1902, the said Japanese were received on board the vessel Korea for transportation to Japan. The stipulation then recites the following facts:

"That on the twelfth day of November, A. D. 1902, the said steamship Korea did arrive at the port of Honolulu, in the District and Territory of Hawaii; that at the time of the arrival of said steamship Korea at said port of Honolulu, the said immigrants were still on board of said vessel; that said Japanese immigrants, together with certain deported Chinese, were placed in a room on board said vessel and locked up by the steerage steward of said vessel; at 12 o'clock midnight of said twelfth day of November, A. D. 1902, said Japanese were still

on board said vessel in said room; that between that time and 5 o'clock on the morning of the thirteenth day of November, A. D. 1902, said Japanese had effected their escape; that the only method of egress was through portholes, which were nearly 25 feet above the water; that this method of escape could not have been reasonably anticipated by the master, or officers, or agents of said steamship Korea; that said escape did not occur by *vis major* or inevitable accident; and that said escape did not occur by reason of any negligence or lack of proper care on the part of the officers of the vessel or said defendant.

"That the said defendant made search for said escaped immigrants, but up to the present time has not apprehended the said immigrants, and said immigrants have not been returned to Japan."

From the conviction in the lower court upon these stipulated facts a writ of error was taken to the Circuit Court of Appeals for the Ninth Circuit. In that court, without passing upon the question whether the statute justified conviction without proof of negligence, it was held that the judgment of conviction should be affirmed because the facts recited left room for the inference that the petitioner was found guilty of negligence in putting the Japanese in the room without taking the necessary precautions against escape through the portholes. The stipulation that the escape did not occur by reason of negligence or lack of proper care on the part of the officers of the vessel it was held did not bind the court nor prevent it from placing upon the facts stipulated the construction which, in its judgment, they should properly receive. 125 Fed. Rep. 596, 60 C. C. A. 428.

Mr. Maxwell Evarts for petitioner:

The trial court was bound by the stipulation and the claim therein that the escape did not occur by reason of any negligence or lack of proper care on the part of the vessel or defendant. The stipulation met the requirements of the court.

Raimond v. *Terrebonne Parish,* 132 U. S. 192; *Wilson* v. *Merchants' L. & T. Co.,* 183 U. S. 121, 128. This court is bound by the stipulation as by a finding of the lower court. *Dooley* v. *Pease,* 88 Fed. Rep. 446; *S. C.,* 180 U. S. 126; *Supervisors* v. *Kennicolt,* 103 U. S. 554. The conviction cannot be sustained under the act in the absence of negligence. The act is highly penal and must be strictly construed. *United States* v. *Wiltberger,* 5 Wheat. 95.

Warren v. *United States,* 58 Fed. Rep. 559, is adverse to petitioner and was wrongly decided. See *United States* v. *Spruth,* 71 Fed. Rep. 678.

Mr. Assistant Attorney General Robb for the United States:

The recital in the stipulation as to absence of negligence was a conclusion of law and not of fact. Where the facts are undisputed, admitted, or conclusively proved, negligence is a question of law for the court. 21 Am. & Eng. Ency. Law, 506; *Grand Trunk Ry. Co.* v. *Ives,* 144 U. S. 408; *Elliott* v. *Chicago, Mil. & St. Paul Ry. Co.,* 150 U. S. 245; *Union Pac. Ry. Co.* v. *McDonald,* 152 U. S. 262; *So. Pac. Co.* v. *Pool,* 160 U. S. 438.

Assuming the recital as a fact such a stipulation is void against public policy. The transportation company was a custodian and comes under the rule that an officer who keeps a prisoner so negligently that he escapes is guilty of crime. Bishop Cr. Law., ed. 1865, § 392, §1056; 1 Russell on Crimes, 8th Am. ed., 420; *Smith* v. *Commonwealth,* 59 Pa. St. 325. Negligence was to be presumed. *Lumber Co.* v. *Bibb,* 139 California, 325; *Berkshire* v. *Railway Co.,* 28 Mo. App. 225; *Graves* v. *Alsap,* 1 Arizona, 274, 282; *Detroit* v. *Beckman,* 34 Michigan, 125; *Murphy* v. *People,* 3 Colorado, 147; *Attorney General* v. *Rice,* 64 Michigan, 385; *Jones* v. *Madison County,* 72 Mississippi, 777; *Holmes* v. *Johnston,* 59 Tennessee, 155; *Happel* v. *Brethauer,* 70 Illinois, 166. The admission of specific facts nullifies a reservation denying their legal effect. 20 Ency. Pl. & Prac., 661; *Haight* v. *Green,* 19 California, 113.

The defendant was properly adjudged guilty by the trial

court even if there was no evidence before the court upon which a finding of negligence could be based.

Section 10 formed a part of the immigration act of 1891. The Executive Department immediately took the position that the act demanded that transportation companies bringing immigrants whose admission the law prohibited were chargeable at all hazards with the responsibility of returning them to the ports which from they came. This was sustained by the courts. *Warren* v. *United States*, 58 Fed. Rep. 559. And see *United States* v. *Spruth*, 71 Fed. Rep. 678.

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

The Circuit Court of Appeals disposed of this case upon the view that the judgment of conviction would have been warranted upon the evidentiary facts stipulated, and that the stipulation, in so far as it stated that the escape of the immigrants could not have been reasonably anticipated by the master or officers of the steamship, and did not occur by reason of any negligence or want of proper care upon their part, was the statement of a mere conclusion, not binding upon the court, and would not prevent it from rendering an independent judgment upon the facts stated. We cannot take this view of the case. It may be conceded that where the facts are all stated, the court cannot be concluded by a stipulation of the parties as to the legal conclusions to be drawn therefrom, but we know no rule of public policy which will prevent the United States Attorney from stipulating with the defendant in a case of this character as to the ultimate facts in the controversy. It is to be presumed that such an officer will do his duty to the Government and not stipulate away the rights of the prosecution. The question of negligence in a given case is not easily reduced to one of law and, as is the case here, its presence or absence is the ultimate question to be decided between the parties. Ordinarily, the issue of negligence is one of fact to be deter-

mined by the jury. This proposition has been so often adjudicated in this court that it is only necessary to refer to the cases in passing. It has been held that where there is no reasonable doubt as to the facts or the inference to be drawn from them, the question becomes one of law. Where the state of facts is such that reasonable minds may fairly differ upon the question as to whether there was negligence or not, its determination is a matter of fact for the jury to decide. *Grand Trunk Ry. Co.* v. *Ives*, 144 U. S. 408, 417; *Baltimore & Ohio R. R. Co.* v. *Griffith*, 159 U. S. 603, 611; *Texas & Pacific Ry. Co.* v. *Gentry*, 163 U. S. 353, 368; *Warner* v. *Baltimore & Ohio R. R. Co.*, 168 U. S. 339.

The evidentiary facts in the stipulation upon which this case was tried are not very fully set forth, and the Government and the defendant were content to stipulate that the method of escape through the portholes (assuming that it was by this means the immigrants escaped) could not have been reasonably anticipated by those in charge of the Korea, and that the escape did not occur by reason of any negligence or lack of proper care upon the part of the officers of the vessel or the defendant.

We think the parties were entitled to have this case tried upon the assumption that these ultimate facts, stipulated into the record, were established, no less than the specific facts recited.

We come then to the important question in this case, as to the construction of the statute under which the petitioner was convicted and fined. The conviction was under section 10 of the act of March 3, 1891, 26 Stat. 1084, which is as follows:

"SEC. 10. That all aliens who may unlawfully come to the United States shall, if practicable, be immediately sent back on the vessel by which they were brought in. The cost of their maintenance while on land, as well as the expense of the return of such aliens, shall be borne by the owner or owners of the vessel on which such aliens came; and if any master, agent, consignee, or owner of such vessel shall refuse to receive back

on board the vessel such aliens, or shall neglect to detain them thereon, or shall refuse or neglect to return them to the port from which they came, or to pay the cost of their maintenance while on land, such master, agent, consignee, or owner shall be deemed guilty of a misdemeanor, and shall be punished by a fine not less than three hundred dollars for each and every offense; and any such vessel shall not have clearance from any port of the United States while any such fine is unpaid."

The question is as to the effect of this requirement upon shipowners who have wrongfully brought aliens into this country, and who, having received them on board the vessel for the purpose of returning them to the place from whence they came, shall neglect to detain them thereon, or neglect to return them. In this case, the court found the defendants guilty as charged in the information in that they refused and neglected to return to the port from whence they came the two Japanese immigrants. It is the contention of the Government that this statute requires of persons, situated as were the defendants, the absolute duty of returning to the place from whence they came, immigrants unlawfully brought into the ports of the United States; and that the word "neglect" as used in this statute is equivalent to the word "fail" or "omit," and the return of the immigrants is required at all hazards, and the vessel owner will only be relieved when the default is the result of *vis major* or inevitable accident. This contention finds support in the case of *Warren* v. *United States*, 58 Fed. Rep. 559, decided in November, 1893, in the Circuit Court of Appeals for the First Circuit, in which section 10 of the act of March 3, 1891, was directly under consideration. We are cited to no other cases construing this section wherein it was directly involved, although in *United States* v. *Spruth*, 71 Fed. Rep. 678, a case in the District Court for the Eastern District of Pennsylvania, involving the eighth section of the same act, Judge Butler criticized the decision in the *Warren case*, and expressed doubts as to the construction therein given to the language of a criminal statute. The word "neglect"

as sometimes used, imports an absence of care or attention in the doing or omission of a given act, or it may be used in the sense of an omission or failure to perform some act. To "neglect" is not always synonymous with to "omit." Whether the use of the term is intended to express carelessness or lack of attention required by the circumstances, or to express merely a failure to do a given thing, depends upon the connection in which the term is used and the meaning intended to be expressed. These meanings find illustration in the lexical definition of the word, as well as the adjudicated cases in which it has been construed when applied to different subjects. In Webster's Dictionary the verb "neglect" is defined as meaning "not to attend to with due care or attention; to forbear one's duty in regard to; to suffer to pass unimproved, unheeded, undone." In the Standard Dictionary the word is defined as meaning "to fail to perform through carelessness." And in the Century Dictionary: "1. To treat carelessly or heedlessly; forbear to attend to or treat with respect; be remiss in attention to or duty toward; 2. To overlook or omit; disregard. 3. To omit to do or perform; let slip; leave undone; fail through heedlessness to do or in doing (something)."

As defined in the penal statutes of several of the States, the word "neglect" is said to import "a want of such attention to the nature or probable consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns." Words and Phrases Judicially Defined, vol. 5, p. 4940.

While the term may be used as indicative of carelessness, it may also merely mean an omission or failure to do or perform a given act. This meaning finds illustration in the case of *Rosenplaenter* v. *Roessle*, 54 N. Y. 262, 266, in which a guest at a hotel who failed to deposit his valuables for safekeeping as required by the statute, was held to have "neglected" to deposit within the meaning of the law, for, having the opportunity so to do, he omitted to avail himself of this means of safekeeping. An illustration of the meaning of the term when indica-

tive of a want of care is found in *Watson* v. *Hall*, 46 Connecticut, 204, 206, in which case it was held that in a statute by which a grand juror is made subject to prosecution when he shall neglect to make reasonable complaint of a crime, the word "neglect" was construed to be used in the sense of omission from carelessness to do something that can be done and that ought to be done, and the grand juror was held not to have neglected the complaint when, after investigation, he had become convinced that the offense should not be prosecuted.

In which sense is the term used in this statute? This is a highly penal statute and we think the well known rule, as laid down by Mr. Chief Justice Marshall in the case of *United States* v. *Wiltberger*, 5 Wheat. 76, 95, is applicable here:

"The rule that penal laws are to be construed strictly is, perhaps, not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the court, which is to define a crime, and ordain its punishment."

It is true that in the construction of penal statutes, as well as others, the object and purpose is to ascertain the correct meaning of the act with a view to carrying out the expressed intent of the legislature, and penal statutes are not to be construed so strictly as to defeat the obvious intention of the legislature. *United States* v. *Lacher*, 134 U. S. 624. We are to search for the true meaning of this statute, remembering that it undertakes to define an offense which is not to be broadened by judicial construction so as to include acts not intended by Congress. The statute imposes upon one who has brought immigrants into the United States not permitted to land here, the duty of returning them to the place from whence they came, with a penalty by fine in case the duty is neglected. If, by this requirement, it was intended to make the shipowner or master an insurer of the absolute return of the immigrant, at all hazards, except when excused by *vis major* or inevitable

accident, it would seem that Congress would have chosen terms more clearly indicative of such intention, and instead of using a word of uncertain meaning, would have affixed the penalty in cases wherein the owner or master *omitted* or *failed* to safely return the immigrant illegally brought here, or provided some punishment for the person who had so far complied with the terms of the statute as to receive the immigrant on board his vessel, but had permitted the escape, either with or without fault upon his part. Where the statute permits of a construction which does not require this absolute insurance of the return of the immigrant, but holds the shipowner to the care and diligence required by the circumstances, we do not feel inclined to adopt the construction least favorable to the accused. This statute imports a duty, and in the absence of a requirement that it shall be performed at all hazards, we think no more ought to be required than a faithful and careful effort to carry out the duty imposed.

It is urged by the Government that in view of the reënactment of section 10 as section 19 of the act of 1903, 32 Stat. 1213, it is to receive a construction in harmony with the judicial interpretation given to the act before the revision. While recognizing the rule that doubtful terms which have acquired through judicial interpretation a well understood legislative meaning are presumed to be used by the legislature in the sense determined by authoritative decisions, *The Abbotsford*, 98 U. S. 440, we do not think the rule applies to this case. So far as we know, there has been but one decision, in the *Warren case, supra*, which was doubted in the *Spruth case, supra*. In 1900 the construction of this act was under consideration by the Attorney General of the United States upon a question submitted by the Secretary of the Treasury involving the remission of fines to which the owner or master of a vessel was supposed to be liable under the terms of the act now under consideration. In construing section 10 of the act the Attorney General said:

"But while I assume nothing relative to the facts in this

case, with which it is your duty to deal and not mine, I am clearly of the opinion that in a case where every precaution to detain in safe custody and prevent escape has been rigidly taken, and yet in some real and unforeseen emergency an escape has occurred, there is no such neglect as the act contemplates. If the question were regarded otherwise, the act would rather have said 'if any such alien *shall escape* from such vessel, such master shall be deemed guilty of a misdemeanor, and shall be punished.' " Opinions of Attorneys General, v. 23, p. 277.

In this state of judicial and official opinion we do not think this act can be said to have received such judicial interpretation as should control its legislative meaning. We think the Attorney General, in the case cited, laid down the true rule, which does not make the shipowner the insurer at all hazards of the safe return of the immigrant, but does require every precaution to detain him and prevent his escape.

It is further urged by the Government that if the burden of proof in cases under this act is placed upon the prosecution, it will be impossible to convict, as the facts and circumstances under which the escape took place are within the knowledge of the defendants alone. We are not dealing with the question of burden of proof in this case, for here it is expressly stipulated that the defendants could not have anticipated the escape by the method employed and were not guilty of any want of care in the premises. Undoubtedly, the act of Congress should be given a reasonable interpretation, with a view to effect its purpose to prevent the introduction into this country of classes of persons excluded by the immigration laws. If this act should be construed as requiring the return at all hazards of the immigrants, those who are required to perform its mandate will doubtless claim the right to use all the force necessary to avoid the penalty of the law in delivering the immigrant to the country or place from whence he came. What would be the result of such power, it is easy to imagine. It is difficult to see how a shipowner could insure the return of such immigrants

without such confinement or imprisonment as may result in great hardship to that class of individuals who may themselves have had no intention to violate any law of this country. We think this statute was intended to secure, not the delivery of the immigrant, at all hazards, but to require good faith and full diligence to carry him back to the port from whence he came. It follows that the judgment of the Circuit Court of Appeals must be reversed and the cause remanded to the District Court with instructions to discharge the petitioner.

NEW ORLEANS GAS LIGHT COMPANY *v.* DRAINAGE COMMISSION OF NEW ORLEANS.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 172. Argued March 8, 9, 1905.—Decided April 3, 1905.

The drainage of a city in the interest in the public health and welfare is one of the most important purposes for which the police power can be exercised.

Every reason of public policy requires that grants in the sub-surface of streets shall be held subject to such reasonable regulation as the public health and safety may require.

Uncompensated obedience to a regulation enacted for the public safety under the police power of the State is not a taking of property without due compensation.

Under the facts of this case, the changing of the location of gas pipes at the expense of the Gas Company to accommodate a system of drainage, which has been upheld by the state court as an execution of the police power of the State, does not amount to a deprivation of property without due process of law.

THE New Orleans Gas Light and Banking Company was incorporated in 1835, and was given the exclusive privilege of vending gas in the city of New Orleans and its faubourgs, and the city of La Fayette, to such persons or bodies corporate as might voluntarily choose to contract for the same, and it

was permitted to lay pipes and conduits at its own expense in the public ways and streets of New Orleans, having due regard for the public convenience. In 1845 and 1854 the charter of the company as to its right to engage in banking was withdrawn, and the right to vend gas and use the streets was continued to the corporation under the name of the New Orleans Gas Light Company until April 1, 1875, when its corporate privileges should end, the company during the continuance of its charter to furnish the Charity Hospital with necessary gas and fixtures free of charge. By amendments the contract privilege of the company was extended until April 1, 1895, the exclusive privileges granted by the original charter not to extend beyond the time fixed in the act of incorporation. In 1870 another company, under the name of the Crescent City Gas Light Company, was incorporated, its charter providing that the company, its successors and assigns, should for fifty years from the expiration of the charter of the New Orleans Gas Light Company have the sole and exclusive privilege of making and supplying gas light in the city of New Orleans, and for that purpose be allowed to lay pipes and conduits in the streets and alleys of the city where the same may be required, at its own expense, in such manner as to least inconvenience the city and its inhabitants, and the company was also required to afterwards repair with the least possible delay the streets it had broken. In 1873 an act of the legislature fixed the date of the expiration of the exclusive franchise of the New Orleans Gas Light Company at April, 1875, and the franchise of the Crescent City Gas Light Company was confirmed from that date for the period of fifty years. On March 29, 1875, the New Orleans Gas Light Company and the Crescent City Gas Light Company were consolidated under the name of the former corporation. This company is the plaintiff in the action in the state court. By an act of the legislature, approved July 9, 1896, the State created a board known as the Drainage Commission of New Orleans, which board was given the power to control and execute a plan for the drainage of the

city of New Orleans, and also the power to appropriate property according to the laws of the State, by legal proceedings, for the purpose of constructing a drainage system. After adopting a system of drainage, and proceeding with the construction thereof, according to the plans, it was found necessary to change the location in some places in the streets of the city of the mains and pipes theretofore laid by the New Orleans Gas Light Company. The testimony shows that there was nothing to indicate that these changes were made in other than cases of necessity and with as little interference as possible with the property of the gas company. By stipulation between the parties it was agreed that the charges should be paid by the gas company when it became necessary to accede to the demands of the Drainage Commission; the gas company should keep an account thereof, and that its right to recover for the amount expended by it should not be prejudiced by the arrangement made, but should be submitted to the courts for final adjudication. This action was brought to recover the cost of the changes so made. In the court of original jurisdiction there was a judgment in favor of the Drainage Commission. Upon appeal the Supreme Court of Louisiana reversed this judgment. Upon rehearing the latter judgment was reversed and a final decree rendered, affirming the judgment of the lower court, rejecting the claim of the gas company. 111 Louisiana, 838. A writ of error to this court brings into review that judgment, the contention being that the judgment of the state court has impaired the contract rights of the gas company and has the effect to take its property without compensation, in derogation of rights secured by the Constitution and the Fourteenth Amendment.

Mr. Charles F. Buck for plaintiff in error:

The charter of the Gas Light Company is a contract. *Gaslight Co.* v. *Light & Heat Co.*, 115 U. S. 650. The franchise includes the right to lay mains as well as to sell and deliver gas, and the Gas Light Company has special rights in the

streets of which it cannot be deprived. *New Orleans* v. *Clark*, 95 U. S. 644; *Moore* v. *Waterworks Co.*, 114 Fed. Rep. 382, distinguishing *Waterworks Co.* v. *City of Kansas*, 28 Fed. Rep. 921. This is a taking of property for a public use and not a regulation. *Chicago* v. *Taylor*, 125 U. S. 161; *Road Co.* v. *Tulmuck County*, 31 Oregon, 1; *Railroad Co.* v. *Southern Tel. Co.*, 46 Georgia, 43; *Railroad Co.* v. *Commissioners*, 127 Massachusetts, 50; *San Mateo County* v. *So. Pacific Co.*, 13 Fed. Rep. 733; *Electric Light Co.* v. *Marble City Co.*, 85 Vermont, 377; *Hudson Tel. Co.* v. *Jersey City*, 49 N. J. L. 303; *Trust Co.* v. *Railway Co.*, 53 Fed. Rep. 687; *Electric Light Co.* v. *Clarksburg*, 50 L. R. A. 142, 151; *Louisville Gas Co.* v. *Citizens' Gas Co.*, 115 U. S. 683; *Chicago Gas Co.* v. *Lake*, 130 Illinois, 42; *Indianapolis* v. *Gas Company*, 140 Indiana, 114; *Re Sixth Ave. R. R. Co.*, 72 N. Y. 330; 2 Dillon Mun. Corp., 3d ed., § 588; *Irwin* v. *Telegraph Co.*, 37 La. Ann. 63; *Glover* v. *Powell*, 10 N. J. Eq. 211.

The police power whatever it may be is subordinate to the Constitution. *Matter of Jacobs*, 95 N. Y. 98; *Mugler* v. *Kansas City*, 123 U. S. 623, does not apply. As to conflict between the police power and the Constitution, see Mills on Eminent Domain, §§ 7, 44; Elliot on Roads and Streets, § 20, p. 897; Cooley Const. Lim., 3d ed., 544, 572; Russel on the Police Power, 25, 86; Lewis on Eminent Domain, §§ 35, 56, 153, 602; Freund on Police Power, §§ 513, 555, 577; *Detroit* v. *Citizens' Street Ry. Co.*, 184 U. S. 868; *Railroad Tax Cases*, 13 Fed. Rep. 755; *Binghampton Bridge Case*, 3 Wall. 51; *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116. The right to compensation for property taken for public use, is not to be denied on the ground that the expropriation is the exercise of the police power. *Railway Co.* v. *Railroad Co.*, 51 La. Ann. 814; *Railroad Co.* v. *Levee Board*, 49 La. Ann. 570; *Western Union Tel. Co.* v. *Myatt*, 98 Fed. Rep. 335.

The enforced removal and relaying of plaintiff's mains is a taking of its private property and impairs its contract with the city. 1 Blackstone, 139; Freund, 545; Elliot, § 202;

Eaton v. *Railroad Co.*, 51 N. H. 504; *Tumpelly* v. *Green Bay Co.*, 13 Wall. 166, 181; *Cotting* v. *Kansas City*, 183 U. S. 105; *United States* v. *Lynah*, 188 U. S. 469; *Barbier* v. *Connolly*, 113 U. S. 27.

Mr. Omer Villeré for defendant in error:

This case comes under the same rule that expenses of erecting gates, planking and crossing, and maintaining flagmen, necessarily resulting from the laying out of a street across a railroad, are incidental to the exercise of the police powers of the State, and do not constitute an element of the just compensation to the railroad. *Chicago R. R.* v. *Chicago*, 166 U. S. 226. And see as to police power, *Mugler* v. *Kansas City*, 123 U. S. 623; *Chicago* v. *Quincy*, 27 N. E. Rep. 193; *Water Works Co.* v. *City of Kansas*, 28 Fed. Rep. 921; *Railroad Co.* v. *Wakefield*, 103 Massachusetts, 261; *Jamaica Bond Co.* v. *Brookline*, 121 Massachusetts, 5; *Gas Co.* v. *Columbus*, 19 L. R. A. 510; *Cleveland* v. *Augusta*, 102 Georgia, 233; *Clapp* v. *Spokane*, 53 Fed. Rep. 516; *State* v. *Flower*, 49 La. Ann. 1199; *Cincinnati* v. *Penny*, 21 Ohio St. 499; and other cases in the opinion of the state court.

It is certainly for the common welfare of the people of New Orleans that the State of Louisiana has created the Drainage Commission and charged it with the control and execution of the drainage of New Orleans, and given it the right in all streets of said city for any of its works. And whenever the pipes and conduits of the New Orleans Gas Light Company are in the way of the proper execution of the drainage plans, it is but just and proper that said company should readjust its pipes and conduits to permit of the execution of a great work of public utility.

The State gave the company the right to lay its pipes and conduits in the streets, but never abandoned its superior right of control over and in and under said streets.

Unless the Gas Light Company can show that it has a right under the street, superior to the rights of railroads on the

street, it is not entitled to any compensation that railroads would not be entitled to.

The Supreme Court of Louisiana has decided, in the interpretation of its constitution and of its statutes, that the requirement of the Drainage Commission that the Gas Light Company shift its mains to meet the exigencies of a public work, did not constitute a taking or damaging of property in violation of the articles of its constitution, and that decision is not subject to review by this court in the absence of a specific point raised in the case that such a requirement violates the provisions of the Fourteenth Amendment.

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

In the case of the *New Orleans Gas Company* v. *Louisiana Light Company*, 115 U. S. 650, it was held that the complainant, by reason of the franchises granted and agreements made, as fully set forth in that case, had acquired the exclusive right to supply gas to the city of New Orleans and its inhabitants through pipes and mains laid in the streets.

It is the contention of the plaintiff in error that, having acquired the franchise and availed itself of the right to locate its pipes under the streets of the city, it has thereby acquired a property right which cannot be taken from it by a shifting of some of its mains and pipes from their location to accommodate the drainage system, without compensation for the cost of such changes. It is not contended that the gas company has acquired such a property right as will prevent the Drainage Commission, in the exercise of the police power granted to it by the State, from removing the pipes so as to make room for its work, but it is insisted that this can only be done upon terms of compensation for the cost of removal. This contention requires an examination of the extent and nature of the rights conferred in the grant to the gas company. The exclusive privilege which was sustained by this court in the case

of the *New Orleans Gas Co.* v. *Louisiana Light Co., supra,* was the right to supply the city and its inhabitants with gas for the term granted. There was nothing in the grant of the privilege which gave the company the right to any particular location in the streets; it had the right to use the streets, or such of them as it might require in the prosecution of its business, but in the original grant to the New Orleans Gas Light and Banking Company the pipes were to be laid in the public ways and streets, "having due regard to the public convenience." And in the grant to the Crescent City Gas Light Company the pipes were to be "laid in such manner as to produce the least inconvenience to the city or its inhabitants." In the very terms of the grant there is a recognition that the use of the streets by the gas company was to be in such manner as to least inconvenience the city in such use thereof. Except that the privilege was conferred to use the streets in laying the pipes in some places thereunder, there was nothing in the terms of the grant to indicate the intention of the State to give up its control of the public streets, certainly not so far as such power might be required by proper regulations to control their use for legitimate purposes connected with the public health and safety. In the case above cited, in which the exclusive right to supply gas was sustained, there was a distinct recognition that the privilege granted was subject to proper regulations in the interest of the public health, morals and safety. Upon this subject Mr. Justice Harlan, speaking for the court, said (115 U. S. 671):

"With reference to the contract in this case, it may be said that it is not, in any legal sense, to the prejudice of the public health or the public safety. It is none the less a contract because the manufacture and distribution of gas, when not subjected to proper supervision, may possibly work injury to the public; for the grant of exclusive privileges to the plaintiff does not restrict the power of the State, or of the municipal government of New Orleans acting under authority for that purpose, to establish and enforce regulations which are not

inconsistent with the essential rights granted by plaintiff's charter, which may be necessary for the protection of the public against injury whether arising from the want of due care in the conduct of its business, or from any improper use of the streets in laying gas pipes, or from the failure of the grantee to furnish gas of the required quality and amount. The constitutional prohibition upon state laws impairing the obligation of contracts does not restrict the power of the State to protect the public health, the public morals, or the public safety, as the one or the other may be involved in the execution of such contracts. Rights and privileges arising from contracts with a State are subject to regulations for the protection of the public health, the public morals, and the public safety, in the same sense, and to the same extent, as are all contracts and all property, whether owned by natural persons or corporations."

The drainage of a city in the interest of the public health and welfare is one of the most important purposes for which the police power can be exercised. The Drainage Commission, in carrying out this important work, it has been held by the Supreme Court of the State, is engaged in the execution of the police power of the State. *State* v. *Flower*, 49 La. Ann. 1199, 1203.

It is admitted that in the exercise of this power there has been no more interference with the property of the gas company than has been necessary to the carrying out of the drainage plan. There is no showing that the value of the property of the gas company has been depreciated nor that it has suffered any deprivation further than the expense which was rendered necessary by the changing of the location of the pipes to accommodate the work of the Drainage Commission. The police power, in so far as its exercise is essential to the health of the community, it has been held cannot be contracted away. *N. Y. & N. E. Railroad Co.* v. *Bristol*, 151 U. S. 556, 567; *Butchers' Union Co.* v. *Crescent City Co.*, 111 U. S. 746, 751; *Stone* v. *Mississippi*, 101 U. S. 814, 816. In a large city

like New Orleans, situated as it is, and the entrepôt of an extensive commerce coming from many foreign countries, it is of the highest importance that the public health shall be safeguarded by all proper means. It would be unreasonable to suppose that in the grant to the gas company of the right to use the streets in the laying of its pipes it was ever intended to surrender or impair the public right to discharge the duty of conserving the public health. The gas company did not acquire any specific location in the streets; it was content with the general right to use them, and when it located its pipes it was at the risk that they might be, at some future time, disturbed, when the State might require for a necessary public use that changes in location be made.

This right of control seems to be conceded by the learned counsel for the plaintiff in error, in so far as it relates to the right to regulate the use of the surface of the streets, and it is recognized that the users of such surface may be required to adapt themselves to regulations made in the exercise of the police power. We see no reason why the same principle should not apply to the sub-surface of the streets, which, no less than the surface, is primarily under public control. The need of occupation of the soil beneath the streets in cities is constantly increasing, for the supply of water and light and the construction of systems of sewerage and drainage, and every reason of public policy requires that grants of rights in such sub-surface shall be held subject to such reasonable regulation as the public health and safety may require. There is nothing in the grant to the gas company, even if it could legally be done, undertaking to limit the right of the State to establish a system of drainage in the streets. We think whatever right the gas company acquired was subject in so far as the location of its pipes was concerned, to such future regulations as might be required in the interest of the public health and welfare. These views are amply sustained by the authorities. *National Water Works Co.* v. *City of Kansas*, 28 Fed. Rep. 921, in which the opinion was delivered by Mr. Justice Brewer,

then Circuit Judge; *Gas Light & Coke Co.* v. *Columbus*, 50 Ohio St. 65; *Jamaica Pond Aqueduct Co.* v. *Brookline*, 121 Massachusetts, 5; *In re Deering*, 93 N. Y. 361; *Chicago, Burlington &c. R. R. Co.* v. *Chicago*, 166 U. S. 226, 254. In the latter case it was held that uncompensated obedience to a regulation enacted for the public safety under the police power of the State was not taking property without due compensation. In our view, that is all there is to this case. The gas company, by its grant from the city, acquired no exclusive right to the location of its pipes in the streets, as chosen by it, under a general grant of authority to use the streets. The city made no contract that the gas company should not be disturbed in the location chosen. In the exercise of the police power of the State, for a purpose highly necessary in the promotion of the public health, it has become necessary to change the location of the pipes of the gas company so as to accommodate them to the new public work. In complying with this requirement at its own expense none of the property of the gas company has been taken, and the injury sustained is *damnum absque injuria.*

We find no error in the judgment of the Supreme Court of Louisiana and the same is

Affirmed.

IRON CLIFFS COMPANY *v.* NEGAUNEE IRON COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

No. 173. Argued March 9, 10, 1905.—Decided April 3, 1905.

No person can be deprived of property rights by any decree in a case wherein he is not a party.

Where a corporation is not itself made a party to the suit, complainant alleging that its corporate existence had ended, its rights cannot be adjudged even though certain persons are made defendants on the ground that they are using the name of the corporation as a cover for their alleged wrongful acts and they answer, denying any personal interest, and claiming that the corporation is a going concern and justify their acts as its agent; and a decree of a state court in such an action cannot be reviewed in this court at the instance of one of such defendants on the ground that the corporation has been deprived of its property without due process of law.

THIS case was begun in the Circuit Court of the State of Michigan by the defendants in error, The Negaunee Iron Company, Edward N. Breitung and Mary Kaufman, against The Iron Cliffs Company, The Cleveland Cliffs Iron Company, William G. Mather and Murray M. Duncan. The defendants in error, plaintiffs in the court below, claimed to be the owners of certain premises upon which there was an outstanding lease purported to run for a term of ninety-nine years from its date, September 17, 1857, made by Charles Harvey to the Pioneer Iron Company. As the controversy in this court centers about this lease the allegations of the bill in respect thereto may be noticed. It is alleged that the interest conveyed by Harvey on the seventeenth day of September, 1857, to the Pioneer Iron Company was for the sole purpose of mining and quarrying at its own expense such ores and marble as might be found on the premises, subject to the qualification that the said company should not quarry, mine or remove any ore from said

lands, except such as it could actually convert into merchantable iron in its own furnaces and forges, being the furnaces and forges then being constructed or about to be constructed by the said company at Negaunee. Complainants allege that at the time of the filing of the bill they were, and for more than fifteen years theretofore, had been in the actual and exclusive possession of all the lands described in the bill, and the ore and marble thereon, claiming to be the exclusive owners thereof. That said Pioneer Iron Company, in the month of September, 1859, erected two certain ore furnaces at Negaunee instead of one furnace, as contemplated at the time of the execution of the grant or lease by Harvey to the Pioneer Iron Company.

That said Pioneer Iron Company carried on the business of manufacturing iron at its said furnaces from the time they were constructed until about the first day of January, 1866. That said Pioneer Iron Company, in carrying on its said business, procured no iron from the premises, or any portion of the premises described in said lease executed by the said Charles T. Harvey to the said Pioneer Iron Company, but procured all of its ore for the manufacturing of iron from other lands.

Complainant alleges that on the first day of January, 1866, the Pioneer Iron Company ceased to do business, and has not since that time manufactured or operated under the lease, but, on the contrary, at and from the date aforesaid abandoned the same. On the tenth day of March, 1866, the Pioneer Iron Company entered into an agreement with and leased to the Iron Cliffs Company for the period of ten years its entire real and personal property situated in the county of Marquette, Michigan, consisting of all its iron works, buildings, lands and property rights. That after making said lease and agreement with the Iron Cliffs Company the said Pioneer Iron Company has made and filed no reports as required by the laws of the State of Michigan.

"That at some time prior to the first day of January, 1873, the said Iron Cliffs Company became the owner of all the capital stock of said Pioneer Iron Company, and said stock has

since that time been held in the names of different individuals for the uses and purposes of said Iron Cliffs Company, and the certificates of stock representing said capital stock of said Pioneer Iron Company have been and now are held in the names of different individuals who are officers, directors, stockholders, agents or servants of the said Iron Cliffs Company and of the Cleveland Cliffs Iron Company, a corporation organized under the laws of the State of West Virginia and doing business at Negaunee, in said county of Marquette, Michigan, which two corporations have been operating together in the conduct of their business, and whose officers and agents are in the main the same persons; that said stock is held as aforesaid for the use and benefit of said Iron Cliffs Company and the said Cleveland Cliffs Iron Company.

"That on the second day of April, A. D. 1887, the corporate existence of said Pioneer Iron Company, by the terms of its articles of association, expired by limitation, and said corporation became and was thereby dissolved; and that whatever rights, if any, the said Pioneer Iron Company had and held under and by virtue of said lease were thereby terminated and extinguished, and such rights and interest thereby reverted to and became vested in said Charles T. Harvey and his grantees.

"That all the lands hereinbefore specially described are mineral lands and have therein large deposits of valuable iron ore and that the chief value of said lands consists in the iron ore situated therein, and the mining and removing therefrom of said iron ore by the defendants would take from said lands their principal value and would work and would be to your orators an irreparable injury.

"That the officers and agents of said Iron Cliffs Company and said Cleveland Cliffs Iron Company, who are engaged in and carrying out the said scheme and plan to defraud your orators and to mine and remove the iron ore from said lands under the cover and by the use of the name of the Pioneer Iron Company, are, so far as they are known to your orators, William G. Mather, who is the president of said Iron Cliffs

Company and also president of said Cleveland Cliffs Iron Company, and Murray M. Duncan, who your orators are informed and believe, and upon information and belief charge the truth to be, is the managing agent of the said Iron Cliffs Company and of the said Cleveland Cliffs Iron Company. That said Duncan and said Mather and their confederates, as aforesaid, well know that the corporate existence of the said Pioneer Iron Company has long since been terminated and said corporation dissolved, and that the rights and privileges granted in said lease of date September 17, 1857, have reverted to the said Charles T. Harvey and his grantees; notwithstanding which said Duncan, under the pretense that he is acting as agent of said Pioneer Iron Company, is engaged in superintending and directing said work which is being done on said lands by various persons who are laborers acting under his orders."

The prayer of the bill is:

"(1.) That by the decree of this honorable court, all the rights and privileges in the mineral and stone granted in said lease, executed by the said Charles T. Harvey as aforesaid, to the said Pioneer Iron Company, be declared to be terminated and of no binding force or effect as against your orators or their said lands.

"(2.) That in so far as it affects your orators' said lands, said lease be cancelled and the cloud upon your orators' title as aforesaid be removed, and your orators' title to all the iron ore and marble in and upon their said lands be quieted and confirmed in your orators.

"(3.) That the said William G. Mather, Murray M. Duncan, the said Iron Cliffs Company and the said Cleveland Cliffs Iron Company, and their officers, directors, agents, attorneys and employés, be perpetually enjoined and restrained from setting up in the name of said Pioneer Iron Company or in any other manner any right or title under said lease from said Charles T. Harvey to said Pioneer Iron Company, in or to your orators' said lands, and entering upon or removing from said lands any

iron ore or marble, and for such other and such further relief as to the court shall seem meet and proper."

One of the defendants, Murray M. Duncan, answering separately, took issue upon the allegations of the bill and denied specially that the Pioneer Company is dissolved, or any of its rights or property under the lease or conveyance terminated, and avers that the said Pioneer Iron Company is still the owner of the property rights and interests granted and conveyed; admits that he, as an agent of the said company, has actively engaged in conducting operations on some of the lands covered by the conveyance, for the purpose of discovering iron ore to be used in the furnaces of the Pioneer Iron Company, and that if ore sufficient in quantity and quality is discovered on the premises the said Pioneer Iron Company intends immediately to purchase the right to the surface, as required in the agreement, and intends to continue explorations until it finds ore on said lands for the use of its furnaces, or discovers the nonexistence of such ore, and further says that he has no personal interest in the lands set forth in the bill, but in all his actions is merely the agent of the Pioneer Iron Company, and not the agent of any other corporation or person whatsoever.

The Iron Cliffs Company and Cleveland Cliffs Iron Company and William G. Mather answer together, taking issue upon the allegations of the bill, admitting the existence of the lease of the Pioneer Iron Company, and aver that the entering and explorations on the lands were made and have been carried on by the Pioneer Iron Company, and deny that the charter of said company has expired; admit that said company through its agents has continued to carry on the operations begun by the Pioneer Iron Company under the direction of William G. Mather, as one of the officers of said company, and deny any interest in the matter set forth in the bill except as some or all of them may be stockholders or officers in the Pioneer Iron Company.

After issue joined and proofs taken the bill of complaint was amended so as to charge that the defendants claim and pretend

that under the provisions of number 142 of the Public Acts of 1889 and under number 60 of the Public Acts of 1899 of the State of Michigan, said Pioneer Iron Company has been reorganized and that by reason of said act such reorganized company had the right to mine ore under the said lease. The defendants answered the amendment and admitted that in April, 1901, the Pioneer Iron Company had caused to be filed in the office of the Secretary of State and in the office of the clerk of Marquette County certain perfected articles of incorporation of the said company in renewal of the original organization of said company and under said reorganization, as well as previous filings claimed to be a valid corporation. The record discloses that certain articles of association undertaking to reorganize the Pioneer Iron Company were adopted October 18, 1889, and filed in the office of the Secretary of State, April 8, 1900, and amended articles were filed on April 8, 1901.

And, raising a Federal question, William G. Mather made the following answer:

"And this defendant, William G. Mather, answering for himself, says he owns in his own right and as trustee, 3940 shares of stock of said company, and that if any decree be rendered, in this case by the court in any way declaring a forfeiture or termination or expiration of said ninety-nine year lease, or in any way affecting the rights of the Pioneer Iron Company thereunder, that said Pioneer Iron Company not being made a party to this proceeding, he as such stockholder, and said Pioneer Iron Company would thereby be deprived of its and his property without due process of law, in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, which forbids any State to deprive any person of life or liberty or property without due process of law, and this defendant avers that any decision or findings of the court in any way limiting, terminating, changing, modifying, annulling, or diminishing the value of any of the rights of the Pioneer Iron Company under said ninety-nine year lease, and

as expressed therein, would be void and of no effect under said provision of said amendment of the Constitution of the United States."

Upon hearing, the Circuit Court, after setting forth certain findings, entered the following decree:

"Now, therefore, in consideration of the foregoing findings and determinations of the court concerning the particular matters set forth in the complainants' bill of complaint, it is ordered, adjudged and decreed that the defendants, their counselors, attorneys, solicitors and agents, and each and every of them, whether acting in their individual or representative capacity, immediately vacate and remove from the lands described in the bill of complaint, and that they and each of them be and they hereby are perpetually enjoined from further entering upon the said lands of the complainants for the purpose of exploring for or taking therefrom any minerals or iron ore, or for any purpose whatever, without the consent and authority of the complainants."

This decree, upon appeal, was affirmed by the Supreme Court of Michigan. 96 N. W. Rep. 468.

From this judgment a writ of error was sued out to this court.

Mr. Elihu Root and *Mr. James H. Hoyt* for plaintiffs in error as to the jurisdiction:

A court can make no decree affecting the rights of an absent person, and can make no decree between the parties before it, which so far involves or depends upon the rights of an absent person that complete and final justice cannot be done between the parties to the suit, without affecting those rights. *Shields* v. *Barrow*, 17 How. 130, 141; *Mallow* v. *Hinde*, 12 Wheat. 198; *California* v. *So. Pacific Co.*, 157 U. S. 229, 248; *Minnesota* v. *Northern Securities Co.*, 184 U. S. 199, 237; *Water Co.* v. *Babcock*, 76 Fed. Rep. 243.

Where the rights of a party before the court depend upon the rights of a party not before the court, an adjudication be-

tween parties to a suit which involves or affects and thereby determines the property rights of such persons who are not before the court, violates the constitutional provision, preventing the taking of property without due process of law. *Taylor & Co.* v. *So. Pacific Co.*, 122 Fed. Rep. 147, 152; *Water Works* v. *New Orleans*, 164 U. S. 480; *Pennoyer* v. *Neff*, 95 U. S. 714, 733; *Windsor* v. *McVeigh*, 93 U. S. 264, 277.

The Federal question was properly set up and claimed. *Bridge Co.* v. *Illinois*, 175 U. S. 634; *Water Co.* v. *Canal Co.*, 142 U. S. 254, 268; *Land & Water Co.* v. *Ranch Co.*, 189 U. S. 177; *Dewey* v. *Des Moines*, 173 U. S. 199; *Roby* v. *Cochour*, 146 U. S. 153, 159. The judgment was not based on non-Federal questions; the questions actually decided by the state court require the presence of the Pioneer Iron Company and its constitutional rights were invaded, and no judgment should have been rendered without permitting it to be heard.

Mr. Benton Hanchett and *Mr. S. W. Shaull*, with whom *Mr. Arch. B. Eldredge*, *Mr. H. F. Pennington* and *Mr. Charles R. Brown* were on the brief, for defendants in error.

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

The Federal question, from which alone this court can take jurisdiction, is alleged to arise from the adverse decision made upon the answer of William G. Mather, setting up, in substance, that in proceeding to determine the case and render a decree, without the presence of the Pioneer Iron Company as a party defendant in the action, the said company and Mather, as a stockholder therein, were deprived of property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States. It is elementary that, unless such Federal right set up in the state court was denied the plaintiff in error, this court has no jurisdiction. An examination of the opinion and decision of the Supreme Court

of Michigan shows the court held, among other things, that the lease to the Pioneer Iron Company and the rights acquired thereby were appurtenant to the furnaces then existing upon the lands, and that it acquired no right to mine more ore than was necessary to supply such furnaces. That as the right to mine the ore under the lease was appurtenant to the blast furnaces erected and intended to manufacture the iron so mined, the abandonment and destruction of the furnaces destroyed the right to mine the ore under the lease. The Pioneer Company, after the execution of the ninety-nine year lease, having found ore in non-paying quantities, had abandoned explorations, and for forty-three years had made no attempt to mine on the lands. That in 1866 the Pioneer Iron Company conveyed to the Iron Cliffs Company, for a period of ten years, all its iron works, buildings, lands and property rights. The Iron Cliffs Company afterwards became the owner of all the stock of the Pioneer Company and thereafter carried on the furnace business. That the Pioneer Iron Company was regarded as merged in the Iron Cliffs Company, and never thereafter made or filed any reports as required by the laws of the State of Michigan. That the complainants and those under whom they claim right and title, beginning about the year 1870, spent large sums of money in exploring and developing the lands and opening valuable mines thereon, and that the rights thus acquired, with the knowledge of those in interest, had worked an estoppel of any claim of right under the lease. For these, among other reasons, the Supreme Court affirmed the decree of the Circuit Court.

It is apparent that the questions decided in the state Supreme Court were of a non-Federal character, and give no right of review here unless it is true that in this judgment the Pioneer Iron Company has been concluded, and its property rights taken without giving it an opportunity of being heard in the case. It is fundamental that no person can be deprived of property rights by any decree in a case wherein he is not a party. Not being made a party to the suit, the rights of the

Pioneer Iron Company cannot be affected in any way by the decision of the court. *Finley* v. *United States Bank*, 11 Wheat. 304, 307; *New Orleans Water Works* v. *New Orleans*, 164 U. S. 471, 480.

But it is urged that, notwithstanding the Pioneer Iron Company is not a party to the record, its rights are necessarily adjudged in the decision which affects the lease granted to it, and under which the defendants in their answer claim to act. But we cannot concede this proposition. It may be answered primarily that the Pioneer Iron Company cannot thus be denied its rights. The affirmative relief granted to the complainant must be on the case made in the bill, its amendment, and the testimony supporting the allegations therein made. The bill proceeds upon the theory that under the laws of the State of Michigan the charter of the Pioneer Iron Company had expired in 1887, thirty years from the date of its organization, and there was the most careful avoidance in the pleadings of the complainant of any recognition of the existence as a going corporation of the Pioneer Iron Company. It was charged in the bill that its corporate existence had ended, and so far from making it a party the complainants refrained from recognizing it as an existing corporation, and the relief sought was against the corporations and persons named and made defendants in their own right and not as agents of the Pioneer Iron Company, but who were alleged and found to be using the name of that corporation as a cover for wrongful acts of their own. The mere fact that the defendants sought to justify their acts as agents of the Pioneer Iron Company would not warrant the court in awarding a decree against that company or its agents, neither being made a party to the record. Nor, in our opinion, did the judgment rendered have this effect. In the case of *Tindal* v. *Wesley*, 167 U. S. 204, where a suit was brought in South Carolina to recover possession of certain real property in that State, one of the defendants answered that he had no personal interest in the property except as Secretary of the State of South Carolina, in which capacity alone he had ac-

quired the control of the property. It was argued that in that event the suit could not be maintained, because it was in fact an action against the State within the meaning of the Eleventh Amendment, and the judgment of the court concluded the State. To this contention this court, speaking by Mr. Justice Harlan, made answer:

"It is said that the judgment in this case may conclude the State. Not so. It is a judgment to the effect only that, as between the plaintiff and the defendants, the former is entitled to possession of the property in question, the latter having shown no valid authority to withhold possession from the plaintiff; that the assertion by the defendants of a right to remain in possession is without legal foundation. The State not being a party to the suit, the judgment will not conclude it. Not having submitted its rights to the determination of the court in this case, it will be open to the State to bring any action that may be appropriate to establish and protect whatever claim it has to the premises in dispute. Its claim, if it means to assert one, will thus be brought to the test of the law as administered by tribunals ordained to determine controverted rights of property; and the record in this case will not be evidence against it for any purpose touching the merits of its claim."

So in this case, notwithstanding the answer of the defendants justifying, as agents of the Pioneer Iron Company, the bill made neither the company nor any agent of it as such a party to the proceedings. The mere fact that the claim is made that the Pioneer Iron Company will be concluded can have no effect upon it so long as it has not submitted its rights to adjudication by voluntary proceedings on its part or been brought into court by proper process. It is true the defendants claim the charter of the company has been renewed and that it is still a going corporation. It is conceded that at the date of its origin the constitution of the State of Michigan prohibited the organization of corporations for a period greater than thirty years. That the Supreme Court of Michigan did

not intend to adjudicate that the Pioneer Iron Company if reorganized was concluded by the decree of the Circuit Court, is shown by the language used in the conclusion of its opinion:

"The constitution, at the date of its organization and at the expiration of its charter, expressly prohibited the organization of corporations beyond the period of thirty years. No provisions then existed, either by the constitution or by the statute, authorizing a reorganization of corporations which had expired by limitation. A constitutional amendment was adopted in 1889, authorizing the legislature to provide by general laws for one or more extensions of the term of such corporations, and also for the reorganization 'for a further period not exceeding thirty years of such corporations whose terms have expired by limitation, on consent of not less than four-fifths of the capital.' Pursuant to this authority the legislature in 1889 passed an act authorizing such reorganization. 2 Comp. Laws, § 7035. Very important questions are raised by counsel as to the effect of this reorganization statute, the validity of the act of reorganization by the Pioneer Iron Company, as to whether the Pioneer Iron Company was in position to avail itself of this statute, and also the effect upon the ninety-nine year lease should the reorganization be held to be valid. Inasmuch, however, as these questions are not essential to a decision of the case, we refrain from determining them."

But it is said the Supreme Court affirmed the decree of the lower court, in which the defendants were enjoined in a representative capacity, and that this includes them as agents of the Pioneer Iron Company, and that when the agents of the company are enjoined the decree amounts to a judgment against the corporation which they represent. But in view of the pleadings, as already stated, and the claim made and insisted upon by the complainants that there was no Pioneer Iron Company in existence, we think the language in the decree has reference to the injunction and order against the corporations and individuals made defendants and their attorneys, solicitors and agents, in their representative capacity, that is,

as representing the defendants in any of the ways mentioned. The decree was rendered after finding in favor of the complainants' theory of the case, and had the effect to require the defendants to the bill, their agents and attorneys, to vacate the premises, and enjoined them from further mining thereon. It is utterly inconsistent with the proceedings and the decree to enlarge the judgment so as to include agents of the Pioneer Iron Company. If it should hereafter be insisted that the rights of that company or its agents are concluded, a Federal question might arise if such effect shall be given to the decree in this action. In our view of this case there is nothing in the proceedings or decree in anywise conclusive of the rights of the Pioneer Iron Company, if it is held to be a living corporation, or any of its duly authorized agents acting in its behalf.

We, therefore, find that no Federal question arises upon this record. The proceedings in this court will be dismissed for want of jurisdiction.

UNITED STATES *v.* CADARR.

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

No. 438. Argued February 28, March 1, 1905.—Decided April 3, 1905.

Section 939 of the District of Columbia Code, providing that if any person charged with a criminal offense shall have been committed or held to bail to await the action of the grand jury, and the grand jury does not act within nine months the prosecution on the charge shall be deemed to be abandoned and the accused set free or his bail discharged, is not a statute of limitations, and does not repeal or affect the general statute of limitations in force in the District, § 1044 Rev. Stat., and a person, who in this case had not made any application under § 939 to be released from bail, may be held to answer upon an indictment found more than nine months after he was arrested and held to bail.

It would require clear and specific language to indicate a legislative intent

to bar the prosecution of all offenses for the failure of the grand jury to act within nine months of the arrest of the accused when the latter is at large under bail.

THE facts are stated in the opinion.

Mr. Assistant Attorney General McReynolds, with whom *Mr. William R. Harr*, special assistant to the Attorney General, was on the brief for the United States.

Mr. H. Prescott Gatley for respondent Parker.

MR. JUSTICE DAY delivered the opinion of the court.

The respondents were indicted for conspiracy in the District Court of the District of Columbia on March 31, 1902. On April 4, 1902, Cadarr, Keating and Myers were arraigned and entered pleas of not guilty. On April 7, 1902, Parker entered a plea of not guilty; on May 1, 1902, he withdrew this plea and filed a motion to quash. The ground of this motion was that the indictment was not returned to the court within nine months from the twenty-fifth day of April, 1901, on which day the defendants were held to bail to await the action of the grand jury on the charge of conspiracy, the time for taking action in the case not having been extended by the court or any judge thereof, as provided in section 939 of the act to establish a code for the District of Columbia, approved March 3, 1901. The motion was sustained, and it was directed that Parker's bail be discharged, and all the defendants were allowed to go without day.

Upon appeal by the United States, the Court of Appeals affirmed this judgment. Thereupon this writ of certiorari was granted.

This case raises the question whether section 939 of the Code of the District of Columbia is intended to bar further prosecution of crimes and offenses where the grand jury has failed to act thereon within the period named in the statute, or whether

the failure to take such action is intended to and does end further prosecution so as to discharge the accused from bail or from imprisonment in cases of commitment. The District Court, whose judgment was sustained by the Court of Appeals, construed the statute as one of limitations, and held that failure to take action within the period limited was a final bar to further prosecution. The section directly involved is number 939 of the District of Columbia Code, and is as follows:

"SEC. 939. *Abandonment of prosecution.*—If any person charged with a criminal offense shall have been committed or held to bail to await the action of the grand jury, and within nine months thereafter the grand jury shall not have taken action on the case, either by ignoring the charge or by returning an indictment into the proper court, the prosecution of such charge shall be deemed to have been abandoned and the accused shall be set free or his bail discharged, as the case may be: *Provided, however,* That the Supreme Court of the District of Columbia, holding a special term as a criminal court, or, in vacation, any justice of said court, upon good cause shown in writing, and, when practicable, upon due notice to the accused, may from time to time enlarge the time for the taking action in such case by the grand jury." 31 Stat. 1189, 1342.

The general statute of limitations is in force in the District and is section 1044, Revised Statutes of the United States, which is as follows:

"No person shall be prosecuted, tried, or punished for any offense, not capital, except as provided in section one thousand and forty-six, unless the indictment is found, or the information is instituted within three years next after such offense shall have been committed."

It is the contention of respondents' counsel that section 939 operates as a special statute of limitation for cases within its terms wherein the accused has been arrested and committed to prison or released on bail. On the other hand, the Government contends that it is not a statute of limitation, but is intended to limit the time within which the grand jury must act

upon a charge upon which the accused has been arrested and committed or admitted to bail. At the common law and in the absence of special statutes of limitations the mere failure to find an indictment will not operate to discharge the accused from the offense nor will a *nolle prosequi* entered by the Government or the failure of the grand jury to indict. It is doubtless true that in some cases the power of the Government has been abused and charges have been kept hanging over the heads of citizens, and they have been committed for unreasonable periods, resulting in hardship. With a view to preventing such wrong to the citizen, statutes have been passed in many States similar to the one under consideration, in aid of the constitutional provisions, National and state, intended to secure to the accused a speedy trial. These statutes differ so much in purpose and phraseology that we cannot derive much aid from decisions under them in determining the correct construction of the one under consideration. With a few exceptions, they relate to the bringing to trial of the accused after indictment found, and are intended to speed the trial of the cause. Whether the failure to bring on the trial within the time limited shall have the effect of discharging the accused from further prosecution for the crime or offense, or shall operate merely to put an end to the pending prosecution, depends upon the terms used in the different statutes. Generally speaking, where the statute has provided that the discharge shall be from imprisonment or bail, without other language, it has been held not to operate as a statute of limitations. On the other hand, where the statute has provided that the failure to prosecute shall discharge the accused so far as relates to the offense or from the crime, or he shall be acquitted of the offense charged in the indictment, failure to prosecute has been held to work a final discharge from the offense. Of the former class of cases are *State* v. *Garthwaite*, 3 Zab. 143; of the latter class are *Ex parte McGehan*, 22 Ohio St. 442; *Commonwealth* v. *Cawood*, 2 Va. Cases, 527; *State* v. *Wear*, 145 Missouri, 162; *In re Edwards*, 35 Kansas, 99, 103.

Turning to the particular statute under consideration, we find it is one in terms dealing with the status of the accused before indictment, after he has been committed or held to bail, and limits the time within which the grand jury may take action in such cases, whether the same results in ignoring the charge or the return of an indictment, and for the failure of the grand jury to take action within the time limited it is provided "that the prosecution of such charge shall be deemed to have been abandoned and the accused shall be set free or his bail discharged, as the case may be." This statute is not one of limitations, having effect upon the time in which the particular case may be prosecuted after the commission of the crime, but relates solely to the right of action by the grand jury as to one who has been committed or held to bail, wherein it is provided that the grand jury must act within the time named or the accused shall be set free, if imprisoned, or his bail discharged, if out on bond. We think this act was not intended to amount to a repeal *pro tanto* of the statute of limitation as contained in section 1044. For failure to indict within the time limited it is not provided, as in the cases where the statute has been construed to finally discharge the accused, that he shall be discharged from the offense, or that prosecution shall be forever barred, or he shall be deemed acquitted of the charge, but the result of the failure to prosecute has reference solely to the right in the pending prosecution to be freed, if imprisoned, or released from bail if under bond. If it had been the purpose of Congress to work so radical a change in the law as to end the right of further prosecution for the offense, we think it would have used language apt for that purpose, and the failure so to do indicates the intention to deal only with delays in action by the grand jury against persons under arrest or bonds. It is delay in the action of the grand jury, not the cutting down of the time of prosecution for offenses, that is aimed at in this statute. Much stress is laid in the argument of counsel for the respondent upon the expression, "the prosecution of such charge shall be deemed to

have been abandoned." But having reference to the previous part of the section, "such charge," relates to the one under which the accused has been committed or held to bail. The section prescribes the time within which the grand jury must act, and failing so to do, it is decreed that the prosecution shall be deemed to have been abandoned, and the effect upon the accused is not that he shall be discharged from prosecution for the offense, but that he shall be set free, if imprisoned, or his bail discharged, if released on bond. The statute, it is observed, acts upon persons committed to prison, and, with like effect, upon those not incarcerated but only held to bail. We think it would require clear and specific language to indicate a legislative intent to bar the prosecution of all offenses for the failure of the grand jury to act within nine months of the arrest of the accused, when the latter is at large upon bond. Again, if the contention of counsel for the accused is adopted, one will be discharged from further prosecution if the grand jury does not act upon the case, but if the grand jury does act, and the charge against the accused is found to be unwarranted, he is still subject to indictment until the three years of the statute of limitations have run, while the person whose case has not been wholly investigated will be forever released from the offense. Furthermore, section 1044 does not apply to capital offenses, for such are expressly excluded from the operation of that section; but section 939, under consideration, makes no exception, and applies alike to all offenses, and would operate to discharge a person accused of murder as well as one accused of petty theft. But, it is urged, section 939 permits the court to control and extend the time for taking action by the grand jury, thereby indicating the purpose of Congress to make this statute one of limitation. But we do not think the control of the time for taking action before the grand jury, given in this paragraph, enlarges the statute so as to make it applicable beyond the effect prescribed, which is upon the liberty of the accused or his freedom from the requirement to give bail. It is urged that if the construction insisted upon

by the Government is given to this statute the accused may be discharged for failure of the grand jury to act, and then immediately rearrested, so that the statute will be defeated of its purpose to protect the accused. The question of whether one who has made application to the court, and been discharged for failure to find an indictment against him within the time limited, could again be arrested without indictment, is not involved in this case. The question is, Is the prosecution of the offense finally barred by this statute, so that the accused may not be held to answer upon an indictment found after the nine months' period has elapsed? It is urged by counsel for the respondents that the power given the court to enlarge the time for taking action by the grand jury is not limited, and that the time may be extended beyond the period of three years fixed by the general statute of limitations. We cannot agree to this contention. We think the general statute of limitations has not been repealed or modified by this section. The purpose of statutes of limitation is to finally bar all prosecution, and the purpose of the act under consideration, as we view it, is to control the prosecution by requiring action by the grand jury, and in default thereof release the person of the accused or discharge him from bail, so far as the pending prosecution is concerned. While the construction of this section is not free from difficulty, we think the view herein expressed best effectuates the purpose and intention of Congress in enacting this statute, viewed in the light of the language used and the objects intended. This view of the case renders it unnecessary to pass upon other questions raised in the record.

The judgment of the Court of Appeals will be reversed and the cause remanded with directions to reverse the judgment of the Supreme Court of the District of Columbia and remand the cause to that court for further proceedings in accordance with this opinion.

In re COMMONWEALTH OF MASSACHUSETTS, PETITIONER.

ORIGINAL.

No. 15. Argued February 27, 28, 1905.—Decided April 10, 1905.

In a proceeding brought by a State on petition for writs of prohibition, mandamus or certiorari, to restrain the justices of the Supreme Court of the District of Columbia from proceeding further in an action brought by a citizen of the District of Columbia against the Secretary of the Treasury to enjoin him from issuing to the Governor of the petitioning State a duplicate warrant, *held*, that this court has no original jurisdiction and as the controversy was not one between a State and citizens of another State, and under the act of February 9, 1893, 27 Stat. 434, establishing the Court of Appeals of the District of Columbia, this court has no appellate jurisdiction as it cannot review judgments and decrees of the Supreme Court of the District directly by appeal or writ of error.

In cases over which this court has no original or appellate jurisdiction it cannot grant prohibition, mandamus or certiorari as ancillary thereto.

By an act of Congress of the United States approved July 27, 1861, 12 Stat. 276, c. 21, it was provided:

"That the Secretary of the Treasury be, and he is hereby, directed, out of any money in the Treasury not otherwise appropriated, to pay to the Governor of any State, or to his duly authorized agents, the costs, charges, and expenses properly incurred by such State for enrolling, subsisting, clothing, supplying, arming, equipping, paying, and transporting its troops employed in aiding to suppress the present insurrection against the United States, to be settled upon proper vouchers, to be filed and passed upon by the proper accounting officers of the Treasury."

On March 20, 1888, the legislature of Massachusetts passed the following resolution:

"*Resolved*, That the Governor and council are hereby authorized to employ the agent of the Commonwealth for the prosecution of war claims against the United States, to prose-

cute also the claim of the Commonwealth for a refund of the direct tax paid under act of Congress approved August fifth in the year eighteen hundred and sixty-one, and of the interest paid upon war loans during the period from eighteen hundred and sixty-one to eighteen hundred and sixty-five, also to fix his compensation which shall be paid out of any amount received therefrom."

On July 12, 1899, the executive council of the Commonwealth passed a resolution authorizing the attorney general to employ John B. Cotton to prosecute said claim. Mr. Cotton was a citizen of the District of Columbia.

Thereupon a form of contract was prepared and executed by the then Governor of Massachusetts, in behalf and under the seal of the Commonwealth, and by Cotton; and a duplicate original thereof was deposited with the Secretary of the Treasury of the United States.

The prosecution of the claim was at once entered upon, and after five years was finally adjudicated, audited and passed.

On or about May 2, 1904, the Treasury Department issued and delivered to Cotton, as the duly authorized agent of the Commonwealth of Massachusetts, war settlement warrant No. 11343, payable "to the Governor of the State of Massachusetts, or order," for the sum of $1,611,740.85, and addressed "P. O. address, c. o. John B. Cotton, agent and att'y, Washington, D. C."

Mr. Cotton notified the state attorney general of the delivery of the warrant to him, and that he was entitled to a lien upon the warrant for the amount of his fees under his contract; and the Governor was informed to the same effect. Mr. Cotton also notified the Secretary of the Treasury that he claimed a lien upon the warrant for compensation in accordance with his contract. Subsequently, the Governor, Hon. John L. Bates, addressed a communication to the Secretary of the Treasury, in which he demanded that the warrant be cancelled and that a duplicate thereof be forwarded to him as Governor of the

Commonwealth. The Secretary declined to comply with the demand. Later Mr. Cotton filed a bill in the Supreme Court of the District of Columbia against "Leslie M. Shaw, Secretary of the Treasury, and John L. Bates, Governor of the Commonwealth of Massachusetts," in which he asserted his right to an attorney's lien upon the papers of his client, the Commonwealth of Massachusetts, including the warrant in question, and prayed, among other things, that said Leslie M. Shaw might be restrained and enjoined from cancelling the warrant which had been delivered to him, and from drawing or issuing a duplicate thereof to said Bates, and "that the defendant, John L. Bates, may be restrained and enjoined from asking, demanding or receiving from the defendant, Leslie M. Shaw, or any of his assistants, subordinates or clerks, a second or duplicate warrant as aforesaid."

The State of Massachusetts was not named as a party to this suit, and no relief was prayed against the State.

Upon the filing of this bill one of the justices of the Supreme Court of the District of Columbia entered a rule on the Secretary of the Treasury, requiring him to show cause why the relief prayed against him should not be granted, which was duly served, but has not yet come on for hearing. No process was served upon defendant Bates, who has since ceased to be Governor, and he has never appeared in the suit, nor has the Commonwealth of Massachusetts intervened therein in any way.

The Commonwealth of Massachusetts then filed a petition in this court, on leave, for writs of prohibition, mandamus and certiorari, to restrain the justices of the Supreme Court of the District of Columbia from taking further proceedings or entertaining jurisdiction in the equity suit.

In response to a rule entered on that petition, the Chief Justice and Associate Justices of the Supreme Court of the District of Columbia showed cause, and submitted, for reasons set forth, that, as the case stood, the court ought not to be prevented from exercising jurisdiction.

Mr. Herbert Parker, Attorney General of the State of Massachusetts, and *Mr. Frederick H. Nash* for petitioner:

The Supreme Court of the District of Columbia has no jurisdiction of the bill in equity filed in that court and the lack of jurisdiction appears on the face of the bill. The only court where the dispute between Cotton and the Commonwealth can be adjudicated is the Supreme Court of Massachusetts where the Commonwealth has consented to be impleaded. 11th Amendment, Const. U. S.; Rev. Laws Mass. c. 201; *Hagood* v. *Southern*, 117 U. S. 52, 71; *Cunningham* v. *Railroad Company*, 109 U. S. 446; *Rhode Island* v. *Massachusetts*, 12 Pet. 657, 718; *Grignon's Lessee* v. *Astor*, 2 How. 338; *Florida* v. *Georgia*, 17 How. 478, 507.

Massachusetts is an indispensable party to the suit and in its absence jurisdiction is lacking. *Mallow* v. *Hinde*, 12 Wheat. 193; *Findley* v. *Hinde*, 1 Pet. 241; *Shields* v. *Barrow*, 17 How. 130; *Barney* v. *Baltimore*, 6 Wall. 280; *Ribon* v. *Railway Co.*, 16 Wall. 446; *Gregory* v. *Stetson*, 133 U. S. 579; *California* v. *So. Pac. R. R. Co.*, 157 U. S. 229, 249.

As to necessity of having both parties before the court and subject to its jurisdiction see *Price* v. *Forrest*, 173 U. S. 410; *Sanborn* v. *Maxwell*, 18 App. D. C. 245, 253; *Minnesota* v. *Nor. Securities Co.*, 184 U. S. 199; *Williams* v. *Bankhead*, 19 Wall. 563; *Dodd* v. *Una*, 40 N. J. Eq. 672, 709; Calvert's Parties in Eq., 10; Daniell Ch. Pr., 3d Am. ed., 285; *In re Ayers*, 123 U. S. 443, 505.

As to the Eleventh Amendment this case comes within *Louisville* v. *Jumel*, 107 U. S. 711; *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446; *Hagood* v. *Southern*, 117 U. S. 52; *In re Ayers*, 123 U. S. 443; *Christian* v. *Atlantic & N. C. R. R. Co.*, 133 U. S. 233; *Belknap* v. *Schild*, 161 U. S. 10; *Fitz* v. *McGhee*, 172 U. S. 516; *Smith* v. *Reeves*, 178 U. S. 436; *Minnesota* v. *Hitchcock*, 185 U. S. 373. And not within *United States* v. *Peters*, 5 Cranch, 115; *Osborn* v. *Bank of United States*, 9 Wheat. 738; *Davis* v. *Gray*, 16 Wall. 203; *Board of Liquidation* v. *McComb*, 92 U. S. 531; *United States* v.

Lee, 106 U. S. 196; *Virginia Coupon Cases*, 114 U. S. 270; *Pennoyer* v. *McConnaughy*, 140 U. S. 1; *In re Tyler*, 149 U. S. 164; *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 389; *Scott* v. *Donald*, 165 U. S. 108; *Tindal* v. *Wesley*, 167 U. S. 204; *Smyth* v. *Ames*, 169 U. S. 517; *Illinois Central R. R. Co.* v. *Adams*, 180 U. S. 28; *Missouri R. R. Co.* v. *Missouri Railroad Commissioners*, 183 U. S. 53.

The Supreme Court of the District of Columbia having no jurisdiction of the subject matter of the bill, by reason of the exemption from suit of an indispensable party, the Commonwealth's remedy for the usurpation of jurisdiction is a writ of prohibition to the judges of that court.

If this suit is removed the Commonwealth can apply for mandamus to compel the Secretary to issue another warrant. *Redfield* v. *Windham*, 137 U. S. 636; *Roberts* v. *United States*, 176 U. S. 221.

The Commonwealth should not appear, and none of its officers can appear, in any court outside of its own jurisdiction. *United States* v. *Lee*, 106 U. S. 196, 205; *Hagood* v. *Southern*, 117 U. S. 52, 71; *Georgia* v. *Jesup*, 106 U. S. 458; *South Carolina* v. *Wesley*, 155 U. S. 542.

This court has power to issue the writ of prohibition to the Supreme Court of the District of Columbia, that being the appropriate remedy. *In re Vidal*, 179 U. S. 126; *Ex parte Joins*, 191 U. S. 93; *Anderson* v. *Dunn*, 6 Wheat. 204, 227; *Ex parte Robinson*, 19 Wall. 505; Rev. Stat. § 716; *Re Chetwood*, 165 U. S. 443; *Re Tampa Ry. Co.*, 168 U. S. 583; *Bronson* v. *La Crosse R. R. Co.*, 1 Wall. 405. In every case where the remedy has been denied there has been a meritorious reason without dealing with the court's power to issue it. See *Asphalt Co.* v. *Morris*, 132 Fed. Rep. 945; act of February 9, 1893, 27 Stat. 434; *United States* v. *Schenz*, 102 U. S. 378.

If this court declines to issue a writ of prohibition, then the petitioner's only remedy is a writ of mandamus to command the judges of the Supreme Court of the District of Columbia to dismiss the suit. Certiorari is desired, if necessary as an

auxiliary writ. *Re Hollon Parker*, 131 U. S. 221; *Re Chateaugay Iron Co.*, 128 U. S. 544; *Ex parte Parker*, 120 U. S. 737; *Ex parte Morgan*, 114 U. S. 174; *Ex parte Burtis*, 103 U. S. 238; *Ex parte Railway Co.*, 101 U. S. 711; *Ex parte Flippin*, 94 U. S. 348; *In re Hohorst*, 150 U. S. 653.

Mandamus is a remedy when the case is outside of the exercise of the inferior court's discretion and outside of the jurisdiction of the court. *Virginia* v. *Rives*, 100 U. S. 313; *Ex parte Bradley*, 7 Wall. 364, 375; *Ex parte Newman*, 14 Wall. 152, 165; *Ex parte Robinson*, 19 Wall. 505; *In re W. & G. R. R. Co.*, 140 U. S. 91; *Gaines* v. *Rugg*, 148 U. S. 228; *In re Grossmayer*, 177 U. S. 48; *Virginia* v. *Paul*, 148 U. S. 107.

Mr. Frederic D. McKenney and *Mr. John D. Flannery*, with whom *Mr. William Hitz* and *Mr. William Frye White* were on the brief, for respondents:

This court has no power to issue the writ of prohibition. High on Extra. Leg. Rem., 3d ed., § 767*b*; *Ex parte Gordon*, 1 Black, 503; *Ex parte Christy*, 3 How. 292. This is not a controversy between a State and citizen of another State. *Hepburn* v. *Ellzey*, 2 Cr. 445; *Met. R. R. Co.* v. *Dist. of Columbia*, 132 U. S. 1, 9; *Hooe* v. *Jamieson*, 166 U. S. 395.

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

This court has no original jurisdiction over this controversy, in any view, because it is not a controversy between a State and a citizen of another State. *Hepburn* v. *Ellzey*, 2 Cranch, 445; *Hooe* v. *Jamieson*, 166 U. S. 395. And it has not appellate jurisdiction, because since the passage of the act of February 9, 1893, 27 Stat. 434, c. 74, establishing the court of Appeals for the District of Columbia, this court, generally speaking, and not including cases arising under the bankruptcy law, *Audubon* v. *Shufeldt*, 181 U. S. 575, cannot review the judgments and decrees of the Supreme Court of the District, directly by appeal or writ of error.

By section 716 of the Revised Statutes, this court and the Circuit and District Courts "have power to issue all writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

By section 688, prohibition may issue "in the District Courts, when proceeding as courts of admiralty and maritime jurisdiction," but there is no similar provision in respect of other courts. And it has been repeatedly held, as to the Circuit Courts, that they have no power under section 716 to issue writs of prohibition and mandamus, except when necessary in the exercise of their existing jurisdiction. *Bath County* v. *Almy*, 13 Wall. 244, 248; *McClung* v. *Silliman*, 6 Wheat. 598, 601.

This is equally true of this court, that is to say, that in cases over which we possess neither original nor appellate jurisdiction we cannot grant prohibition or mandamus or certiorari as ancillary thereto.

Rule discharged; petition denied.

MATTER OF HEFF.

ORIGINAL.

No. 14. Argued January 9, 10, 1905.—Decided April 10, 1905.

The recognized relation between the Government and the Indians is that of a superior and an inferior, whereby the latter is placed under the care of the former. The Government, however, is under no constitutional obligation to continue the relationship of guardian and ward and may, at any time and in the manner that Congress shall determine, abandon the guardianship and leave the ward to assume and be subject to all the privileges and burdens of one *sui juris*.

In construing a statute affecting the relationship of the Government and the Indians it is not within the power of the courts to overrule the judg-

ment of Congress. While there may be a presumption that no radical change of policy is intended, and courts may insist that a supposed purpose of Congress to change be made clear by its legislation, when that purpose is made clear the question is at an end.

Under the act of February 8, 1887, 24 Stat. 388, an Indian who has received an allotment and patent for land is no longer a ward of the Government but a citizen of the United States and of the State in which he resides, and, as such, is not within the reach of Indian police regulations on the part of Congress, and this emancipation from Federal control cannot be set aside without the consent of the Indian or the State, nor is it affected by the provisions in the act subjecting the land allotted to conditions against alienation and encumbrance, and guaranteeing him an interest in tribal or other property.

In the United States there is a dual system of government, National and state, each of which is supreme within its own domain and it is one of the chief functions of this court to preserve the balance between them.

The general police power is reserved to the States subject to the limitation that it may not trespass on the rights and powers vested in the National Government.

The regulation of the sale of intoxicating liquors is within the power of the State and the license exacted by the National Government is solely for revenue and is not an attempted exercise of the police power.

The act of January 30, 1897, 29 Stat. 506, prohibiting sales of liquors to Indians, is a police regulation and does not apply to an allottee Indian who has become a citizen under the act of February 8, 1887.

On October 15, 1904, petitioner was convicted in the District Court of the United States, District of Kansas, under an indictment charging that he did "unlawfully sell, give away and dispose of certain malt, spirituous and vinous liquors, at the town of Horton, in the county of Brown, in the State and District of Kansas, to John Butler, to wit, two quarts of beer, more or less, and he, the said John Butler, being then and there an Indian, a member of the Kickapoo tribe of Indians and a ward of the Government, under the charge of O. C. Edwards, an Indian superintendent, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America." Upon such conviction he was sentenced to imprisonment in the county jail of Shawnee County, Kansas, for a period of four months, and to pay a fine in the sum of two hundred dollars and the costs of the prosecution. The Court of Appeals of the Eighth Circuit

having decided the question involved, *Farrell* v. *United States*, 110 Fed. Rep. 942, adversely to his contention, he presented this application for a writ of *habeas corpus* directly to this court.

The act of Congress, January 30, 1897, 29 Stat. 506, provides:

"That any person who shall sell, give away, dispose of, exchange, or barter any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or other intoxicating liquor of any kind whatsoever, or any essence, extract, bitters, preparation, compound, composition, or any article whatsoever, under any name, label, or brand, which produces intoxication, to any Indian to whom allotment of land has been made while the title to the same shall be held in trust by the Government, or to any Indian a ward of the Government under charge of any Indian superintendent or agent, or any Indian, including mixed bloods, over whom the Government, through its departments, exercises guardianship, . . . shall be punished by imprisonment for not less than sixty days, and by a fine of not less than one hundred dollars for the first offense and not less than two hundred dollars for each offense thereafter."

The act of Congress, February 8, 1887, 24 Stat. 388, is entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes." Section 1 of that act provides:

"That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary,

and to allot the lands in said reservation in severalty to any Indian located thereon in quantities as follows: . . ."

"SEC. 4. That where any Indian not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, act of Congress, or executive order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children, in quantities and manner as provided in this act for Indians residing upon reservations; and when such settlement is made upon unsurveyed lands, the grant to such Indians shall be adjusted upon the survey of the lands so as to conform thereto; and patents shall be issued to them for such lands in the manner and with the restrictions as herein provided. . . ."

Section 5 reads:

"That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever; *Provided*, That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void. . . ."

Section 6 is as follows:

"That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

Mr. A. E. Crane for petitioner:

The act of February 8, 1887, has been construed by state courts and allottee Indians held to be citizens. They become citizens on the allotment and not twenty-five years later. *State* v. *Denoyer*, 72 N. W. Rep. 1015; *State* v. *Morris*, 55 N. W. Rep. 1086; *Wa La &c.* v. *Carter*, 53 Pac. Rep. 106; *United States* v. *Rickert*, 106 Fed. Rep. 5; *In re Now Ge Zhuck*, 76 Pac. Rep. 877. And see *Boyd* v. *Nebraska*, 143 U. S. 162; *Draper* v. *United States*, 164 U. S. 240, 246; *United States* v. *Kopp*, 110 Fed. Rep. 160, 166.

A citizen is one who owes the Government allegiance, service and money by way of taxation, and to whom the Government in turn grants and guarantees liberty of person and conscience, the right of acquiring and possessing property, of marriage

and the social relations of suit and defense, and security in person, estate and reputation. *United States* v. *Cruikshank*, 92 U. S. 542; *Dred Scott* v. *Sandford*, 19 How. 476; *Lyons* v. *Cunningham*, 14 Pac. Rep. 938; *Blank* v. *Pausch*, 113 Illinois, 60.

At the time of the sale of intoxicating liquor to him petitioner was a citizen of the State of Kansas and subject to its laws both civil and criminal and owing allegiance to the State, which was bound to protect him in his rights as such citizen; and in so doing the State would have the right to legislate concerning the sale of intoxicating liquor to him. *People* v. *Bray*, 38 Pac. Rep. 731. If the State has the right to legislate concerning such matters, it cannot belong to the Federal Government. *United States* v. *Ward*, 1 Kansas, 604; *State* v. *Campbell*, 55 N. W. Rep. 553; *The Kansas Indians*, 5 Wall. 737.

Citizenship is not affected by tribal relations. *French* v. *French*, 52 S. W. Rep. 517; *Raymond* v. *Raymond*, 83 Fed. Rep. 723; *United States* v. *Rogers*, 4 How. 567.

When an Indian becomes a citizen of the United States, he also becomes a citizen of the State wherein he resides. *People* v. *Bray*, 38 Pac. Rep. 732; *Beck* v. *Flourney Co.*, 65 Fed. Rep. 35; *Keokuk* v. *Ulam*, 38 Pac. Rep. 1080; *United States* v. *Hadley*, 99 Fed. Rep. 437; *Ells* v. *Ross*, 64 Fed. Rep. 417; *Gassies* v. *Ballon*, 6 Peters, 761. And is subject to its laws both civil and criminal. Congress only has power to regulate commerce of a tribe of Indians who maintain their tribal relations and while they are in a condition to determine for themselves with whom they will have commerce, or are in a condition to have Congress determine it for them. As to the status of an Indian who is subject to the jurisdiction and control of Congress see *United States* v. *Kagama*, 118 U. S. 375; *State* v. *Williams*, 43 Pac. Rep. 15; *People* v. *Ketchem*, 15 Pac. Rep. 353; *State* v. *Newell*, 24 Atl. Rep. 943; *Stevens* v. *Thatcher*, 39 Atl. Rep. 282; *United States* v. *Hershman*, 53 Fed. Rep. 543; act of March 3, 1871, now § 2079, Rev. Stat.; act of March 3, 1885. *Farrell* v. *United States*, 110 Fed. Rep. 942, cannot be sustained. The act of February 8, 1887, makes all allottee

Indians citizens without qualifications, and Kansas, and it alone, can regulate the sale of liquor to citizens of the State and to Indians. Congress cannot make police regulations affecting citizens of States. *State* v. *Wise*, 72 N. W. Rep. 843; *State* v. *Lee*, 38 S. W. Rep. 583; *Breechbill* v. *Randall*, 1 N. E. Rep. 362; *New* v. *Walker*, 108 Indiana, 365; *W. U. Tel. Co.* v. *Pendleton*, 95 Indiana, 12; *Hockett* v. *State*, 5 N. E. Rep. 181; *Board of Excise* v. *Barrie*, 34 N. Y. 666; Cooley on Const. Lim., § 572; *United States* v. *DeWitt*, 9 Wall. 41; *License Tax Cases*, 5 Wall. 462, 475; *Slaughter House Cases*, 16 Wall. 36. Indians can be citizens as to their personal rights and obligations and yet the Government can control their land under the act of 1887. *United States* v. *Rickert*, 188 U. S. 432; 15 Am. & Eng. Ency. Law, 2d ed., 20.

The *Solicitor General* for the United States:

Indian allottees, under the act of 1887, are not citizens at all until the issue of the patent in fee. The "first patent," so-called, does not confer citizenship of the United States or invoke state laws for their benefit and government. The allotment is not completed nor the lands patented within the meaning of sections 5 and 6 of the act until the final grant free of trust or incumbrance. The act of 1897 must be taken as a legislative interpretation of the act of 1887; the matter being political and for the determination of Congress, the courts will follow the construction by Congress; *a fortiori*, when a different construction would render the later act unconstitutional. *Johnson* v. *Southern Pacific Company*, 196 U. S. 1.

As to suspension of the citizenship privilege until issue of final patent see Kickapoo treaty of 1862, which provided (Arts. 2, 3) for preliminary certificates and for ultimate conveyance in fee and citizenship when it was duly determined that allottees were sufficiently intelligent and prudent to control their own affairs.

Even if qualified citizenship attaches upon the issue of the preliminary patent, the Government nevertheless possesses

authority to regulate liquor traffic with Indian allottees. The fundamental Federal power of dealing with Indians and controlling trade with them is broad and absolute, affecting individuals as well as tribes, especially so long as the tribal organization exists. *United States* v. *Kagama*, 118 U. S. 375; *United States* v. *Holliday*, 3 Wall. 407; *United States* v. *43 Gallons of Whiskey*, 93 U. S. 188.

The tribal relations of Indian allottees are not affected by the act of 1887. Section 10, Indian Appropriation Act of March 2, 1895, 23 Stat. 876; § 5, act of February 28, 1899, 30 Stat. 909; Reports Interior Dept. for 1902, pt. 1, p. 217; for 1903, pt. 1, p. 182; act of March 3, 1903, § 7, 32 Stat. 982, 1007. The treaties with the Kickapoos preserved the tribal organization, and the later policy of dealing with them by statute continues that status.

The qualified citizenship and subjection to state laws is not inconsistent with the power of Congress to regulate commerce. The state cases upon which petitioner relies recognize that fact. *State* v. *Campbell*, 53 Minnesota, 354. *United States* v. *Ward*, McCahon's Rep. 199, distinguished, and see *United States* v. *McBratney*, 104 U. S. 621; *Draper* v. *United States*, 164 U. S. 240.

Ordinarily, a Territory has general jurisdiction over an Indian reservation, but only in matters not interfering with the Federal protection of the Indians in accordance with treaty stipulations. *Utah Northern Ry. Co.* v. *Fisher*, 116 U. S. 28. Accordingly, many of the state cases cited by petitioner hold that an Indian allottee may sue and be sued in the state courts; that he may be punished by the State for an offense committed against the State; that if the State confers its citizenship and the right of suffrage upon him, he may vote at state elections.

There is no conflict of jurisdiction here, and the case does not really call for an examination of the meaning of the privileges and liabilities under the State created by the act of 1887. The Indian is not invoking a state law, nor complaining of one, nor is he charged with violation of a state law.

It is not necessary to view the act of 1897 as a repeal *pro tanto* of the act of 1887, but it is certainly true that any jurisdiction that the States may have over the Indians, being derived from Congress, is subject to alteration and repeal by Congress, and the intention of the act of 1897 is manifest. The citizenship of Indian allottees is not inconsistent with the guardianship of Congress. The act of 1887 itself contemplates further Federal control, and this policy is carried out by later acts, *e. g.*, act of February 28, 1891, 26 Stat. 794; act of March 3, 1891, 26 Stat. 987; act of May 31, 1900, 31 Stat. 221; 33 Stat. 213. This guardianship of the United States has been recently recognized. *Cherokee Nation* v. *Hitchcock*, 187 U. S. 308; *Lone Wolf* v. *Hitchcock*, 187 U. S. 567. *United States* v. *Rickert*, 188 U. S. 432, 437. *Farrell* v. *United States*, 110 Fed. Rep. 942, precisely rules the controversy. The act of 1887 did not change the status of Indian allottees as wards of the Government. *Ells* v. *Ross*, 64 Fed. Rep. 417; *United States* v. *Logan*, 105 Fed. Rep. 240; *United States* v. *Flournoy Live Stock &c. Co.*, 69 Fed. Rep. 886; *United States* v. *Mullin*, 71 Fed. Rep. 682; *United States* v. *Belt*, 128 Fed. Rep. 168; *United States* v. *Kiya*, 126 Fed. Rep. 879; *In re Lincoln*, 129 Fed. Rep. 247; *Mulligan* v. *United States*, 120 Fed. Rep. 98.

The continuance of the relation as wards relates both to property and to personal protection. The personal protection is at least as important, and the time of all others when Indians need this protection is when they are taking their first tentative steps as citizens. The right to buy or sell liquor is not an inherent or fundamental right; it is not a privilege or immunity of a citizen of a State or of a citizen of the United States. *Crowley* v. *Christensen*, 137 U. S. 86; *Farrell* v. *United States*, *ut supra*.

The power of the Federal Government to protect the Indians is not dependent upon the preservation of tribal relations.

From the adoption of the Constitution the Indians have been under the exclusive control of the nation, and the States are

without authority to extend their laws over the tribes residing within their limits. Authorities *supra*, and *Worcester* v. *Georgia*, 6 Pet. 565; *Fellows* v. *Blacksmith*, 19 How. 366; *Cherokee Nation* v. *Southern Kansas Ry. Co.*, 135 U. S. 641, 653; *Stevens* v. *Cherokee Nation*, 174 U. S. 445, 484; *Renfrow* v. *United States*, 3 Oklahoma, 166; § 2139, Rev. Stat.

If these Indians are citizens at all, they are not citizens of full competence, just as minors are citizens and subject to rights and duties as such, but are not *sui juris* in respect of age, and other classes of citizens under personal or legal disabilities are not *sui juris* in other respects. *United States* v. *Ritchie*, 17 How. 525, 540.

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

The contention of petitioner is that the act of January 30, 1897, is unconstitutional as applied to the sales of liquor to an Indian who has received an allotment and patent of land under the provisions of the act of February 8, 1887, because it is provided in said act that each and every Indian to whom allotments have been made shall be subject to the laws, both civil and criminal, of the State in which they may reside, and further that John Butler, having, as is admitted, received an allotment of land in severalty and his patent therefor under the provisions of the act of Congress of February 8, 1887, is no longer a ward of the Government, but a citizen of the United States and of the State of Kansas, and subject to the laws, both civil and criminal, of said State.

The relation between the Government and the Indians and the rights and obligations consequent thereon have been the subject of frequent consideration by this court. Among the recent cases, in which are found references to many prior adjudications, may be mentioned *Stephens* v. *Cherokee Nation*, 174 U. S. 445; *Minnesota* v. *Hitchcock*, 185 U. S. 373; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294; *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, and *United States* v. *Rickert*, 188 U. S. 432. In

a general way it may be said that the recognized relation between the Government and the Indians is that of a superior and an inferior, whereby the latter is placed under the care and control of the former. *Choctaw Nation* v. *United States*, 119 U. S. 1, 28. In the early dealings of the Government with the Indian tribes the latter were recognized as possessing some of the attributes of nations, with which the former made treaties, and the policy of the Government was, sometimes by treaties and sometimes by the use of force, to put a stop to the wanderings of these tribes and locate them on some definite territory or reservation, there establishing for them a communal or tribal life. While this policy was in force, and this location of wandering tribes was being accomplished, much of the legislation of Congress ran in the direction of the isolation of the Indians, preventing general intercourse between them and their white neighbors in order that they might not be defrauded or wronged through the superior cunning and skill of those neighbors. The practice of dealing with the Indian tribes as separate nations was changed by a proviso inserted in the Indian appropriation act of March 3, 1871 (16 Stat. 566; carried into section 2079 Rev. Stat.), which reads: "No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty." From that time on the Indian tribes and the individual members thereof have been subjected to the direct legislation of Congress which, for some time thereafter, continued the policy of locating the tribes on separate reservations and perpetuating the communal or tribal life.

While during these years the exercise of certain powers by the Indian tribes was recognized, yet their subjection to the full control of the United States was often affirmed. In *Lone Wolf* v. *Hitchcock*, 187 U. S. 565, it was said: "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the

judicial department of the Government." And the conclusion thus reached was supported by the authority of several cases. It is true we ruled, when treaties between the Indian tribes and the United States were the subject of consideration, that "how the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction." *Worcester* v. *Georgia*, 6 Pet. 515, 582. And we also said that the obligations which the United States were under to the Indians called for "such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection." *Choctaw Nation* v. *United States*, 119 U. S. 1, 28. But none of the decisions affirming the protection of the Indians questioned the full power of the Government to legislate in respect to them.

Of late years a new policy has found expression in the legislation of Congress—a policy which looks to the breaking up of tribal relations, the establishing of the separate Indians in individual homes, free from national guardianship and charged with all the rights and obligations of citizens of the United States. Of the power of the Government to carry out this policy there can be no doubt. It is under no constitutional obligation to perpetually continue the relationship of guardian and ward. It may at any time abandon its guardianship and leave the ward to assume and be subject to all the privileges and burdens of one *sui juris*. And it is for Congress to determine when and how that relationship of guardianship shall be abandoned. It is not within the power of the courts to overrule the judgment of Congress. It is true there may be a presumption that no radical departure is intended, and courts may wisely insist that the purpose of Congress be made clear by its legislation, but when that purpose is made clear the question is at an end.

It may be well to notice some of the legislation of Congress having this end in view. Section 15 of the act of March 3, 1893, 27 Stat. 612, 645, reads:

"The consent of the United States is hereby given to the allotment of lands in severalty not exceeding one hundred and sixty acres to any one individual within the limits of the country occupied by the Cherokees, Creeks, Choctaws, Chickasaws, and Seminoles; and upon such allotments the individuals to whom the same may be allotted shall be deemed to be in all respects citizens of the United States. And the sum of twenty-five thousand dollars, or so much thereof as may be necessary, is hereby appropriated to pay for the survey of any such lands as may be allotted by any of said tribes of Indians to individual members of said tribes; and upon the allotment of the lands held by said tribes respectively, the reversionary interest of the United States therein shall be relinquished and shall cease."

Section 16 created what is known as the Dawes Commission, for extinguishing the national or tribal title to lands within the Indian Territory. Pursuant to its authority an agreement was made with the Choctaw and Chickasaw Nations, for the allotment of their lands among the members, which agreement was ratified and approved by the act of Congress of June 28, 1898. 30 Stat. 495. In that agreement it was stipulated (p. 513): "It is further agreed that the Choctaws and Chickasaws, when their tribal governments cease, shall become possessed of all the rights and privileges of citizens of the United States." By the same act an agreement made with the Creek Indians, which contained a similar stipulation, was ratified and approved. In the last treaty with the Kickapoos, to which tribe John Butler, the person to whom the petitioner is charged to have sold the liquor, belonged, a treaty concluded June 28, 1862 (Revision of Indian Treaties, Art. 8, p. 449), it was provided:

"ART. 3. At any time hereafter, when the President of the United States shall have become satisfied that any adults, being males and heads of families, who may be allottees under the provision of the foregoing article, are sufficiently intelligent and prudent to control their affairs and interests, he may, at

the requests of such persons, cause the land severally held by them to be conveyed to them by patent in fee simple, with power of alienation; and may, at the same time, cause to be set apart and placed to their credit severally, their proportion of the cash value of the credits of the tribe, principal and interest, then held in trust by the United States, and also, as the same may be received, their proportion of the proceeds of the sale of lands under the provisions of this treaty. And on such patents being issued, and such payments ordered to be made by the President, such competent persons shall cease to be members of said tribe, and shall become citizens of the United States; and thereafter the lands so patented to them shall be subject to levy, taxation, and sale, in like manner with the property of other citizens: *Provided*, That before making any such application to the President, they shall appear in open court, in the District Court of the United States for the District of Kansas, and make the same proof and take the same oath of allegiance as is provided by law for the naturalization of aliens; and shall also make proof, to the satisfaction of said court, that they are sufficiently intelligent and prudent to control their affairs and interests; that they have adopted the habits of civilized life, and have been able to support, for at least five years, themselves and families."

A similar clause is found in the treaty of April 19, 1862, between the United States and the Pottawatomie Indians. (Revision of Indian Treaties, 683, 685.) It was not uncommon in the District Court of the United States for the District of Kansas, in the years following these treaties, to see Indians coming into the District Court and taking the oath of allegiance, as required by these provisions. We make these references to recent treaties, not with a view of determining the rights created thereby, but simply as illustrative of the proposition that the policy of the Government has changed, and that an effort is being made to relieve some of the Indians from their tutelage and endow them with the full rights of citizenship, thus terminating between them and the Government the

relation of guardian and ward, and that the statute we are considering is not altogether novel in the history of Congressional legislation.

Now the act of 1887 was passed twenty-five years after the treaty of 1862 with the Kickapoos, and must be construed in the light of that treaty. By the treaty it was declared that at the instance of the President, and upon compliance with specified provisions, certain of the Indians should be considered as competent persons, should cease to be members of the tribe and become citizens of the United States. The act of 1887, in like manner, provides that at the instance of the President, a reservation may be surveyed and individual tracts allotted to the Indians, and that upon approval of the allotments by the Secretary of the Interior patents shall issue, subject to a condition against alienation and incumbrances during a period of twenty-five years, or longer, if the President deems it wise. Section 6 then declares that the "Indians to whom allotments shall have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside, and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law."

It is urged that this clause becomes operative only when the final patent provided for by section 5 is issued, but there are many reasons why such contention is unsound. In the first place, it is hardly to be supposed that Congress would legislate twenty-five years in advance in respect to the general status of these Indians. If they were to continue in the same relation to the Government that they hitherto occupied, it would seem as though Congress would have said nothing and waited until near the expiration of twenty-five years before determining what should be such status. Second, the language of the first sentence of section 6 forbids the construction contended for. It is "that upon the completion of said allotments and the patenting of the lands to said allottees." Now the allotting and the patenting are joined together as though oc-

curring at or near the same time. Further, when the first patent is issued, the recipient ceases to be an allottee and becomes a patentee. Again, the second patent does not always go to the holder of the first patent because, as provided by section 5, it may go to the first patentee or his heirs. And finally, the last sentence indicates that the whole section deals with present conditions and present rights. It reads: "And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act . . . is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, . . . without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property." This confers citizenship upon the allottee and not upon the patentee, while at the same time securing to him his right to tribal or other property. So far as his political status is concerned the allottee is declared to be a citizen—not that he will be a citizen after twenty-five years have passed and a second patent shall have been issued. That citizenship is limited to the allottees born within the territorial limits of the United States was obviously intended to exclude from that privilege such allottees, if any there should be, who had recently come into this country from the Dominion of Canada or elsewhere.

This question has been presented to several state and some Federal courts, and the ruling universally has been to the same effect. *State ex rel.* v. *Denoyer*, 6 N. Dak. 586; *State ex rel.* v. *Norris*, 37 Nebraska, 299; *Wa-La-Note-Tke-Tynin* v. *Carter*, 6 Idaho, 85; *In re Now-Ge-Zhuck*, 76 Pac. Rep. 877; *United States* v. *Rickert*, 106 Fed. Rep. 1, 5; *Farrell* v. *United States*, 110 Fed. Rep. 942, 947. In the first of these cases this declaration is made: "Such Indians and persons of Indian descent, so residing upon lands allotted to them in severalty, and upon which the preliminary patents have been issued, are citizens of the United States, and qualified electors of this State." See also *Boyd* v. *Thayer*, 143 U. S. 135, 162, in which it is said:

"The act of Congress approved February 8, 1887, 24 Stat. 388, was much broader, and by its terms made every Indian situated as therein referred to, a citizen of the United States."

In reference to this matter the learned Solicitor General makes these observations:

"Were it not for the fact that every court that has considered this language at all has assumed it to mean that an Indian becomes entitled to the benefit of and subject to the laws of the State in which he resides upon the receipt of his first patent, the natural inference would be that Congress intended those consequences to attach only when the allotments referred to had been fully completed and final patent issued. But in spite of the array of cases upon this subject, it will be found, upon examination, that in none of them was the provision referred to carefully analyzed and discussed, and that from first to last it has been merely a matter of assumption.

"Upon the subject of citizenship, section 6 provides that 'every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act or under any law or treaty, . . . is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens.'

"It would seem that Congress intended citizenship of the United States to attach at the same time that the Indian becomes subject to the laws of the State or Territory in which he resides. As a matter of constitutional law, an Indian appears to be entitled to the benefit of and to be subject to the laws of the State in which he resides the moment he becomes a citizen of the United States. By virtue of the Fourteenth Amendment a citizen of the United States becomes, by residence therein, a citizen of the State, and entitled to all the rights, privileges, and immunities of other citizens of the State and to the equal protection of its laws. *The Slaughter House Cases*, 16 Wall. 36."

We do not doubt that the construction placed by these several courts upon this section is correct, and that John Butler, at the time the defendant sold him the liquor, was a citizen of the United States and of the State of Kansas, having the benefit of and being subject to the laws, both civil and criminal, of that State. Under these circumstances could the conviction of the petitioner in the Federal court of a violation of the act of Congress of January 30, 1897, be sustained? In this Republic there is a dual system of government, National and state. Each within its own domain is supreme, and one of the chief functions of this court is to preserve the balance between them, protecting each in the powers it possesses and preventing any trespass thereon by the other. The general police power is reserved to the States, subject, however, to the limitation that in its exercise the State may not trespass upon the rights and powers vested in the General Government. The regulation of the sale of intoxicating liquors is one of the most common and significant exercises of the police power. And so far as it is an exercise of the police power it is within the domain of state jurisdiction. It is true the National Government exacts licenses as a condition of the sale of intoxicating liquors, but that is solely for the purposes of revenue and is no attempted exercise of the police power. A license from the United States does not give the licensee authority to sell liquor in a State whose laws forbid its sale, and neither does a license from a State to sell liquor enable the licensee to sell without paying the tax and obtaining the license required by the Federal statute. *License Cases*, 5 How. 504; *McGuire* v. *The Commonwealth*, 3 Wall. 387; *License Tax Cases*, 5 Wall. 462. Now the act of 1897 is not a revenue statute, but plainly a police regulation. It will not be doubted that an act of Congress attempting as a police regulation to punish the sale of liquor by one citizen of a State to another within the territorial limits of that State would be an invasion of the State's jurisdiction and could not be sustained, and it would be immaterial what the antecedent status of either buyer or seller

was. There is in these police matters no such thing as a divided sovereignty. Jurisdiction is vested entirely in either the State or the Nation and not divided between the two.

In *The Kansas Indians*, 5 Wall. 737, the question was whether lands of Shawnee Indians held in severalty were subject to state taxation, and it was held that they were not, although in the last treaty with the Shawnees, the one authorizing the allotments, there was no express stipulation for exemption from taxation. The court said (p. 755):

"If the tribal organization of the Shawnees is preserved intact, and recognized by the political department of the Government as existing, then they are a 'people distinct from others,' capable of making treaties, separated from the jurisdiction of Kansas, and to be governed exclusively by the government of the Union. If under the control of Congress, from necessity there can be no divided authority. If they have outlived many things, they have not outlived the protection afforded by the Constitution, treaties, and laws of Congress. It may be that they cannot exist much longer as a distinct people in the presence of the civilization of Kansas, 'but until they are clothed with the rights and bound to all the duties of citizens,' they enjoy the privilege of total immunity from state taxation."

If it be true that there can be no divided authority over the property of the Indian, *a fortiori* must it be true as to his political status and rights.

Subjection to both state and National law in the same matter might often be impossible. The power to punish a sale to an Indian implies an equal power to punish a sale by an Indian. If by National law a sale to or by an Indian was punished solely by imprisonment and by state law solely by fine, how could both laws be enforced in respect to the same sale? The question is not whether a particular right may be enforced in either a court of the State or one of the Nation, but whether two sovereignties can create independent duties and compel obedience. In *United States* v. *Dewitt*, 9 Wall. 41, the

question was whether the twenty-ninth section of the internal revenue act of March 2, 1867, 14 Stat. 471, 484, which established a police regulation in respect to the mixing for sale or the selling of naphtha and illuminating oils was enforcible within the limits of a State, and it was held that it was not, the court saying (p. 45):

"As a police regulation, relating exclusively to the internal trade of the States, it can only have effect where the legislative authority of Congress excludes, territorially, all state legislation, as for example, in the District of Columbia. Within state limits, it can have no constitutional operation."

In re Now-Ge-Zhuck, 76 Pac. Rep. 877, decided by the Supreme Court of Kansas, referred to an allottee under the act of February 8, 1887, and in respect to the power of the State to enforce its laws over such allottee that court said:

"An Indian upon whom has been conferred citizenship, and who enjoys the protection of the laws of the State, should be punished for a transgression of them. This we are to presume Congress contemplated. It being shown by the agreed facts that the petitioner was an allottee to whom a patent had been issued, and further shown that the allotments had been made and completed as provided by the act of February 8, 1887, the laws of the State were operative, and the State had jurisdiction to arrest and punish petitioner for the offense by him committed."

It is true the same act may often be a violation of both the state and Federal law, but it is only when those laws occupy different planes. Thus, a sale of liquor may be a violation of both the state and Federal law, in that it was made by one who had not paid the revenue tax and received from the United States a license to sell, and also had not complied with the state law in reference to the matter of state license. But in that case the two laws occupy different planes—one that of revenue and the other that of police regulation. There is no suggestion in the present case of a violation of the internal revenue law of the Nation, but the conviction is sought to be

upheld under the act of 1897, a mere statute of police regulation.

But it is contended that although the United States may not punish under the police power the sale of liquor within a State by one citizen to another it has power to punish such sale if the purchaser is an Indian. And the power to do this is traced to that clause of section 8, Art. I, of the Constitution, which empowers Congress "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." It is said that commerce with the Indian tribes includes commerce with the members thereof, and Congress having power to regulate commerce between the white men and the Indians continues to retain that power, although it has provided that the Indian shall have the benefit of and be subject to the civil and criminal laws of the State and shall be a citizen of the United States, and therefore a citizen of the State. But the logic of this argument implies that the United States can never release itself from the obligation of guardianship; that so long as an individual is an Indian by descent, Congress, although it may have granted all the rights and privileges of National and therefore state citizenship, the benefits and burdens of the laws of the State, may at any time repudiate this action and reassume its guardianship, and prevent the Indian from enjoying the benefit of the laws of the State, and release him from obligations of obedience thereto. Can it be that because one has Indian, and only Indian blood in his veins, he is to be forever one of a special class over whom the General Government may in its discretion assume the rights of guardianship which it has once abandoned, and this whether the State or the individual himself consents? We think the reach to which this argument goes demonstrates that it is unsound.

But it is said that the Government has provided that the Indians' title shall not be alienated or encumbered for twenty-five years, and has also stipulated that the grant of citizenship shall not deprive the Indian of his interest in tribal or other

property, but these are mere property rights and do not affect the civil or political status of the allottees. In *United States* v. *Rickert,* 188 U. S. 432, we sustained the right of the Government to protect the lands thus allotted and patented from any encumbrance of state taxation. Undoubtedly an allottee can enforce his right to an interest in the tribal or other property (for that right is expressly granted) and equally clear is it that Congress may enforce and protect any condition which it attaches to any of its grants. This it may do by appropriate proceedings in either a National or a state court. But the fact that property is held subject to a condition against alienation does not affect the civil or political status of the holder of the title. Many a tract of land is conveyed with conditions subsequent. A minor may not alienate his lands; and the proper tribunal may at the instance of the rightful party enforce all restraints upon alienation.

But it is unnecessary to pursue this discussion further. We are of the opinion that when the United States grants the privileges of citizenship to an Indian, gives to him the benefit of and requires him to be subject to the laws, both civil and criminal, of the State, it places him outside the reach of police regulations on the part of Congress; that the emancipation from Federal control thus created cannot be set aside at the instance of the Government without the consent of the individual Indian and the State, and that this emancipation from Federal control is not affected by the fact that the lands it has granted to the Indian are granted subject to a condition against alienation and encumbrance, or the further fact that it guarantees to him an interest in tribal or other property.

The District Court of Kansas did not have jurisdiction of the offense charged, and therefore the petitioner is entitled to his discharge from imprisonment.

Mr. Justice Harlan dissented.

WHITAKER *v.* McBRIDE.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

No. 135. Submitted January 18, 1905.—Decided April 10, 1905.

The question of the title of a riparian owner is one of local law, and unrestricted grants of the Government, bounded on streams and other waters, are to be construed according to the law of the State in which the lands lie. *Hardin* v. *Jordan*, 140 U. S. 371.

Government surveys of public lands are not open to collateral attack in an action at law between private parties.

A meander line is not a line of boundary but a means of ascertaining the quantity of land in the fraction which is to be paid for by the purchaser.

Where the Government has surveyed and patented the lands up to the bank of a channel in which an unsurveyed island is situated, a patentee of the land on such bank, although his land may itself be an island surrounded by two channels of the river, has all the rights of a riparian owner in the channel lying opposite his banks, including the unsurveyed island if, as a riparian owner, he is entitled thereto by the laws of the State.

By the law of Nebraska, as interpreted by its highest court, riparian proprietors own the bed of a stream to the center of the channel. The Government as original proprietor has the right to survey and sell any lands, including islands in a river or any other body of water, and if it omits to survey an island in a stream and refuses to do so when its attention is called to the matter, no citizen can overrule the Department, and assuming that the island should be surveyed, occupy it for homestead or preëmption entry. In such a case the rights of riparian owners are to be preferred to those of the settler.

THIS was an action commenced on June 27, 1898, in the District Court of Buffalo County, Nebraska, and terminated by a decision of the Supreme Court of the State. 65 Nebraska, 137. The facts found by the District Court are that McBride and Killgore were respectively the owners and in possession of tracts of land bordering on the Platte River, one on the north and the other on the south side thereof. Between these two tracts and in the main channel of the Platte River is an island, containing about twenty-two acres. This island had

been in the possession of McBride and Killgore for more than ten years prior to the bringing of the action, but during that time they were contending as to how much of the land each was entitled to. It had never been surveyed by the Government.

It appeared in evidence that Whitaker, in 1897, settled on the island, claiming the right to enter the same as a homestead; that application to the Land Department of the Government to have the island surveyed was in 1897 refused, the Department declining to take any action in the matter. These lands were a part of the Fort Kearney Military Reservation, which was surveyed and sold under a special act of Congress, dated July 21, 1876, 19 Stat. 94; the patent to McBride, who had entered his tract as a homestead, bearing date March 28, 1885. There was testimony tending to show that the island was at the time of the survey of the reservation frequently covered with water, and that since then—perhaps owing to the construction of bridges and dykes—overflows had been less frequent and the land better adapted to occupation and cultivation. The decree directed by the Supreme Court was adverse to Whitaker, and quieted the title of McBride and Killgore to the island, giving to each one-half.

Mr. E. E. Brown, and *Mr. Francis G. Hamer* for plaintiff in error.

Mr. H. M. Sinclair, *Mr. E. C. Calkins* and *Mr. M. P. Kinkaid* for defendants in error.

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

The decision of the Supreme Court of the State was that the owner of lands bordering on a river owns to the center of the channel, and takes title to any small bodies of land on his side of the channel that have not been surveyed or sold by the Government. It is the settled rule that the question of the

title of a riparian owner is one of local law. In *Hardin* v. *Jordan*, 140 U. S. 371, the matter was discussed at some length, the authorities cited, and the conclusion thus stated by Mr. Justice Bradley, delivering the opinion of the court (p. 384):

"In our judgment the grants of the Government for lands bounded on streams and other waters, without any reservation or restriction of terms, are to be construed as to their effect according to the law of the State in which the lands lie."

See also *Shively* v. *Bowlby*, 152 U. S. 1, 45; *Lowndes* v. *Huntington*, 153 U. S. 1, 19; *Grand Rapids &c. Railroad Company* v. *Butler*, 159 U. S. 87, 92; *St. Anthony Falls Power Company* v. *Water Commissioners*, 168 U. S. 349; *Kean* v. *Calumet Canal Co.*, 190 U. S. 452; *Hardin* v. *Shedd*, 190 U. S. 508.

If there were no island in this case it would not, under these authorities, be questioned that the title of the riparian owners extended to the center of the channel. How far does the fact that there is this unsurveyed island in the river abridge the scope of the rule? In seeking an answer to this question these facts must be borne in mind: The official surveys made by the Government are not open to collateral attack in an action at law between private parties. *Stoneroad* v. *Stoneroad*, 158 U. S. 240; *Russell* v. *Maxwell Land Grant Company*, 158 U. S. 253; *Horne* v. *Smith*, 159 U. S. 40. A meander line is not a line of boundary, but one designed to point out the sinuosity of the bank or shore, and a means of ascertaining the quantity of land in the fraction which is to be paid for by the purchaser. *Railroad Company* v. *Schurmeir*, 7 Wall. 272; *Hardin* v. *Jordan*, *supra*; *Horne* v. *Smith*, *supra*. The Fort Kearney reservation was a single body of land, whose survey was directed by a special act of Congress, and there is nothing to show that in making the survey there was any intentional wrong on the part of the surveyors. Evidently the survey of the entire tract was completed before the lands, or any part of them, were offered for sale. According to statements in the brief of counsel for plaintiff in error as well as in the opinion of the Secretary of the Interior in *In re Christensen*, 25 L. D. 413,

there were several islands in the Platte River within the reservation not surveyed. The Secretary says that it does not appear why the lines of survey were not extended over these islands, but in the brief of counsel as well as in the opinion of the Supreme Court it is stated that the instructions issued by the Land Department to the surveyors were to survey all islands of twenty-one acres and upwards. The reason of the Department or of the surveyors (whichever may have been responsible for the omission to survey these small islands) for these omissions is not disclosed. Possibly they may have been regarded as having no stability as tracts of land but as mere sandbars, which are frequently found in Western waters, and are of temporary duration, existing to-day and gone to-morrow. Be that as it may, there is nothing to indicate any fraud or mistake on the part of the surveyors. Doubtless this island of about twenty-two acres was regarded as coming within their instructions, and very likely at the time of the survey did not contain even twenty-one acres. Further, an application for a survey of this island was refused, and this refusal was repeated once or twice. The Secretary of the Interior based his action on the decision of this court in *Grand Rapids & Indiana Railroad Company* v. *Butler*, 159 U. S. 87, and held that the Department was precluded from a survey and sale of an island after the lands on the adjacent banks of the river had been surveyed and sold. In the *Grand Rapids case* it appeared that the land on the east bank of Grand River had been surveyed in 1831, and that on the west bank of the river in 1837, and also that included in this last survey were four islands. Upon these surveys the adjacent land and the islands were sold and patented to private parties. In 1855 a parcel of ground in the river was, under instructions from the surveyor general, surveyed and marked "Island No. 5," and for that island a patent was issued to the railroad company. We held that the patent to the riparian owner issued before the date of the last survey conveyed to him the title to the island, saying (p. 95):

"We have no doubt upon the evidence that the circumstances were such at the time of the survey as naturally induced the surveyor to decline to survey this particular spot as an island. There is nothing to indicate mistake or fraud, and the Government has never taken any steps predicated on such a theory; and did not survey the so called Island No. 5 until twenty-five years after the survey of 1831, and nearly twenty years after that of 1837."

These considerations furnish a sufficient answer to the question and sustain the decision of the Supreme Court of Nebraska.

It is further contended that the land of one of these patentee's is itself part of an island, and that therefore he has no riparian rights. It is sufficient reply to this contention that the Government surveyed and patented the lands up to the banks of the channel in which the island in controversy is situated, and a patentee, although his land may be itself surrounded by two channels of the river, has all the rights of a riparian owner in the channel lying opposite his banks.

Nothing herein stated conflicts with *Horne* v. *Smith, supra; Niles* v. *Cedar Point Club*, 175 U. S. 300; *French-Glenn Live Stock Company* v. *Springer*, 185 U. S. 47, or *Kirwan* v. *Murphy*, 189 U. S. 35. In the first of those cases it appeared that the survey stopped at a bayou and did not extend to the main channel of Indian River, a mile distant, and we held that the line of that bayou must be considered as the boundary of the grant; that it could not be extended over the unsurveyed land between the bayou and the main channel of Indian River; that it was a case of an omission from the survey of land that ought to have been surveyed, and that such omission did not operate to transfer unsurveyed land to the patentee of the surveyed land bordering on the bayou. In the second we held that, as the survey showed a meander line bordering on a tract of swamp or marsh lands, the grant by patent terminated at the meander line and did not carry the swamp lands lying between it and the shores of Lake Erie. In the third, it appeared that there was no body of water in front of the meandered line,

and we held that that line must, therefore, be the limit of the grant, and the fact that outside the side lines extended there was a body of water did not operate to extend the grant into any portion of that body of water. In the last of these cases the complainants, the owners of 859.38 acres as shown by the descriptions in their patents of fractional lots, claimed by reason thereof to be the owners of 1,202 acres lying between the meandered lines and a lake, and sought by injunction to restrain the Land Department from making a survey of these latter lands. We held that injunction would not lie, and that the officers of the Government could not be restrained from making a survey; that the rights of the complainants could be settled, after a survey and transfer of the legal title from the Government, by an action at law.

It is suggested in one of the briefs that this island extends up or down the river beyond the side lines of the tracts belonging to these riparian proprietors. A plat which is in evidence seems to support this statement, but the finding of the trial court, which is not disturbed by the Supreme Court, is to the effect that it lies between the tracts of the riparian proprietors. Of course, their title is only to the land which is in front of their banks and not beyond the side lines in either direction.

It must also be noticed that the Government is not a party to this litigation, and nothing we have said is to be construed as a determination of the power of the Government to order a survey of this island or of the rights which would result in case it did make such survey. As we reserve the rights of the United States we do not even impliedly sanction the intimation contained in the opinion of the court below that under the decision in *Hardin* v. *Jordan*, 140 U. S. 371, although, on non-navigable waters, riparian rights were not conferred by the state law, nevertheless the land beyond the banks passed to the State in virtue of the patents of the United States to the lot owners. Upon that question we express no opinion.

Our conclusion, therefore, is that by the law of Nebraska, as interpreted by its highest court, the riparian proprietors are

the owners of the bed of a stream to the center of the channel; that the Government, as original proprietor, has the right to survey and sell any lands, including islands in a river or other body of water; that if it omits to survey an island in a stream and refuses, when its attention is called to the matter, to make any survey thereof, no citizen can overrule the action of the Department, assume that the island ought to have been surveyed, and proceed to occupy it for the purposes of homestead or preëmption entry. In such a case the rights of riparian proprietors are to be preferred to the claims of the settler.

We see no error in the judgment of the Supreme Court of Nebraska, and it is

Affirmed.

RASSMUSSEN *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA.

No. 51. Argued November 4, 1904.—Decided April 10, 1905.

The treaty with Russia concerning Alaska, instead of exhibiting, as did the treaty with Spain respecting the Philippine Islands, the determination to reserve the question of the status of the acquired territory for ulterior action by Congress, manifested a contrary intention to admit the inhabitants of the ceded territory to the enjoyment of citizenship, and expressed the purpose to incorporate the territory into the United States.

Under the treaty with Russia ceding Alaska and the subsequent legislation of Congress, Alaska has been incorporated into the United States and the Constitution is applicable to that Territory, and under the Fifth and Sixth Amendments Congress cannot deprive one there accused of a misdemeanor of trial by a common law jury, and that § 171 of the Alaska Code, 31 Stat. 358, in so far as it provides that in trials for misdemeanors six persons shall constitute a legal jury, is unconstitutional and void.

THE facts are stated in the opinion.

Mr. R. W. Jennings and *Mr. W. E. Crews* for plaintiff in error submitted:

Section 171, p. 179, Carter's Annotated Alaska Codes, providing that in trials for misdemeanors six persons shall constitute a legal jury, was taken verbatim from the Oregon Code, with the proviso added.

That portion of § 171 authorizing a trial by a jury of six persons is void, because it deprives a person of the right of trial by a jury of twelve competent, impartial men as guaranteed to every citizen by the provisions of the Constitution, and Congress has no power under the Constitution to pass an act authorizing a trial in a criminal case by a jury of less than twelve men.

The terms "jury" and "trial by jury" are and always have been well known in the language of the law. They were used at the adoption of the Constitution, and always it is believed before that time; and almost since in a single sense. Cooley's Const. Lim. 391; 1 Bishop Crim. Procedure, §§ 764 *et seq; Flint River Steamboat Co.* v. *Foster*, 5 Georgia, 195; *Stoppe* v. *Commonwealth*, 74 Pa. St. 458; Wharton's Law Dict., Title "Challenge" U. S. Crim. Law (Lewis), 611; *Worke* v. *State*, 2 Ohio St. 277; *People* v. *Bodine*, 1 Denio, 304; *Freeman* v. *People*, 4 Denio, 34; *Wyheimer* v. *People*, 15 N. Y. 424; *Cancemei* v. *People*, 16 N. Y. 504; *People* v. *Williams*, 6 California, 207; *Cooley* v. *State*, 38 Texas, 637; *Ingersoll* v. *Wilson*, 2 W. Va. 59; *Nevada* v. *McClare*, 2 Nevada, 42, 60.

The provisions of the Constitution relating to the right of the trial by jury in suits at common law apply to the Territories of the United States. *Webster* v. *Reid*, 2 How. 437, 460; *Publishing Co.* v. *Fisher*, 166 U. S. 464; *Springville* v. *Thomas*, 166 U. S. 707; *Reynolds* v. *United States*, 98 U. S. 145, 154; *Callan* v. *Wilson*, 127 U. S. 540, 548; *Thompson* v. *Utah*, 170 U. S. 343, citing *Mormon Church Case*, 136 U. S. 1, 44; *Bank* v. *Yankton*, 101 U. S. 129; *Murphy* v. *Ramsay*, 114 U. S. 15, 44.

Such an act can not be sustained as a police regulation; for, as such, it would be equally obnoxious. Citizens of Alaska are

guaranteed the constitutional right of a trial by jury. They are under the direct and complete jurisdiction of the United States. The courts are clothed with the power and jurisdiction of Circuit and District Courts of the United States. Section 367, p. 432, Alaska Code; Art. 3, Treaty of Cession between United States and Russia.

Mr. Assistant Attorney General Robb for the United States:

Cases cited by plaintiff in error do not apply as the Constitution has not been extended over the Territory as it had been in the cases cited. This case is controlled by *Hawaii* v. *Mankichi*, 190 U. S. 197; *Dorr* v. *United States*, 195 U. S. 138; and see *Downes* v. *Bidwell*, opinion Brown, J., 182 U. S. 280.

As to Art. 3 of the treaty with Russia it was intended to extend, and no doubt did extend, to the civilized inhabitants of the Territory certain fundamental attributes and privileges of American citizenship, but it will hardly be contended that it was thereby intended to extend all the provisions of the Constitution to this barren and desolate region, peopled as it was by savages and an alien race, wholly out of sympathy with our customs and institutions.

As to legislation regarding Alaska see §§ 2, 9, 14, 23 Stat. 24; Crim. Code, Alaska, March 3, 1899, 30 Stat. 1253; Act of June 6, 1900, 31 Stat. 321; § 1891, Rev. Stat., does not cover Alaska as it is not an organized Territory. And see Standard and Century Dictionaries, *Sub* "Territory." *The Coquitlam*, 163 U. S. 346, and *Binns* v. *United States*, 194 U. S. 486, do not decide that Alaska is organized Territory. And see *In re Lane*, 135 U. S. 443.

Mr. Justice White delivered the opinion of the court.

The plaintiff in error was indicted for violating section 127 of the Alaska Code, prohibiting the keeping of a disreputable house and punishing the offense by a fine or imprisonment in the county jail.

As stated in the bill of exceptions, when the case was called

the court announced "that the cause would be tried before a jury composed of six jurors," in accordance with section 171 of the Code for Alaska adopted by Congress, wherein, among other things, it was provided as follows (31 Stat. 321, 359): "That hereafter in trials for misdemeanors six persons shall constitute a legal jury." To this announcement by the court an exception was duly preserved. A jury of six persons was then empanelled, when the objection was renewed and a demand made for a common law jury, which was refused, and an exception was again taken.

To a verdict and judgment of conviction this writ is prosecuted directly to this court, reliance for a reversal being had on the violation of the Constitution alleged to have resulted from the trial of the case by a jury of six persons and upon other errors of law which, it is asserted, the court committed in the course of the trial.

At the threshold of the case lies the constitutional question whether Congress had power to deprive one accused in Alaska of a misdemeanor of trial by a common law jury, that is to say, whether the provision of the act of Congress in question was repugnant to the Sixth Amendment to the Constitution of the United States.

At the bar the Government did not deny that offenses of the character of the one here prosecuted could only be tried by a common law jury, if the Sixth Amendment governed. The Government, moreover, did not dispute the obvious and fundamental truth that the Constitution of the United States is dominant where applicable. The validity of the provision in question is therefore sought to be sustained upon the proposition that the Sixth Amendment to the Constitution did not apply to Congress in legislating for Alaska. And this rests upon two contentions which we proceed separately to consider.

1. *Alaska was not incorporated into the United States, and therefore the Sixth Amendment did not control Congress in legislating for Alaska.*

If the premise, that is, the status of Alaska, be conceded, the conclusion deduced from it is established by the previous rulings of this court. In *Dorr* v. *United States*, 195 U. S. 138, the question was whether the Sixth Amendment was controlling upon Congress in legislating for the Philippine Islands. Applying the principles which caused a majority of the judges who concurred in *Downes* v. *Bidwell*, 182 U. S. 244, to think that the uniformity clause of the Constitution was inapplicable to Porto Rico, and following the ruling announced in *Hawaii* v. *Mankichi*, 190 U. S. 197, it was decided that, whilst by the treaty with Spain the Philippine Islands had come under the sovereignty of the United States and were subject to its control as a dependency or possession, those Islands had not been incorporated into the United States as a part thereof, and therefore Congress, in legislating concerning them, was subject only to the provisions of the Constitution applicable to territory occupying that relation. The power to acquire territory without incorporating it into the United States as an integral part thereof, as we have said, was sustained upon the reasoning expounded in the opinion of three, if not of four, of the judges who concurred in the judgment in *Downes* v. *Bidwell*, that reasoning being in effect adopted in the *Dorr case* as the basis of the ruling there made, the court saying (p. 143:)

"Until Congress shall see fit to incorporate territory ceded by treaty into the United States, we regard it as settled by that decision (*Downes* v. *Bidwell*) that the territory is to be governed under the power existing in Congress to make laws for such territories and subject to such constitutional restrictions upon the powers of that body as are applicable to the situation."

And in view of the status of the Philippine Islands it was decided that the Sixth Amendment was not applicable to those Islands, and therefore Congress, when it legislated concerning them, was not controlled by the provisions of that Amendment. It would serve no useful purpose to reëxpress the reasons supporting this conclusion, and we content ourselves with quoting

the summing up made by the court in the opinion in the *Dorr case*, as follows (p. 149):

"We conclude that the power to govern territory, implied in the right to acquire it, and given to Congress in the Constitution in Article IV, § 3, to whatever other limitations it may be subject, the extent of which must be decided as questions arise, does not require that body to enact for ceded territory, not made a part of the United States by Congressional action, a system of laws which shall include the right of trial by jury, and that the Constitution does not, without legislation and of its own force, carry such right to territory so situated."

We are brought then to determine whether Alaska has been incorporated into the United States as a part thereof, or is simply held, as the Philippine Islands are held, under the sovereignty of the United States as a possession or dependency.

Concerning the test to be applied to determine whether in a particular case acquired territory has been incorporated into and forms a part of the United States, we do not deem it necessary to review the general subject, again contenting ourselves by quoting a brief passage from the opinion in *Dorr* v. *United States*, summing up the reasons which controlled in determining that the Philippine Islands were not incorporated, viz. (p. 143):

"If the treaty-making power could incorporate territory into the United States without Congressional action, it is apparent that the treaty with Spain, ceding the Philippines to the United States, carefully refrained from so doing; for it is expressly provided that (Article IX) 'the civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress.' In this language it is clear that it was the intention of the framers of the treaty to reserve to Congress, so far as it could be constitutionally done, a free hand in dealing with these newly-acquired possessions.

"The legislation upon the subject shows that not only has Congress hitherto refrained from incorporating the Philippines

into the United States, but in the act of 1902, providing for temporary civil government, 32 Stat. 691, there is express provision that section eighteen hundred and ninety-one of the Revised Statutes of 1878 shall not apply to the Philippine Islands."

This brings us to consider the treaty by which Alaska was acquired and the action of Congress concerning that acquisition, for the purpose of ascertaining whether within the criteria referred to in *Downes* v. *Bidwell* and adopted and applied in *Dorr* v. *United States*, Alaska was incorporated into the United States.

The treaty concerning Alaska, instead of exhibiting, as did the treaty respecting the Philippine Islands, the determination to reserve the question of the status of the acquired territory for ulterior action by Congress, manifested a contrary intention, since it is therein expressly declared, in Article 3, that:

"The inhabitants of the ceded territory shall be admitted to the enjoyment of all the rights, advantages and immunities of citizens of the United States; and shall be maintained and protected in the free enjoyment of their liberty, property and religion."

This declaration, although somewhat changed in phraseology, is the equivalent, as pointed out in *Downes* v. *Bidwell*, of the formula employed from the beginning to express the purpose to incorporate acquired territory into the United States, especially in the absence of other provisions showing an intention to the contrary. And it was doubtless this fact conjoined with the subsequent legislation of Congress which led to the following statement concerning Alaska made in the opinion of three, if not four, of the judges who concurred in the judgment of affirmance in *Downes* v. *Bidwell* (p. 335):

"Without referring in detail to the acquisition from Russia of Alaska, it suffices to say that that treaty also contained provisions for incorporation and was acted upon exactly in accord with the practical construction applied in the case of the acquisitions from Mexico as just stated."

Presumably it was also a consideration of the character of the rights conferred by the treaty by which Alaska was acquired, and the legislation of Congress concerning that Territory, to which we shall hereafter refer, which caused Mr. Justice Gray, in his concurring opinion in *Downes* v. *Bidwell*, to say (p. 345):

"The cases now before the court do not touch the authority of the United States over the Territories, in the strict and technical sense, being those which lie within the United States, as bounded by the Atlantic and Pacific Oceans, the Dominion of Canada and the Republic of Mexico, and the Territories of Alaska and Hawaii, but they relate to territory in the broader sense, acquired by the United States by war with a foreign State."

That Congress, shortly following the adoption of the treaty with Russia, clearly contemplated the incorporation of Alaska into the United States as a part thereof, we think plainly results from the act of July 20, 1868, concerning internal revenue taxation, c. 186, section 107, 15 Stat. 125, 167, and the act of July 27, 1868, c. 273, extending the laws of the United States relating to customs, commerce and navigation over Alaska and establishing a collection district therein. 15 Stat. 240. And this is fortified by subsequent action of Congress, which it is unnecessary to refer to.

Indeed, both before and since the decision in *Downes* v. *Bidwell* the status of Alaska as an incorporated Territory was and has been recognized by the action and decisions of this court. By the sixth section of the judiciary act of March 3, 1891, 26 Stat. 826, it was made the duty of this court to assign the several Territories of the United States to particular circuits; and in execution of this law this court, by an order promulgated May 11, 1891, assigned the Territory of Alaska to the ninth judicial circuit. *Steamer Coquitlam* v. *United States*, 163 U. S. 346. That case was a suit in admiralty, brought by the United States in the District Court of Alaska for the forfeiture of the steamer Coquitlam, because of a violation of the revenue laws

of the United States. From a decree rendered in favor of the United States an appeal was prosecuted to the Circuit Court of Appeals for the Ninth Circuit. The United States challenged the jurisdiction of the Circuit Court of Appeals upon the grounds: 1. That the District Court of Alaska was not a District Court within the meaning of the sixth section of the judiciary act of 1891, and was not a District Court belonging to the Ninth Circuit; 2. That the District Court of Alaska was not the Supreme Court of a Territory within the meaning of the order of this court. The Circuit Courts of Appeal certified the question of jurisdiction. After fully reviewing the legislation of Congress relating to Alaska and stating the general appellate power of the Circuit Court of, Appeal over judgments and decrees of the District and Circuit Courts, it was decided that under the authority granted to the Circuit Courts of Appeal by the fifteenth section of the judiciary act of March 3, 1891, to review judgments of the Supreme Court of any Territory assigned to such circuit by this court, the Circuit Court of Appeals of the Ninth Circuit possessed appellate jurisdiction over the cause. In the course of the opinion it was declared (p. 352):

"Alaska is one of the Territories of the United States. It was so designated in that order (referring to the order of this court assigning to the ninth circuit) and has always been so regarded. And the court established by the act of 1884 is the court of last resort within the limits of that Territory. It is, therefore, in every substantial sense the Supreme Court of that Territory."

In *Binns* v. *United States*, 194 U. S. 486, the question was this: The penal code for Alaska imposed certain license taxes. The plaintiff in error was convicted for not paying such a tax, and the case was brought to this court on the contention that the act of Congress levying the tax was repugnant to the clause of the Constitution requiring uniformity throughout the United States, as licenses of the character complained of were imposed only in Alaska. After referring to the statements concerning

Alaska contained in the concurring opinions in *Downes* v. *Bidwell,* the one written by Mr. Justice Gray and the other by Mr. Justice White, and after approvingly citing the passage from the *Coquitlam case* above referred to, the court declared it to be settled that Alaska had been undoubtedly incorporated into the United States, and hence conceded that the license complained of was invalid if levied by Congress under the general grant in the Constitution of the power of taxation. The legislation in question was, however, sustained on the exceptional ground that Congress had therein merely exerted its authority as a local legislature for Alaska.

It follows, then, from the text of the treaty by which Alaska was acquired, from the action of Congress thereunder and the reiterated decisions of this court, that the proposition that Alaska is not incorporated into and a part of the United States is devoid of merit, and therefore the doctrine settled as to unincorporated territory is inapposite and lends no support to the contention that Congress in legislating for Alaska had authority to violate the express commands of the Sixth Amendment.

This brings us to the second proposition, which is—

2. *That even if Alaska was incorporated into the United States, as it was not an organized Territory, therefore the provisions of the Sixth Amendment were not controlling on Congress when legislating for Alaska.*

We do not stop to demonstrate from original considerations the unsoundness of this contention and its irreconcilable conflict with the essential principles upon which our constitutional system of government rests. Nor do we think it is required to point out the inconsistency which would arise between various provisions of the Constitution if the proposition was admitted, or the extreme extension on the one hand and the undue limitation on the other of the powers of Congress which would be occasioned by conceding it. This is said, because, in our opinion, the unsoundness of the proposition is conclusively established by a long line of decisions. *Webster* v. *Reid,*

11 How. 437; *Reynolds* v. *United States*, 98 U. S. 145; *Callan* v. *Wilson*, 127 U. S. 540; *American Publishing Co.* v. *Fisher*, 166 U. S. 464; *Springville* v. *Thomas*, 166 U. S. 707; *Thompson* v. *Utah*, 170 U. S. 343; *Capital Traction Co.* v. *Hof*, 174 U. S. 1; *Black* v. *Jackson*, 177 U. S. 349.

The argument by which the decisive force of the cases just cited is sought to be escaped is that as when the cases were decided there was legislation of Congress extending the Constitution to the District of Columbia or to the particular territory to which a case may have related, therefore the decisions must be taken to have proceeded alone upon the statutes and not upon the inherent application of the provisions of the Fifth, Sixth and Seventh Amendments to the District of Columbia or to an incorporated Territory. And, upon the assumption that the cases are distinguishable from the present one upon the basis just stated, the argument proceeds to insist that the Sixth Amendment does not apply to the Territory of Alaska, because section 1891 of the Revised Statutes only extends the Constitution to the organized Territories, in which, it is urged, Alaska is not embraced.

Whilst the premise as to the existence of legislation declaring the extension of the Constitution to the Territories with which the cases were respectively concerned is well founded, the conclusion drawn from that fact is not justified. Without attempting to examine in detail the opinions in the various cases, in our judgment it clearly results from them that they substantially rested upon the proposition that where territory was a part of the United States the inhabitants thereof were entitled to the guarantees of the Fifth, Sixth and Seventh Amendments, and that the act or acts of Congress purporting to extend the Constitution were considered as declaratory merely of a result which existed independently by the inherent operation of the Constitution. It is true that in some of the opinions both the application of the Constitution and the statutory provisions declaring such application were referred to, but in others no reference to such statutes was made,

and the cases proceeded upon a line of reasoning, leaving room for no other view than that the conclusion of the court was rested upon the self-operative application of the Constitution. *Springville* v. *Thomas*, 166 U. S. 707; *Thompson* v. *Utah*, 170 U. S. 343; *Capital Traction Co.* v. *Hof*, 174 U. S. 1; *Black* v. *Jackson*, 177 U. S. 349.

And this result of the cases will be made clear by a brief reference to some of the opinions. In *Thompson* v. *Utah*, considering a law of the State of Utah, which provided that a jury in a criminal cause should consist of only eight persons, the statute was held to be *ex post facto* and void in its application to felonies committed before the Territory became a State, "because, in respect of such crimes, the Constitution of the United States gave the accused, at the time of the commission of his offense, the right to be tried by a jury of twelve persons, and made it impossible to deprive him of his liberty except by the unanimous verdict of such a jury."

In *Springville* v. *Thomas* it was contended that the territorial legislature of Utah was empowered by Congress, in the organic act of the Territory, to dispense with unanimity of the jurors in rendering a verdict in a civil case. The court said (p. 708): "In our opinion the Seventh Amendment secured unanimity in finding a verdict as an essential feature of trial by jury in common law cases, and the act of Congress could not impart the power to change the constitutional rule, and could not be treated as attempting to do so."

Again, in *Capital Traction Co.* v. *Hof*, 174 U. S. 1, no reference whatever being made to the statute of February 21, 1871, extending the provisions of the Constitution to the District of Columbia (15 Stat. 419), it was declared (p. 5): "It is beyond doubt, at the present day, that the provisions of the Constitution of the United States securing the right of trial by jury, whether in civil or criminal cases, are applicable to the District of Columbia."

And in *Black* v. *Jackson*, 177 U. S. 349, speaking of a law of the Territory of Oklahoma, it was said (p. 363):

"And it also fails to recognize the provisions of the Seventh Amendment securing the right of trial by jury in 'suits at common law,' where the value in controversy exceeds twenty dollars. That amendment, so far as it secures the right of trial by jury, applies to judicial proceedings in the Territories of the United States, *Webster* v. *Reid*, 11 How. 437, 460; *American Publishing Co.* v. *Fisher*, 166 U. S. 464, 466; *Springville* v. *Thomas*, 166 U. S. 707. So that a court of a Territory authorized as Oklahoma was to pass laws not inconsistent with the Constitution of the United States, 26 Stat. 81, 84, c. 182, § 6, could not proceed in a 'common law' action as if it were a suit in equity and determine by mandatory injunction rights for the protection or enforcement of which there was a plain and adequate remedy at law according to the established distinctions between law and equity."

As it conclusively results from the foregoing considerations that the Sixth Amendment to the Constitution was applicable to Alaska, and as of course being applicable it was controlling upon Congress in legislating for Alaska, it follows that the provision of the act of Congress under consideration depriving persons accused of a misdemeanor in Alaska of a right to trial by a common law jury, was repugnant to the Constitution and void. Having disposed of the constitutional question, we deem it unnecessary to review the other alleged errors.

The judgment must therefore be reversed and the case remanded with directions to set aside the verdict and grant a new trial.

And it is so ordered.

MR. JUSTICE HARLAN concurring.

My views in reference to what are called the Insular Questions have been fully expressed in the opinions filed by me in *Downes* v. *Bidwell*, 182 U. S. 244, 375; *Hawaii* v. *Mankichi*, 190 U. S. 197, 226; *Dorr* v. *United States*, 195 U. S. 138, 154. I adhere to what has been said in those opinions, and do not

care to restate here the grounds upon which I proceeded in former cases.

The particular question arising in the present case is whether that section of the act of Congress of June 6, 1900, c. 786, relating to Alaska, which provides "that hereafter in trials for misdemeanors six persons shall constitute a legal jury," is consistent with the Constitution of the United States. I content myself in this case with stating only the general reasons for the conclusion which I have reached on that question.

Immediately upon the ratification in 1867 of the treaty by which Alaska was acquired from Russia, that Territory, as I think, came under the complete, sovereign jurisdiction and authority of the United States, and, without any formal action on the part of Congress in recognition or enforcement of the treaty, and whether Congress wished such a result or not, the inhabitants of that Territory became at once entitled to the benefit of all the guarantees found in the Constitution of the United States for the protection of life, liberty, and property.

After such ratification no person charged with the commission of a crime against the United States in that Territory could be legally tried therefor otherwise than by what this court has adjudged to be the jury of the Constitution.

The constitutional requirement that "the trial of all crimes, except in cases of impeachment, shall be by jury" means, as this court has adjudged, a trial by the historical, common law jury of twelve persons, and applies to all crimes against the United States committed in any territory, however acquired, over which, for purposes of government, the United States has sovereign dominion.

No tribunal or person can exercise authority involving life or liberty, in any territory of the United States, organized or unorganized, except in harmony with the Constitution.

Congress cannot suspend the operation of the Constitution in any territory after it has come under the sovereign authority of the United States, nor, by any affirmative enactment, or

by mere non-action, can Congress prevent the Constitution from being the supreme law for any peoples subject to the jurisdiction of the United States.

The power conferred upon Congress to make needful rules and regulations respecting the Territories of the United States does not authorize Congress to make any rule or regulation inconsistent with the Constitution or violative of any right secured by that instrument.

The proposition that a people subject to the full authority of the United States for purposes of government, may, under any circumstances, or for any period of time, long or short, be governed, as Congress pleases to ordain, without regard to the Constitution, is, in my judgment, inconsistent with the whole theory of our institutions.

If the Constitution does not become the supreme law in a Territory acquired by treaty, and whose inhabitants are under the dominion of the United States, until Congress, in some distinct form, shall have expressed its will to that effect, it would necessarily follow that, by positive enactment, or simply by non-action, Congress, under the theory of "incorporation," and although a mere creature of the Constitution, could forever withhold from the inhabitants of such Territory the benefit of the guaranties of life, liberty and property as set forth in the Constitution. I cannot assent to any such doctrine. I cannot agree that the supremacy of the Constitution depends upon the will of Congress.

As these are my views upon the underlying questions presented by the record, I cannot concur in all the reasoning in the opinion of the court. But I entirely concur in the judgment holding the act of Congress in question to be void. I do so, not upon the ground that Alaska had been previously "incorporated" into the United States by the legislation of Congress, but upon the ground that the right of the accused to a trial by the jury of the Constitution became complete immediately upon the acquisition of Alaska by treaty, and before any legislation upon the subject by Congress—indeed,

without any power in Congress to add to or impair or destroy that right.

MR. JUSTICE BROWN concurring.

I am disposed to concur in the conclusion of the court upon the ground that, by the treaty of cession with Russia, it was provided that "the inhabitants of the ceded territory shall be admitted to enjoy all the rights, advantages and immunities of citizens of the United States; and shall be maintained and protected in the free enjoyment of their liberty, property and religion." I am inclined to think, though with some doubt, that those words include a right to a trial by a jury, as understood among us from the adoption of the Constitution. I certainly should not dissent if the case were put upon that ground.

The tenor of the opinion, however, is such that I should be doing an injustice to myself if I failed to express my views upon the doctrine of incorporation. My position regarding the applicability of the Constitution to newly-acquired territory is contained in the opinion delivered by me in *Downes* v. *Bidwell*, 182 U. S. 244. It is simply that the Constitution does not apply to territories acquired by treaty until Congress has so declared, and that in the meantime, under its power to regulate the Territories, it may deal with them regardless of the Constitution, except so far as concerns the natural rights of their inhabitants to life, liberty and property.

A different view, however, was expressed in a concurring opinion by Mr. Justice White, to the effect that when Congress "incorporated" territory into the United States it resulted that in governing such territory "all the limitations of the Constitution which are applicable to Congress in exercising this authority necessarily limit its power on this subject. It follows also that every provision of the Constitution which is applicable to the Territories is also controlling therein. . . . And the determination of what particular provision of the Constitution is applicable, generally speaking, in all cases,

involves an inquiry into the situation of the territory, and its relations to the United States." The question was thus briefly stated: "Had Porto Rico, at the time of the passage of the act in question, been incorporated into and become an integral part of the United States?" If it had, the inference was that the Constitution applied in all its force.

This, however, was not the opinion of the court; it was certainly not the opinion of the Justice who announced the conclusion and judgment of the court; it was wholly disclaimed by the four dissenting Justices, who held that the Constitution applied the moment the territory was ceded and became the property of the United States, and that no act of incorporation was necessary. It was simply the individual opinion of three members of the court. The point was not pressed upon our attention in the briefs or arguments of counsel in that case. It is but faintly suggested in the briefs in this case. It has never since that time received the endorsement of this court, and in my opinion is wholly unnecessary to the disposition of this case.

My own view is, and has been, that Congress in dealing with newly-acquired territory is unfettered by the Constitution, unless it formally or by implication extends the Constitution to it; and that it may accept a cession of territory, institute a temporary government there, as it has done in a large number of instances, without thereby extending the Constitution over it. In the general act, Rev. Stat. sec. 1891, Congress did declare that "the Constitution and all laws of the United States which are not locally inapplicable, shall have the same force and effect within all the *organized* Territories, and in every Territory hereafter organized, as elsewhere within the United States." If the act of May 17, 1884, providing a civil government for Alaska, 23 Stat. 24, be regarded as *organizing* a Territory there, it would follow that such Territory at once fell within Rev. Stat. sec. 1891, and the Constitution was extended to it without further action. The first article declares that Alaska "shall constitute a civil and judicial district, the

government of which shall be organized and administered as hereinafter provided." Had the opinion treated the Territory as organized under this act, I should not have dissented from this view, since section 1891 would have applied to it.

Congress did undoubtedly provide a permanent civil government for Alaska by the act of June 6, 1900, 31 Stat. 321, but it evidently did not regard the Constitution as extended to it by any previous act, since it provided in section 171 for trials of misdemeanors by a jury of six.

There are so many difficulties connected with the applicability of the Constitution that it has seemed to me that the only true test was whether Congress intended to apply it or not in the particular case. When is a Territory incorporated so as to make the Constitution applicable in all its provisions? That some action on the part of Congress is necessary to extend the Constitution to the Territories was settled in *Downes* v. *Bidwell*, but shall such action be direct or may it be indirect by way of incorporation? May Congress, in organizing or incorporating a Territory, restrict the application of the Constitution to it, or must it give it all? What is an organized as distinguished from an incorporated Territory? Does not the acceptance of a cession of territory and the appointment of a civil governor work an incorporation of the territory as territory of the United States? If the acceptance of territory as territory of the United States be not an incorporation, what language is necessary to effect that result? Apparently, acceptance of the territory is insufficient in the opinion of the court in this case, since the result that Alaska is incorporated into the United States is reached, not through the treaty with Russia, or through the establishment of a civil government there, but from the act of July 20, 1868, concerning internal revenue taxation, and the act of July 27, 1868, extending the laws of the United States relating to the customs, commerce and navigation over Alaska and establishing a collection district there. Certain other acts are cited, notably the judiciary act of March 3, 1891, making it the duty of this court to assign

the several Territories of the United States to particular circuits. But no mention is made either of the act of May 17, 1884, providing a civil government for Alaska or the act of June 6, 1900, making further provision for a civil government and establishing a complete code of laws. These seem to me the vital acts upon the *status* of Alaska; yet they are completely ignored in the opinion of the court, and the fact of incorporation is sought to be established by what seem to me remote inferences from immaterial statutes. Indeed I regard the whole theory of the extension of the Constitution by the incorporation of territory as a new departure in Federal jurisprudence, and that the true answer to the question whether the Constitution applies to a Territory is to be found in the fact whether Congress has extended the Constitution to it or not.

That the mere act of incorporating territory into the United States does not of its own force carry the Constitution there, regardless of the wishes of Congress, is evident from the case of *Hawaii* v. *Mankichi*, 190 U. S. 197, wherein it was held that, notwithstanding the island had been annexed to the United States "as a part of the territory of the United States, and subject to the sovereign dominion thereof," yet it was possible for Congress to declare that "the municipal legislation of the Hawaiian Islands not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this joint resolution, nor contrary to the Constitution of the United States nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine."

While the government provided by this resolution was temporary in its character, and a mere continuance of existing laws, the act itself was as complete an incorporation of the islands as it was possible for language to make it. The resolution declared that "said cession" of the Republic of Hawaii "is accepted, ratified and confirmed, and that the said Hawaiian Islands and their dependencies be, and they are hereby, annexed as a part of the territory of the United States, and are

subject to the sovereign dominion thereof." In view of this language I do not see how it is possible to escape the conclusion that there was a plain incorporation by Congress of these islands and an extension of sovereignty over them. Notwithstanding this, however, we held that the conviction of one, who between the date of the Newlands resolution and the date of establishing a civil government, had been tried on information and convicted by a non-unanimous jury, was legal, though not in compliance with the Fifth and Sixth Amendments to the Constitution, upon the ground that the Constitution was not formally extended to them until the Territory was organized, June 14, 1900. 31 Stat. 141, sec. 5. This case shows the impossibility of applying the doctrine of incorporation without an accurate definition of the term. Hitherto we have been content to divide our Territories into the organized and unorganized; but now we are asked to introduce a new classification of "incorporated" Territories without attempting to define what shall be deemed an incorporation. The word appears to me simply to introduce a new element of confusion and to be of no practical value. Rev. Stat. sec. 1891, declaring that the Constitution shall have force and effect within all the organized Territories and in every Territory hereafter organized, seems to meet the requirements of every case, and to be operative wherever Congress does not in the organization restrict the application of the Constitution in some particular.

In *Dorr* v. *United States*, 195 U. S. 138, the question was presented, as stated by Mr. Justice Day, whether, "in the absence of a statute of Congress, expressly conferring the right, trial by jury is a necessary incident of judicial procedure in the Philippine Islands, where demand for trial by that method has been made by the accused and denied by the courts established in the islands." In discussing the case it was said that not only has Congress hitherto refrained from incorporating the Philippine Islands into the United States, but in the act of 1902, providing for temporary civil government, 32 Stat. 691, there was an express provision that Rev. Stat. sec. 1891

should not apply to the Philippine Islands. This is the section giving force and effect to the Constitution of the United States, not locally inapplicable, within the organized Territories. The case simply holds that as Congress did not extend the right of trial by jury to the Philippine Islands, and had not so incorporated them as to make the provision apply by implication, the right did not exist. The cases of *Steamer Coquitlam*, 163 U. S. 346, and *Binns* v. *United States*, 194 U. S. 486, are too obviously inapplicable to require comment.

I do not dissent from the conclusion of the court in this case, but I do dissent from the proposition that Congress may not deal with Territories as it pleases, until it has seen fit to extend the provisions of the Constitution to them, which, once done, in my view, is irrevocable. I regret that the disputed doctrine of incorporation should have been made the mainstay of the opinion of the court, when the case might so easily have been disposed of upon grounds which would have evoked no utterance of disapproval.

KNAPP *v.* LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

No. 251. Argued February 28, 1905.—Decided April 10, 1905.

The Circuit Court of the United States has no original jurisdiction to issue a writ of mandamus at the instance of the Interstate Commerce Commission against a railroad company to compel it to make a report of the matters and things specified in § 20 of the act of Congress to regulate commerce.

THE facts are stated in the opinion.

Mr. Assistant Attorney General McReynolds and *Mr. L. A. Shaver*, Solicitor for the Interstate Commerce Commission, for plaintiffs in error:

Under the act of March 3, 1887, 24 Stat. 552, which defined the jurisdiction of Circuit Courts of the United States, and other similar acts passed prior thereto, a Circuit Court has jurisdiction of an original proceeding seeking relief by mandamus.

While this proposition is undoubtedly out of harmony with the opinions of this court in a number of cases arising under the judiciary act of 1789, 1 Stat. 73, and the act of 1875, 18 Stat. 470, the question has not been directly passed upon by this court in any case arising since the act of March 3, 1887 defined the jurisdiction of United States courts. That act repealed all laws and parts of laws in conflict with its provisions. *McIntire* v. *Wood*, 7 Cranch, 504; *McClung* v. *Silliman*, 6 Wheat. 598; *Bath County* v. *Amy*, 13 Wall. 245; *Graham* v. *Norton*, 15 Wall. 427; *County of Greene* v. *Daniel*, 102 U. S. 187, 195; *United States* v. *Schurz*, 102 U. S. 378, 393; *Davenport* v. *County of Dodge*, 105 U. S. 237; *Louisiana* v. *Jumel*, 107 U. S. 711, 727; *Smith* v. *Bourbon County*, 127 U. S. 105, 112; High on Ex. Leg. Rem. § 589; *Mystic Milling Co.* v. *Chicago, M. & St. P. Railway Co. et al.*, 132 Fed. Rep. 289.

As to the reasons why the courts should have jurisdiction to issue mandamus see dissent of Bradley, J., in *Rosenbaum* v. *Bauer*, 120 U. S. 459.

This court should not be bound by the decisions prior to the act of 1887 but should hold that under that act the Circuit Court has authority to entertain any proceeding seeking remedy by mandamus. *Hartman* v. *Greenhow*, 102 U. S. 672; *Ames* v. *Kansas*, 111 U. S. 449, 459.

Congress has power to authorize a Circuit Court to issue a mandamus in an original proceeding. *Kendall* v. *United States*, 12 Peters, 522, 617; *United States* v. *Schurz*, 102 U. S. 378; Merrill on Mandamus, § 217; High on Ex. Leg. Rem. § 589.

If no other statute conferred upon a Circuit Court jurisdiction of an original proceeding for a mandamus such jurisdiction was given in cases where the writ is necessary to enforce orders of the Interstate Commerce Commission by the act to regulate commerce, approved February 4, 1887, and the amendments thereto. See § 20 and § 12 as amended March 2, 1889, and February 10, 1891.

Mandamus is the only adequate remedy known to the law by which a common carrier can be forced to report. Common carriers have assumed public functions and the duties imposed upon them by statute may properly be enforced by mandamus. Merrill on Mandamus, § 1325; *Mobile and Ohio R. R. Co.* v. *Wisdom*, 5 Heiskell (Tenn.), 125.

The purpose of the act to secure Federal supervision of interstate commerce can only be made reasonably effective by resort to Federal courts, and Congress did not intend the Commission to rely upon state courts to secure enforcement of its orders if, indeed, such courts have power to entertain applications therefor.

As to whether the criminal prosecutions provided for by the act were intended to secure compliance with those sections wherein no specific remedy was given it is well settled that a remedy by mandamus is not defeated by the existence of a punitive statute. Merrill on Mandamus, § 53; High Ex. Leg. Rem. §§ 18, 20. The purpose of Congress was to secure proper information for the use of the Commission and the public. The effective way of carrying out such purpose is not by means of a criminal prosecution. Mandamus is the only instrumentality which can be safely relied upon to produce the desired result.

In nearly all original proceedings seeking writs of mandamus to compel carriers to file annual reports presented to the Federal courts in the year 1897 the carriers complied with the orders before they were heard and the suits were dismissed. *I. C. C.* v. *Chicago, K. & S. R. R. Co.*, 81 Fed. Rep. 783; *I. C. C.* v. *Seaboard Ry. Co.*, 82 Fed. Rep. 563, 566; *S. C.*, 85

Fed. Rep. 955. In none of the cases so instituted was the jurisdiction of the court to entertain the proceeding called in question.

Mr. George C. Greene for defendant in error:

A Circuit Court of the United States has no jurisdiction, under the general statute defining its jurisdiction, to issue a writ of mandamus as an original proceeding, nor at all except when necessary to the exercise of its jurisdiction. Rev. Stat. § 716; *McIntire* v. *Wood*, 7 Cranch, 504; *Bath Co.* v. *Avery*, 13 Wall. 244; *United States* v. *Kendall*, 12 Peters, 608.

Jurisdiction has not been conferred upon the Circuit Court by the act to regulate commerce to issue the writ of mandamus applied for in this case.

The method of procurement of information by the Commission is clearly defined in § 12 and it confers no authority upon the Commission to require or compel a carrier to expend its time, labor and money in preparing and laying before the Commission reports, statements, tables or computations upon subjects upon which the Commission may deem it necessary to have information. Under that section it may only obtain such information by examination of witnesses and inspection of books and documents or depositions taken as is provided in that section.

Section 12 confers no jurisdiction upon any court. It merely declares the duty of district attorneys. It requires them to institute in the proper court all necessary proceedings for the enforcement of the act. The "necessary proceedings" intended were such proceedings as were authorized and in accordance with existing law, and they were to be instituted in the proper courts; *i. e.*, courts having jurisdiction to entertain them. Section 16 of the act has no application to this case.

This case is not an application to the Circuit Court sitting in equity. Nor is it an application by the Commission or person interested in the order. It is a suit at law in which the United States is party plaintiff.

Section 1 of judiciary act of 1887, amends § 1 of the act of 1875, by changing the amount of the sum in dispute from $500 to $2,000, but in no respect changes the law as to the questions here involved. So that, what was the law under the act of 1875, as declared by this court in *Rosenbaum* v. *Bauer*, 120 U. S. 450, is the law today. And see *Indiana* v. *L. E. & W. Ry. Co.*, 85 Fed. Rep. 3; *Fuller* v. *Aylesworth*, 75 Fed. Rep. 694, 699; *Riggs* v. *Johnson County*, 6 Wall. 166.

That Congress did not understand that it had conferred jurisdiction generally upon the Circuit Courts to issue writs of mandamus is shown by its enactments specially authorizing them to do so in certain specified cases. See § 3, act of January 7, 1888, and amending act of March 2, 1889.

Mr. Justice McKenna delivered the opinion of the court.

Petition for mandamus filed in the Circuit Court of the United States for the Northern District of Ohio by the Interstate Commerce Commissioners against the Lake Shore and Michigan Southern Railway Company. The railway company moved to dismiss the petition on the ground that the court had no original jurisdiction to issue a writ of mandamus. The motion was granted and the writ dismissed. A certificate was duly made showing that a question of jurisdiction was in issue, and recites that the court acted not only on the motion of the railroad but on its own motion in dismissing the petition for want of jurisdiction.

The petition alleges that the railroad company is a corporation created by the laws of the States of New York, Pennsylvania, Ohio, Michigan, Indiana and Illinois, and has its principal place of business in the State of Ohio, and is a common carrier engaged in interstate commerce, and as such is subject to the provisions of the act of Congress to regulate commerce.

That under section 20 of said act the Interstate Commerce Commission is authorized to require any common carrier subject to the act to make reports of certain matters and things,

and in pursuance thereof the Commission made an order on the third of June, 1903, prescribing the manner and form in which said reports should be made and the contents thereof, and directed each common carrier to file the same on or before the fifteenth. A copy of the order was served on the railroad company, but the company failed and neglected to make out and return a report in full, in that it failed to set forth in the report made and returned by it the data or information called for, namely, "the tonnage, ton-mileage, earnings and receipts per ton per mile on grain, hay, cotton, live stock, dressed meats, anthracite coal, bituminous coal, and lumber carried in carload lots; and that said data or information required by the Commission to be given in said report by respondent is necessary to enable the Commission to perform the duties and carry out the objects for which it was created, in the interest of the public, and that promptness by carriers in furnishing the same on or before the fifteenth day of September of each year, as required by the Commission, is essential for the purpose, among others, of enabling the Commission to make a full and complete annual report to Congress, which, by section 21 of said act to regulate commerce, is required to be transmitted to said body on or before December 1 of each year."

It is also alleged that there is no adequate remedy except that afforded by mandamus.

It is admitted that under the judiciary act of 1789, 1 Stat. 73, and the act of 1875, as construed by this court, a Circuit Court of the United States has no jurisdiction of an original proceeding seeking relief by mandamus. And counsel, not to minimize the admission, quotes the cases in which that has been laid down and the text books which have expressed the doctrine as settled. But, it is suggested, that under the act of 1887, 24 Stat. 552, a different ruling should be made. No change in language is pointed out which would justify such change in ruling, but we are urged to that radical course in view of the modern development of proceedings by mandamus, and the very great importance of the remedy thereby. We

are not impressed by the invocation. We are unable to understand how language conferring jurisdiction on a court can take a new meaning from the circumstances suggested. Difference in remedies is conspicuous in our jurisprudence, and some remedies are of that nature that they can be enforced only under exceptional circumstances and under special grants of power. Of this kind is mandamus, and if Congress had intended by the act of 1887 to confer power on the Circuit Courts to issue mandamus in an original proceeding Congress would not have employed the language which had been construed from the foundation of the Government not to give such jurisdiction. We adhere, therefore, to the prior cases.

2. Congress has undoubtedly power to authorize a Circuit Court to issue a mandamus in an original proceeding. *Kendall* v. *United States*, 12 Pet. 524; *United States* v. *Schurz*, 102 U. S. 378. But has Congress done so, as contended, by sections 12 and 20 of the Interstate Commerce Act as amended? Under section 12 the Commission is given the authority to inquire into the management of the business of common carriers subject to the act, and have the right to obtain from the carriers full and complete information to enable it to perform its duties. It is also authorized to enforce the provisions of the act. By section 20 the Commission may require annual reports and fix the time and prescribe the manner in which such reports shall be made. And it is made the duty of any district attorney of the United States, to whom the Commission may apply, to institute in the proper court and to prosecute under the direction of the Attorney General all necessary proceedings for the enforcement of the provisions of this act. It is hence contended that the power of the Commission to require the report stated in the petition is undoubted, and having power to order the report to be made the Commission has the power to enforce obedience to the order.

But in what way? Manifestly only in such way as the courts have jurisdiction to give. All powers are given in view of that jurisdiction, and the amendments of the Interstate Commerce

Act are so framed. Jurisdiction to issue mandamus is conferred by section 6, to enforce the filing or publishing by a common carrier of its schedules or tariffs of rates, fares and charges. And such jurisdiction is also given to the Circuit Courts and District Courts upon the relation of any person or persons, firm or corporation, alleging a violation of any of the provisions of the act which prevents the relator from having interstate traffic moved on terms as favorable as any other shipper. The remedy is expressly made cumulative of the other remedies provided by the act. It is clear, therefore, when Congress intended to give the power to issue mandamus it expressed that intention explicitly. Such power cannot be inferred from the grant of authority to the Commission to enforce the act or from the direction to district attorneys or the Attorney General to institute "all necessary proceedings for the enforcement of the provisions" of the act (section 12). The proceedings meant are, as we have said, those within the jurisdiction of the court. And special remedies are given. For instance, by section 16 a summary proceeding in equity is authorized, and the form of the ultimate order of the court may be that of a "writ of injunction or other proper process, mandatory or otherwise."

Without attempting now to define the extent of that section, we may say, it seems adequate to enable the Commission to enforce any order it is authorized to make.

Judgment affirmed.

MR. JUSTICE HARLAN dissented.

MUHLKER *v.* NEW YORK AND HARLEM RAILROAD COMPANY.

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

No. 99. Argued December 12, 13, 1905, Reargued February 24, 27, 1905.—Decided April 10, 1905.

The permission or command of the State can give no power to invade private property rights even for a public purpose without payment of compensation. An abutting owner cannot be deprived of his easements of light and air above the surface of the street without compensation because the structure interfering with those easements was formerly on the surface and the raising of it to an elevated structure gave him an increase in his easement of access.

The *Elevated Railroad cases*, decided by the Court of Appeals, established the law of the State of New York to be that the easement of light and air of abutting property owners in the streets of New York above the street to be property and within the protection of the Constitution for compensation in case of its diminution by an elevated railroad structure.

Such decisions assured to purchasers of property, abutting on streets the beds whereof had been deeded to the city of New York in trust for streets, that their easements of light and air were secured by contract and could not be taken from them without compensation; and the courts of that State cannot change or modify their decisions so as to take away rights which have been acquired by contract and are within the protection of the Federal Constitution.

This court determines for itself whether there is an existing contract and where there is a diversity of state decisions the first in time may constitute the obligation of the contract and the measure of rights under it.

The raising, in pursuance of a state statute requiring it, of the New York and Harlem Railroad structure, in Park avenue, New York City, which was formerly on, or partially below, the surface of the street, to an elevated structure, deprived the abutting owner, who in this case had purchased after the decisions by the Court of Appeals in the *Elevated Railroad cases*, of property right in his easements of light and air and under the Constitution of the United States he was entitled to compensation therefor and cannot be deprived of it, either because the structure was erected under a state statute requiring it or because the access to his property was increased by the raising of the structure.

PLAINTIFF sues to enjoin the use of a certain elevated railroad structure on Park avenue, in the city of New York, in front of his premises, unless upon payment of the fee value

of certain easements of light, air and access and other rights appurtenant to his premises. He also prays damages for injury sustained from the year 1890 to time of trial.

From the evidence in the case the Supreme Court found that the plaintiff had been since 1888 the owner of a lot of land on the northwesterly corner of Park avenue and One Hundred and Fifteenth street, on which he, in 1891, erected a five-story brick building, and that there were appurtenant to said lot and building "certain easements of light, air and access in and over said Park avenue, in front of said premises." The defendant, The New York and Harlem Railroad Company, is and was during all the times mentioned herein the owner of a railroad and railroad structures in Park avenue, in front of such premises, and the New York Central and Hudson River Railroad Company is the lessee of said railroad and structures under a lease dated April 1, 1873, for a term of four hundred and one years; that said railroad, prior to 1872, was operated on two tracks laid upon the surface of said avenue and along the center thereof, in front of said premises.

In pursuance of chapter 702 of the Laws of 1872 certain changes were made in the railroad in front of said premises, between the years 1872 and 1874, whereby the number of tracks was increased from two to four and were laid along the center of the avenue, and at the south line of said premises were at the surface, and at the north line of said premises were laid in a trench about five and a half feet below the surface. In front of said premises the railroad was bounded on both sides by masonry walls about three feet high above the surface, and cut off access across said avenue immediately in front of said premises.

The New York Central and Hudson River Railroad Company in 1872 operated its trains over the railroad in front of said premises, and continued to do so until February 16, 1897.

The other facts are expressed in the finding of the court as follows:

"Fourth. That pursuant to chapter 339 of the Laws of 1892, there was constructed along Park avenue, in front of

plaintiff's said premises, between April, 1893, and March, 1896, a new permanent elevated railroad structure of iron and steel; that said railroad in front of plaintiff's said premises is about 59 feet wide and consists of four tracks laid on a solid roadbed, having a mean elevation of about 31 feet above the surface of said avenue, which roadbed is girded along the sides and in the center by solid iron girders, each 7 feet and 4 inches high, and is supported by iron columns, of which there are six directly in front of plaintiff's said premises; and that the work of constructing said permanent elevated railroad structure was done under the supervision of a board created by said act.

"Fifth. That the defendant The New York Central and Hudson River Railroad Company laid the tracks on said permanent elevated railroad structure about March, 1896, and from said date down to February 16, 1897, operated thereon in front of said premises trains of cars drawn by steam engines for the carriage of freight and material used in the construction of said structure, for which service said defendant was paid; that said defendant on February 16, 1897, began to operate regularly and permanently upon said permanent elevated railroad structure in front of plaintiff's said premises its passenger trains, drawn by steam locomotives.

"Sixth. That the rental and fee values of the plaintiff's said premises were damaged by the work of constructing said permanent elevated railroad structure and by the existence of the same from April, 1893, to March, 1896; also by said structure and the operation thereon of trains, as aforesaid, from March, 1896, to February 16, 1899, but that neither of said defendants is liable for such damage.

"Seventh. That said permanent structure and the operation by said defendant, The New York Central and Hudson River Railroad Company, of passenger trains thereon since February 16, 1897, are and have been a continuous trespass upon the plaintiff's easements of light and air appurtenant to his said premises, hereinbefore described as having a frontage of 76 feet and 10 inches on said Park avenue and a depth of

26 feet on 115th street; that solely in consequence of said trespass, and aside from any other causes, the rental and usable value of said premises was depreciated from February 16, 1897, down to October 10, 1900, in the sum of fourteen hundred dollars ($1,400) below what said rental value would have been during said period, if there had been no change in defendant's said railroad in Park avenue in front of said premises pursuant to chapter 339 of the Laws of 1892; and that the fee value of said premises has been, and was on October 10, 1900, depreciated thereby in the sum of three thousand dollars ($3,000) below what said fee value would have been on said date if there had been no change in defendant's railroad as aforesaid.

"Eighth. That the said sums awarded as damages are over and above any and all benefits conferred upon said premises by the changes made, pursuant to chapter 339 of the Laws of 1892, which said benefits result in part from improved access to said premises afforded by said changes, and are offset against the damages to said premises caused by said changes.

"Ninth. That the said sums awarded as damages are exclusive of the damages that would have been occasioned to plaintiff's premises by the maintenance and use of the defendant's railroad and structures had there been no change in the same pursuant to chapter 339 of the Laws of 1892, for which last-mentioned damages the defendants are not liable either jointly or severally.

"Tenth. That this action was commenced by the plaintiff on January 7, 1897, that the plaintiff on April 28, 1892, began an action in this court against the defendant for an injunction and damage by reason of the defendant's railroad structure and the operation of trains thereon in front of the premises described herein, as said railroad existed and was operated on said date; and that said last-mentioned action was discontinued on February 27, 1900."

A decree was entered enjoining the use of the railroad structure and its removal from in front of plaintiff's premises,

but it was provided that the injunction should not become operative if the defendants tender for the purpose of execution by the plaintiff "a form of conveyance and release" to them of the easements of light, air and access appurtenant to said premises, and tender further of the sum of $3,000, with interest thereon from October 10, 1900. Damages were also adjudged to plaintiff in the sum of $1,400, with interest from February 16, 1897, and costs. Either party was given the right to move at the foot of the decree for further directions as to the enforcement of the same.

In the form of the decision and judgment entered, and as to the legal principles involved, the court professed to follow *Lewis* v. *New York & Harlem Railroad,* 162 N. Y. 202.

The judgment was affirmed by the Appellate Division. It was reversed by the Court of Appeals, 173 N. Y. 549; and the judgment of that court, upon the remission of the case, was made the judgment of the Supreme Court and the complaint dismissed without costs. The case was then brought here.

Mr. Elihu Root, with whom *Mr. J. C. Bushby* and *Mr. L. M. Berkeley* were on the brief, for plaintiff in error:

Plaintiff established three contracts within the contract clause of the Federal Constitution. The grant from Benson in 1825, the grant from Poillon in 1827, and the contract between Poillon's grantees, and being grants or conveyances of land were executed contracts within the protection of the clause of the Federal Constitution which provides that no State shall pass any law impairing the obligation of contracts. *Fletcher* v. *Peck,* 6 Cranch, 87, 136; *Dartmouth College Case,* 4 Wheat. 518, 656; *McGee* v. *Mathis,* 4 Wall. 143, 155; *Farrington* v. *Tennessee,* 95 U. S. 679, 683.

The obligations of these contracts preclude the erection of an elevated railroad in Fourth avenue. This has been declared to be the law of New York. *Williams* v. *Brooklyn El. R. Co.,* 126 N. Y. 96, 100; *Lahr* v. *Met. El. R.*

Co., 104 N. Y. 268, 288; *Story* v. *N. Y. El. R. Co.*, 90 N. Y. 122. This rule applies to the case at bar.

The decision of the trial court determined that the structure was inconsistent with the public nature of the street. This finding of fact was affirmed by the Appellate Division, and thus became final; for the Court of Appeals has no power to review facts. N. Y. Const., Art. 6, § 9; N. Y. Code Civ. Pro. § 191, subd. 3. Whatever was a question of fact in the state court, is a question of fact in this court. *Building & Loan Assn.* v. *Ebaugh*, 185 U. S. 114, 121. And this court will not reëxamine the evidence, but will take the facts as found in the court below. *Egan* v. *Hart*, 165 U. S. 188; *W. U. Tel. Co.* v. *Call Pub. Co.*, 181 U. S. 92, 103; *Bement* v. *Nat. Harrow Co.*, 186 U. S. 70, 83.

It therefore follows that the viaduct in front of the plaintiff's premises is a use inconsistent with the public character of the street, just as much as the other elevated railroads in New York City, and is a taking of the property of abutting owners, and a violation of the contracts by which they are protected, just as in the case of the other elevated roads.

A statute, 1813, declared that the streets of New York City are held by the city in trust for certain public purposes. The highest court of the State has steadily held for a score of years, that this trust precludes the erection of an elevated railroad. Thousands of cases have been decided by the lower courts in accordance with the law thus laid down and tens of thousands of conveyances made upon the faith of this rule of property. The Court of Appeals held, in the first of the Fourth avenue viaduct cases, that the elevated railroad decisions were fully applicable to the situation there presented. *Lewis* v. *N. Y. & Harlem R. Co.*, 162 N. Y. 202, and when the learned judges of that court subsequently changed their minds, although they agreed that the elevated railroad cases were distinguishable, yet they seem to have found much difficulty in pointing out the distinctions.

Those cases cannot be distinguished either as to the grade

of the street, or in the fact that the elevated roads were "permitted", and in this case the viaduct was commanded, or on the railroad's title to the bed of the street or because the change was made for the public good. Nor is the viaduct a legitimate street use. A railroad on the street is a legitimate street use. *Fobes* v. *Railroad Co.*, 121 N. Y. 505. If the law in this case is good an obvious device has been discovered by which to impair the obligation of the trust to which the streets of New York City were dedicated. First place the railroad on the surface of the street; and then elevate it. Under the *Fobes case*, no property owner can complain of the first step, and, under the decision of the Court of Appeals in this case, no one can complain of the second. And so indirectly the legislature would accomplish what it could not and should not do directly. *Forster* v. *Scott*, 136 N. Y. 577, 584; *People* v. *Coler*, 166 N. Y. 1, 19; *Gilman* v. *Tucker*, 128 N. Y. 190, 204.

The legislature cannot violate the Constitution, and redeem the violation by the claim that it was done "for the public benefit." The repudiation of contract obligations is quite usually sought to be justified by the plea of "the public benefit;" but the Constitution of the United States may not be nullified in so simple and easy a fashion. *Minnesota* v. *Barber*, 136 U. S. 313, 319; *Brimmer* v. *Rebman*, 138 U. S. 78, 81.

The question is not whether the work is for the public benefit. All railroads are for the public benefit, and it is only on this ground that the right of eminent domain is granted to them. Yet they must pay for what they take, as private property cannot be taken for public benefit without compensation by a statute which "directs" any more than by one which "authorizes." The statute was but an enabling act in any form. The Court of Appeals has construed this act to authorize the taking without compensation. The act is what that court says it is. Therefore, it violates the Constitution.

The rule of property established by the decisions in elevated railroad cases cannot be changed by the state courts.

The construction of a statute by a state court, so far as

contract rights acquired under it are concerned, becomes as much a part of the statute as if embodied in it ; and a change of construction is utterly ineffectual to impair those rights. To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal. *Gelpcke* v. *Dubuque*, 1 Wall. 175, 206; *Louisiana* v. *Pilsbury*, 105 U. S. 278, 294; *Christy* v. *Pridgeon*, 4 Wall. 196; *Shelby* v. *Guy*, 11 Wheat. 361; *Douglass* v. *County of Pike*, 101 U. S. 677, 687; *Ohio Life Ins. Co.* v. *Deboll*, 16 How. 416.

The act in question, in providing for the erection of an elevated railroad in Fourth avenue, is unconstitutional and void.

The obligation of the contracts in this case, as construed by the New York courts, is that Fourth avenue shall not be devoted to uses inconsistent with its character as an open public street; that an elevated railroad, according to the construction of the New York courts, is an inconsistent street use; and that this construction of the said contracts cannot, so far as the plaintiff is concerned, be altered or modified by any change of judicial decision. The obligation of these contracts has been impaired by chapter 339 of the New York Laws of 1892, which provides for the erection and operation of an elevated railroad in Fourth avenue. *Lahr* v. *Met. El. R. Co.*, 104 N. Y. 268, 291.

When the public authorities take the land of an individual for the purpose of a public highway, and pay the proprietor therefor, the transaction becomes a fixed contract between them, which is within the clause of the Federal Constitution forbidding the States to pass any law impairing the obligation of contracts. *People* v. *Comrs.*, 53 Barb. (N. Y.) 70, 74.

There is a total lack of power in the legislature to abrogate the trust under which the city of New York holds its streets. *Elevated Railroad Cases, supra; Kane* v. *N. Y. El. R. Co.*, 125 N. Y. 164, 183; *Williams* v. *N. Y. Cent. R. Co.*, 16 N. Y. 97, 108; *Trustees* v. *Auburn &c. R. Co.*, 3 Hill (N. Y.), 567.

Where land is dedicated to the public in trust for public

purposes, the legislature has no power to abrogate the trust by devoting the land to inconsistent purposes, except upon making compensation. *Railroad Co.* v. *Schurmeir*, 7 Wall. 272, 289; *United States* v. *Ill. Cent. R. Co.*, 2 Biss. 174, 181; *Packet Co.* v. *Sorrels*, 50 Arkansas, 466, 473; *Canastota Knife Co.* v. *Tramway Co.*, 69 Connecticut, 146, 172; *Jacksonville* v. *Railroad Co.*, 67 Illinois, 540; *Chicago* v. *Ward*, 169 Illinois, 392, 412; *Warren* v. *Mayor*, 22 Iowa, 351, 356; *Franklin Co.* v. *Lathrop*, 9 Kansas, 453, 463; *Schurmeier* v. *St. Paul &c. R. Co.*, 10 Minnesota, 82, 105; aff'd 7 Wall. 272, 289; *St. Paul* v. *Chicago &c. R. Co.*, 63 Minnesota, 330, 352; *Sugar Refining Co.* v. *St. Louis &c. Co.*, 82 Missouri, 121, 125, 126; *Cummings* v. *St. Louis*, 90 Missouri, 259, 263, 264; *State* v. *Laverack*, 34 N. J. L. 201; *Trustees* v. *Mayor*, 19 N. J. Eq. 355, 357; *Methodist Episcopal Church* v. *Penna. R. Co.*, 48 N. J. Eq. 452; *Le Clercq* v. *Gallipolis*, 7 Ohio, 217; *Board of Education* v. *Edson*, 18 Ohio St. 221, 225; *Portland &c. R. Co.* v. *Portland*, 14 Oregon, 188, 197; *Lamar Co.* v. *Clements*, 49 Texas, 348; *Pennsylvania* v. *Wheeling Bridge Co.*, 13 How. 518, 565; *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116, 144; *The Binghampton Bridge*, 3 Wall. 51. This clause of the Constitution is to be liberally construed. *Murray* v. *Charleston*, 96 U. S. 432, 448.

The act is also unconstitutional in that it directs the taking of property without due process of law. It is the law of New York that the owner of premises abutting on a public street has, as appurtenant to his premises, certain easements of light, air, and access in the street; that these easements are property; and that the erection and operation of an elevated railroad in the street constitutes a taking of this property. *Elevated Railroad Cases, supra; Lahr* v. *Met. El. R. Co.*, 104 N. Y. 268, 288, 289; *Bohm* v. *Met. El. R. Co.*, 129 N. Y. 576, 587; *Sperb* v. *Met. El. R. Co.*, 137 N. Y. 155, 160. In this case it is conceded that the plaintiff has easements in Fourth avenue. The trial court so found, and the Appellate Division affirmed the finding. The Court of Appeals had no jurisdiction to review this question of fact, and did not attempt to do so. The

opinion speaks of the "partial destruction" of these easements of light, air, and access (Record, p. 170, end), and thus concedes their existence. The Court of Appeals in a still later case has recognized the easements of the Fourth avenue abutters, and, while denying a recovery for the main viaduct structure, has allowed damages for stations. *Dolan* v. *N. Y. & Harlem R. Co.*, 175 N. Y. 367. Thus the Court of Appeals distinctly admits that the Park avenue property owners possess the so-called urban easements in the avenue.

In the act we have a plain case of a statute which provides for the taking of the plaintiff's property, yet makes no provision for notice to him, affords him no opportunity for a hearing, and contains not a syllable in reference to compensation for the property taken. Notice, and a hearing of some kind, or an opportunity to be heard, are necessary elements of due process of law. *Roller* v. *Holly*, 176 U. S. 398, 409; *Carson* v. *Brocton Sewerage Commission*, 182 U. S. 398, 401.

An absolute requisite of due process of law is compensation. *Tindal* v. *Wesley*, 167 U. S. 204, 222; *Holden* v. *Hardy*, 169 U. S. 366, 390; *Norwood* v. *Baker*, 172 U. S. 269, 277. The prohibition in the Fourteenth Amendment applies to all the instrumentalities of the State, to its legislative, executive and judicial authorities. *Chicago &c. R. Co.* v. *Chicago*, 166 U. S. 226, 233, 241; *Scott* v. *McNeal*, 154 U. S. 34, 45.

Mr. Ira A. Place, with whom *Mr. Thomas Emery* was on the brief, for defendants in error:

The jurisdiction invoked, the hearing had, the determination thereon, and resultant adjudication, all had relation to and involved solely the application of the rules and the principles of local property law in force prior to the 1892 enactment, and remaining in force unaffected thereby, to the status of property right which had resulted from the grants express or implied antedating that enactment. *White* v. *M. R. Co.*, 139 N. Y. 19, 25.

Plaintiff's easements of light, air and access over the one-

hundred-foot planned avenue which were created and brought into existence by the grants and acts of Poillon and of his immediate or remote grantee were, like any other property, subject unto the operation of rules of law pertaining to and governing the rights of eminent domain, private grant, express or implied, abandonment, surrender and adverse user, and all such rights as any of these might originate or evidence.

If plaintiff was entitled to recovery of compensation for property taken or for contract broken, the act of 1892 presented no barrier to his recovery, and it was not necessary to such recovery that the act contain provision therefor; and therefore lack of such provision could not render it unconstitutional as constituting the taking of property without due process of law. *Reining* v. *Railroad Co.*, 128 N. Y. 157; *Egerer* v. *Railroad Co.*, 130 N. Y. 108.

The rights of the railroad company in regard to the Park avenue improvement, have been passed on in *Birrell* v. *Railroad Co.*, 41 App. Div. 506; *S. C.*, 60 App. Div. 630; *S. C.*, 173 N. Y. 644; *Caldwell* v. *Railroad Co.*, 84 App. Div. 637; *Campbell* v. *Railroad Co.*, 35 Misc. 497; *S. C.*, 84 App. Div. 637; *Conabeer* v. *Railroad Co.*, 84 Hun, 34; *S. C.*, 156 N. Y. 474; *Dolan* v. *Railroad Co.*, 74 App. Div. 434; *S. C.*, 175 N. Y. 367; *Ehret* v. *Railroad Co.*, 74 App. Div. 628; *S. C.*, 175 N. Y. 503; *Fries* v. *Railroad Co.*, 57 App. Div. 577; *S. C.*, 169 N. Y. 270; *Henry* v. *Railroad Co.*, 84 App. Div. 637; *Keirns* v. *Railroad Co.*, 60 App. Div. 630; *S. C.*, 173 N. Y. 642; *Ketcham* v. *Railroad Co.*, 76 App. Div. 619; *S. C.*, 177 N. Y. 247; *Kriete* v. *Railroad Co.*, 67 App. Div. 620; *S. C.*, 175 N. Y. 484; *Larney* v. *Railroad Co.*, 62 App. Div. 311; *Lewis* v. *Railroad Co.*, 25 Misc. 13; *S. C.*, 40 App. Div. 343; *S. C.*, 162 N. Y. 202; *McCarthy* v. *Railroad Co.*, 74 App. Div. 629; *S. C.*, 175 N. Y. 504; *Mt. Morris Bank* v. *Railroad Co.*, 84 App. Div. 637; *Muhlker* v. *Railroad Co.*, 60 App. Div. 621; *S. C.*, 173 N. Y. 549; *Niewenhous* v. *Railroad Co.*, 76 App. Div. 619; *S. C.*, 177 N. Y. 566; *O'Neil* v. *Railroad Co.*, 67 App. Div. 620; *S. C.*, 175 N. Y. 484; *Pape* v. *Railroad Co.*, 74 App. Div. 175; *S. C.*, 175 N. Y. 504;

People ex rel. Railroad Co. v. *Havemeyer*, 47 How. Pr. 494; *Sander* v. *Railroad Co.*, 42 App. Div. 618; *Sander* v. *Railroad Co.*, 58 App. Div. 622; *Scholz* v. *Railroad Co.*, 67 App. Div. 620; *S. C.*, 175 N. Y. 485; *Siegel* v. *Railroad Co.*, 62 App. Div. 290; *S. C.*, 173 N. Y. 644; *Tocci* v. *Mayor*, 73 Hun, 46; *Talbot* v. *Railroad Co.*, 78 Hun, 473; *S. C.*, 151 N. Y. 155; *Taylor* v. *Railroad Co.*, 27 App. Div. 190; *Tynberg* v. *Railroad Co.*, 84 App. Div. 637; *Welde* v. *Railroad Co.*, 28 App. Div. 379; *Welde* v. *Railroad Co.*, 29 Misc. 13; *S. C.*, 53 App. Div. 637; *S. C.*, 168 N. Y. 597.

Failure of plaintiff's case has not resulted from want of due process of law. He has invoked and had orderly and full hearing preliminary to, and thereupon adjudication by the state courts of competent jurisdiction over the subject matter of his complaint. The conclusion and adjudication against him are based upon the finding that plaintiff and his predecessors in title had either never possessed or had granted away the property rights, the alleged deprivation of which constitutes the gravamen of his complaint. It follows that the judgment, howsoever, if at all, erroneous, is not subject unto the criticism of lack of due process of law. *Davidson* v. *New Orleans*, 96 U. S. 97; *Mo. Pac. Ry. Co.* v. *Flumes*, 115 U. S. 512; *Marchant* v. *Penna. R. R. Co.*, 153 U. S. 380; *Remington Co.* v. *Watson*, 17 U. S. 443.

Where a property or property right is vested subject unto the right and power of police regulation or public servitude, contract obligation in respect of such property or property right cannot be relied upon to oust or terminate the exercise of the right of such regulation or servitude. *Presbyterian Church* v. *New York*, 5 Cowen, 538; *Gushee* v. *New York*, 42 App. Div. 37; *Butchers' Union* v. *Crescent City Co.*, 111 U. S. 746.

Contract obligation is deemed subject unto State's right of police power.

The city and the railroad company were and are the creatures of the State. As to each, the State at all times has the right and power of amendment and alteration of their

respective charter powers. Neither of them could, by entering into contract obligation with or to plaintiff's predecessors in title, deprive the State of, or cripple its exercise of, the right and power to regulate the street and railroad so as to enlarge the usefulness of the street in and for its primary purposes; or deprive the State of the right and power to itself, or by a corporation created for the purpose, build, maintain and operate, upon a line selected by either, a railroad for common carrier service, upon payment of compensation for and thereby acquirement of the land requisite and used therefor. Any contract with either corporation must, as matter of law, be deemed to have been entered into with knowledge of and regard to such right and power of the State, and to intend that obedience to the direction or command of the State in contravention of the letter of the obligation shall not be accounted a breach of the obligation.

An enactment in such case prescribing police regulation in contravention of the terms of the contract, is not nullified by the Federal Constitution's inhibition of impairment of the obligation of the contract. *Lord* v. *Thomas*, 64 N. Y. 107; *Brown* v. *Colorado*, 106 U. S. 95; *Pennsylvania College Cases*, 13 Wall. 190; *Chicago &c. R. R. Co.* v. *Nebraska*, 170 U. S. 57.

The holdings of the state court that, as against plaintiff, the State possessed the right and power of such regulation of street and railroad maintenance and use as were prescribed by and carried into effect in pursuance of the 1892 enactment, and that consequential damage and loss thus occasioned was governed by the doctrine of *damnum absque injuria*, viewed in the light of the proofs and findings as to the origin, history and character of street and railroad maintenance and use to which those easements were incident, evinces that as matter of local property law pertinent thereto, those easements, if at all owned by plaintiff, were deemed to be held not by title absolute, but subject unto the impress of the right and power of state regulation and servitude such as was therein exercised. *Goszler* v. *Georgetown*, 6 Wheat. 593; *Stone* v. *Mississippi*, 101

U. S. 814; *Eldridge* v. *Trezevant*, 160 U. S. 452; *Meyer* v. *Richmond*, 172 U. S. 82, 94.

State decisions construing the state statute of limitations in respect to real property, and declaring what constitutes adverse possession, and the effect thereof, when continued for the period of limitation, constitute a rule of property binding upon the Federal courts of law and in equity in adjudicating upon titles to land within that State. *Elder* v. *McClaskey*, 17 C. C. A. 251; certiorari denied 163 U. S. 685; *Lobenstine* v. *Union El. R. Co.*, 80 Fed. Rep. 9; *Shelby* v. *Guy*, 11 Wheat. 361; *Green* v. *McLean*, 6 Pet. 291. For effect of the words, "persons beyond seas," in a state statute of limitations, as applied to persons in another colony, see *Livingston* v. *Moore*, 7 Pet. 469; *Leffingwell* v. *Warren*, 2 Black. 599; *Tiogo R. R. Co.* v. *Blossburg R. R. Co.*, 20 Wall. 137.

State court decisions in respect of property having its situs therein, and in respect of thereto appurtenant rights and liabilities, whether founded upon the state constitution, statute or common law, constitute a rule of property binding upon the Federal courts adjudicating upon titles, rights or liabilities pertaining to such property in that State. *Walker* v. *Commissioners*, 17 Wall. 648; *Townsend* v. *Todd*, 91 U. S. 452; *Detroit* v. *Osborne*, 135 U. S. 492; *N. Y. & N. E. R. R. Co.*, v. *Bristol*, 151 U. S. 556; *Sioux City R. R. Co.* v. *Trust Co.*, 173 U. S. 99; *Wade* v. *Travis County*, 174 U. S. 499; *Insurance Co.* v. *Chicago &c. Ry. Co.*, 175 U. S. 91.

The right and power to prescribe the rules of property law whereby recovery of consequential damage, occasioned by or under authority of a State, to real property in its domain, shall be accorded or refused, is matter of state prerogative not surrendered to Federal governance, nor subject to its supervision. *Penna. R. R. Co.* v. *Miller*, 132 U. S. 75; *Marchant* v. *Penna. R. R. Co.*, 153 U. S. 380. The doctrine of *damnum absque injuria*, adjudged to govern herein, is recognized as fundamental in New York and Federal courts. *Radcliffe* v. *Brooklyn*, 4 N. Y. 195; *Callender* v. *Marsh*, 1 Pick. 417; *Smith*

v. *Washington*, 20 How. 135, 149; *Transportation Co.* v. *Chicago*, 99 U. S. 635; *Chicago* v. *Taylor*, 125 U. S. 161; *Wabash R. Co.* v. *Defiance*, 167 U. S. 88; *High Bridge Lumber Co.* v. *United States*, 69 Fed. Rep. 324; *Bauman* v. *Ross*, 167 U. S. 548, 587; *Bellinger* v. *N. Y. Cent. R. R. Co.*, 23 N. Y. 42, 48; *Selden* v. *Del. & Hud. Canal Co.*, 29 N. Y. 634, 642; *Coster* v. *Mayor of Albany*, 43 N. Y. 399, 415; *Uline* v. *N. Y. C. & H. R. R. R. Co.*, 101 N. Y. 98, 101; *Conklin* v. *Railroad Co.*, 102 N. Y. 107, 111; *Heiser* v. *New York City*, 104 N. Y. 68, 72; *Atwater* v. *Trustees*, 124 U. S. 602, 608, distinguishing *St. Peter* v. *Denison*, 58 N. Y. 416; *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166. And see also *Benner* v. *Dredging Co.*, 134 N. Y. 156, 161; *Rauenstein* v. *Railway Co.*, 136 N. Y. 528; *Cogswell* v. *Railroad Co.*, 103 N. Y. 10, 15, 19; *Hill* v. *Mayor*, 139 N. Y. 495, 501; *Folmsbee* v. *City of Amsterdam*, 142 N. Y. 118, 122; *Uppington* v. *New York City*, 165 N. Y. 222, 229; *Scranton* v. *Wheeler*, 179 U. S. 141; *Gibson* v. *United States*, 166 U. S. 269.

The trial court found and adjudged that the improvement, executed in pursuance of the enactment, trespassed upon plaintiff's easements, and further adjudged existing laws applicable to and adequate for ascertainment of, and award of compensation for the property the subject of that trespass.

The Court of Appeals did not reverse the judgment upon the ground or theory that the lower court had erred in adjudging existing laws applicable to and adequate authority for ascertainment and award of compensation for property taken or trespassed upon, but did reverse the judgment upon the ground and theory that the damage occasioned was consequential merely, and hence not actionable.

This is purely a local question, and as decided shows plaintiff not in position to contend that the enactment is invalid, in that it fails to provide compensation in favor of any who may suffer actionable damage resultant from the carrying into effect of its provisions. *Castillo* v. *McConnico*, 168 U. S. 674; *Tyler* v. *Registration Court Judges*, 179 U. S. 405; *Hooker* v. *Burr*, 194 U. S. 415.

The plaintiff invoked and had herein the usual and ordinary process, the orderly and full hearing, and thereupon determination and adjudication in respect of the alleged taking of and trespass upon his easements in Park avenue in and by the maintenance and use of the elevated railroad structure described in his complaint.

The structure was directed and built by the State, and used in obedience to the command of the State, extending above and over, and supported by columns standing in and upon, land which was theretofore and thereunto, rightfully, as against plaintiff, occupied and used exclusively by and for the railroad. The State directed and carried into effect this elevation of railroad structure and operations for the purpose of effecting, and thereby did effect the enlargement of the street surface by embracing therein and extending the same over the ground theretofore as aforesaid occupied and used exclusively by and for the railroad and its operations.

In and by the proceedings taken and had in the said action only long-time-established process and procedure were availed of and followed, and only long-time-established and vindicated rules of property laws were administered.

The 1892 enactment, which plaintiff alleges to be violative of the Federal Constitution, as and by way of (1) taking his property without due process of law, and (2), impairing the obligations of contracts, contained no provision the purport whereof would or might in any wise deprive complainants of, or restrain them in or about availing themselves of the plain and adequate process and remedy provided by existing laws in respect of property taken for, or trespassed upon in and about the carrying into effect of, a lawfully authorized public use. That enactment was not in any wise asserted or relied upon by the defendants as or by way of a defense or shield to protect them from liability in respect of any property appropriated or contract obligation violated, nor was it in any wise adjudged to constitute such shield in respect of either property taken or contract broken.

The power of the State to prescribe and carry into effect this regulation as and for and by way of enlargement of the street surface for public travel therein was taken for granted by both parties, and all questions in respect of the possession of such power or of the proper exercise thereof, excluded from dispute by the nature and form of the action and issue. The questions litigated had relation solely to the fact and measure of taking of or trespass upon private property, which had resulted from the carrying into effect of the provisions of the enactment.

The ground upon which plaintiff was adjudged disentitled to recover was, that in so far as it appeared that plaintiff had any right or title in or to the easements, the subject of the alleged taking and trespass, his right and title thereto were in such wise subordinate and subject unto respective and joint public street and railroad servitude that the acts and conduct of which he complained did not constitute any taking of or trespass upon the said easements, invaded no legal right and violated no legal duty, and hence that the loss and damage alleged were within and governed by the rule of *damnum absque injuria.*

The judgment is founded upon interpretation and application of local rules of law, following and consequent upon the exercise and administration of ordinary and usual process, and in no wise involving any question to which Federal Constitution inhibitions have relation.

Mr. Justice McKenna, after stating the case, announced the judgment of the court and delivered the following opinion:

As we have observed, the Supreme Court followed *Lewis* v. *New York & Harlem Railroad,* 162 N. Y. 202, both in the "form of decision and judgment" and "the legal principles involved." Discussion was not considered necessary. The Appellate Division affirmed the judgment on the authority of the same case and other cases which had been ruled by it.

The court, by brief expression, pointed out the identity of the cases and disposed of the defense made by the railroad companies of adverse possession as follows:

"The question of defendants having acquired title by adverse possession was considered by this court in both the *Fries* and *Sander cases*. In the former it was said: 'For these reasons the deed to the city was valid as against the railroad company, and it had no title to that part of the street in front of the plaintiff's premises, and its only rights, therefore, were those which it had acquired by adverse possession. Within the rule laid down in the case of *Lewis* v. *New York & Harlem R. R. Co.* (cited above), that adverse possession did not give to the railroad company the right to carry its tracks, which for twenty years had run in a cut, upon a viaduct such as this is, above ground, in front of the plaintiff's premises. The case of *Lewis* applies fully to the one at bar.' In the *Sander case* this court followed the decision just quoted, the presiding justice dissenting on the sole ground that 'Title by adverse possession as to the twenty-four foot strip at least was established by the evidence.' "

In the case at bar there is a complete change of ruling by the Court of Appeals. The *Lewis case* is declared, in so far as it expressed rights of abutting property owners, to have been improvidently decided, and the elevated railroad cases, which were made its support, were distinguished. The court rested its ruling on one point, the effect of the act of 1892, under which the structure complained of was erected, the court declaring that act a command to the railroad company in the interest of the public; indeed, made the State the builder of the new structure and the use of it by the railroads mere obedience to law. But it does not follow that private property can be taken either by the erection of the structure or its use. This was plainly seen and expressed in the *Lewis case* as to the use of the structure. It was there said: "When they (the railroads) commenced to use the steel viaduct they started a new trespass upon the rights of the abutting owners." There was no hesita-

tion then in marking the line between the power of the State and the duty of the railroad, and assigning responsibility to the latter. This was in accordance with principle. The command of the State, the duty of the railroad to obey, may encounter the inviolability of private property. And in performing the duties devolved upon it a railroad may be required to exercise the right of eminent domain. *Wisconsin, Minn. & Pac. R. R.* v. *Jacobson*, 179 U. S. 287; see also *Mayor and Aldermen of Worcester* v. *Norwich and Worcester R. R.*, 109 Massachusetts, 103. We do not, therefore, solve the questions in this case by reference to the power of the State and the duty of the railroads; the rights of abutting property owners must be considered, and against their infringement plaintiff urges the contract clause of the Constitution of the United States and the Fourteenth Amendment. The latter is invoked because the act of 1892 does not provide for compensation to property owners, and the former on account of the conditions upon which the strip of land constituting the avenue was conveyed to the city. There were two deeds to the city, one made in 1825 and the other in 1827. That of 1825 was stated to be "in trust, nevertheless, that the same be appropriated and be kept open as parts of public streets and avenues forever, in like manner as the other public streets and avenues in said city are and of right ought to be." The deed of 1827 was also "in trust that the same be left open as public streets for the use and benefit of the inhabitants of said city forever." Plaintiff derives title from Poillon, grantor of the city in the deed of 1827, and hence contends that he is entitled to enforce the trust created by Poillon's deed to the city. The railroads oppose this contention. They assert title to the land upon which the structure complained of stands by deed and by prescription. The details of these contentions we need not repeat nor discuss. They are stated at length in the *Lewis case*, and the conclusions there expressed are not disturbed by the decision of the Courts of Appeals in the case at bar. The case is therefore presented to us as to the effect of the deed of

Poillon to the plaintiff and to the city as constituting a contract, and the effect of the act of 1892 as an impairment of that contract or as taking plaintiff's property without due process of law. These questions were directly passed on and negatived by the Court of Appeals.

It will be observed from the statement of facts that before the construction of the viaduct complained of the railroad ran partly on the surface of the street and partly in a cut or trench, the latter being flanked by masonry walls three feet high. The viaduct is a solid roadbed thirty-one feet above the surface, having iron girders on the sides and in the middle, and supported by iron columns, of which there are six in front of the plaintiff's land. The old construction prevented crossing or access to the tracks. The new construction impairs or destroys the plaintiff's easements of light and air. And such easements the trial court found belonged to plaintiff in common with other abutters upon the public streets of New York and his damages for their impairment to be as expressed by Bartlett, J., in his dissenting opinion, "$3,000 fee damages, $1,400 rental damages, from February 16, 1897, to October 10, 1900," the date of trial; that is, $4,400 present damage. It is suggested, however, that the Court of Appeals did not deny the rights of the abutters, but considered that the most important phase of those rights was that of access, and the plaintiff did not have this over the railroad by reason of the stone wall. The basis of the suggestion, as we understand, is the idea that plaintiff was compensated for the injury of his easements of light and air by an increase of his easement of access without regard to the resulting damage. To do this, however, is to make one easement depend upon another, both of which are inseparable attributes of property and equally necessary to its enjoyment. It is impossible for us to conceive of a city without streets, or any benefit in streets, if the property abutting on them has not attached to it as an essential and inviolable part, easements of light and air as well as of access. There is something of mockery to give one access to property which

may be unfit to live on when one gets there. To what situation is the plaintiff brought? Because he can cross the railroad at more places on the street, the State, it is contended, can authorize dirt, cinders and smoke from 200 trains a day to be poured into the upper windows of his house.

In *Barnett* v. *Johnson*, 15 N. J. Eq. 481, there is a clear expression of the right of abutting owners to light and air, and of the common practice and sense of the world upon which it is founded. "It is a right," the court said, "founded in such an urgent necessity that all laws and legal proceedings take it for granted. A right so strong that it protects itself, so urgent that, upon any attempt to annul or infringe it, it would set at defiance all legislative enactment and all judicial decision." And, graphically describing the right, observed further, "is not every window and every door in every house in every city, town, and village the assertion and maintenance of this right?" It has been said *Barnett* v. *Johnson* anticipated "the principle upon which compensation was at last secured in the elevated railroad cases in New York." 1 Lewis Eminent Domain, 183.

It is manifest that easements of light and air cannot be made dependent upon the easement of access, and whether they can be taken away in the interest of the public under the conditions upon which the city obtained title to the streets is now to be considered. The answer depends upon the cases of *Story* v. *New York Elevated R. R. Co.*, 90 N. Y. 122, and *Lahr* v. *Metropolitan Elevated R. R. Co.*, 104 N. Y. 268, known as the elevated railroad cases. The *Lahr case* was decided in 1887. The plaintiff in the case at bar acquired title to his property in 1888.

The first of the elevated railroad cases was the *Story case*, decided in 1882. The plaintiff in the case was the owner of a lot on the corner of Moore and Front streets in the city of New York, on which there were buildings. To their enjoyment light, air and access were indispensable, and were had through Front street. The defendant was about to construct

a railroad above the surface of that street upon a series of columns, about fifteen inches square, fourteen feet and six inches high, placed five inches inside of the sidewalk, with girders from thirty-three to thirty-nine inches deep, for the support of cross ties for three sets of rails for a steam railroad. The cars were to be of such a construction as to reach within nine feet of plaintiff's buildings, and trains were to be run every three minutes, and at a rate of speed as high as eighteen miles an hour.

The fact of injury to the abutting lot was found by the trial court, and also that the city of New York was the owner in fee of Front street, opposite plaintiff's lots, and that he was not and never had been seized of the same in fee nor had any estate therein.

The Supreme Court said the case involved the question whether the scheme of the defendant amounted to the taking of any property of the plaintiff; if it did, it was said, the judgment was invalid on the ground that the intended act, when performed, would violate not only the provision of the Constitution, which declared that such property should not be taken without just compensation, but certain statutes by which defendant was bound or owed its existence, and which would not have been upheld unless, in the opinion of the court, they had provided means to secure such compensation.

The plaintiff contended that, as owner of the abutting premises, he had the fee to one-half of the bed of the street opposite thereto, and he also contended, if the fee was in the city, he, as abutting owner, had such right to have light and access afforded by the street above the roadbed as entitled him to have it kept open for those uses until by legal process and upon just compensation that right was taken away. The defendant justified its intended acts through the permission of the city. The issue thus made the court passed on, and in doing so assumed that the city owned the fee of the street and that the plaintiff derived his title from the city. It was held that the plaintiff had acquired "the right and privilege of

having the street forever kept open as such;" and that the right thus secured was an incorporeal hereditament, which "became at once appurtenant to the lot and formed an 'integral part of the estate' in it," and which followed the estate and constituted a perpetual encumbrance upon the land burdened with it. "From the moment it attached," the court observed, "the lot became the dominant, and the open way or street the servient tenement." Cases were cited for these propositions. And the extent of the easement was defined to be not only access to the lot, but light and air from it. The court said: "The street occupies the surface and to its uses the rights of the adjacent lots are subordinate, but *above the surface* there can be no lawful obstruction to the access of light and air, to the detriment of the abutting owner." And further: "The elements of light and air are both to be derived from the space *over* the land, on the *surface* of which the street is constructed, and which is made servient for that purpose." This was emphasized, the court observing: "Before any interest passed to the city, the owner of the land had from it the benefit of air and light. *The public purpose of a street requires of the soil the surface only.*" The easement was declared to be property and within the protection of the constitutional provision for compensation for its diminution by the contemplated structure.

It is, of course, impossible to reproduce the argument of the court by which its conclusions were sustained. It is enough to say that a distinction was clearly made between the rights of abutting owners in the *surface* of the street and their rights in the *space above* the street, and the distinction was also clearly made between damages and a taking. A review was made of the cases upon which those distinctions rested. The power of a city to alter a grade of a street was adverted to, and held not to justify the intended structure. There was no change in the street surface intended, it was said, "but the elevation of a structure useless for street purposes and as foreign thereto," as the house which was held to be an ob-

struction in *Corning* v. *Lowerre*, 6 Johns. Ch. 439, or the freight depot in *Barney* v. *Keokuk*, 94 U. S. 324.

The conclusion of the court and the distinctions made by it were repeated in *Lahr* v. *Metropolitan Elevated R. R. Co.*, 104 N. Y. 268. The structure complained of in the latter case was also an elevated railroad.

Chief Judge Ruger, speaking for the court, opened his opinion by observing that the action was "the sequel of the *Story case*," and that its defense seemed to have been conducted upon the theory of endeavoring to secure a reëxamination of that case. The endeavor, it was said, must fail, because the doctrine of the *Story case* had been pronounced after most careful and thorough consideration and after two arguments at the bar, made by most eminent counsel, had apparently exhausted the resources of learning and reasoning in the discussion of the question presented. And it was declared that "it would be the occasion of great public injury, if a determination thus made could be inconsiderately unsettled and suffered again to become the subject of doubt, and theme of renewed discussion." The doctrine of the *Story case* was declared to be *stare decisis*, not only upon all the questions involved, but upon all that came logically within the principles decided. There was an enumeration of those principles, as follows:

(1) That an elevated railroad, of the kind described, was a perversion of the use of a street, which neither the city nor the legislature could legalize without providing compensation for the injury inflicted upon the property of abutting owners.

(2) That abutters upon a public street, claiming title by grant from the municipal authorities, which contained a covenant that streets which could be laid out should continue as other streets, acquired an easement in the bed of the street for ingress and egress to and from their premises, and also for the free and uninterrupted passage and circulation of light and air through and over such street for the benefit of the property situated thereon.

(3) That such easement was an interest in real estate and constituted property, within the meaning of the constitution of the State, and could not be taken for a public use without payment of compensation.

(4) That an elevated railroad, upon which cars propelled by steam engines which generated gas, steam and smoke and distributed in the air cinders, dust, ashes, and other noxious and deleterious substances, and interrupted the free passage of light and air to and from adjoining premises, constituted a taking of the easement, and rendered the railroad company liable for the damages occasioned by such taking.

The application of these principles was resisted on the ground that the city was the grantor of the plaintiff in the *Story case* and could not derogate from the title a property it conveyed, and, it was contended, that the case went off on that ground. This was rejected and the principles enumerated held to apply, notwithstanding the land in the street had been taken from plaintiff's grantor by proceedings *in invitum*. And rights of abutting owners were held to rest in contract constituted by the conditions upon which the city received the property.

Equally untenable are the grounds of distinction urged in the case at bar against the application of those principles. What are they? In the *Story* and *Lahr cases* the railroads were imposed for the first time on the street. In the case at bar the Harlem Railroad had occupied the surface of the street, and was changed to the viaduct. But in the *Story* and *Lahr cases* it was not the fact that the railroads were imposed on the street for the first time that determined the judgment rendered. It was the fact that trains were run upon an elevated structure, interrupting the easements of light and air of the abutting owners. It was this that constituted a use inconsistent with the purpose of the street. It was the "elevation of a structure," to quote again from the *Story case*, "useless for general street purposes." This situation of the railroad was especially dwelt upon in the *Story case*, and that case was distinguished thereby from the surface railway cases.

And in the *Lewis case* a difference was recognized between the two situations, and a balance struck between damage done by the railroad in one situation and the railroad in the other situation. The *Lewis case*, we have seen, was overruled by the Court of Appeals in the case at bar, while the *Story* and *Lahr cases* were said not to be in point. We think that the *Lewis case* was an irresistible consequence of the others, and the *Story* and *Lahr cases* are in point and decisive.

Another distinction is claimed, as we have already observed, between the case at bar and those cases. The act of the railroad in occupying the viaduct, it is said, was the act of the State. But this defense was made in the other cases. It did not give the court much trouble. It is urged, however, now, with an increased assurance. Indeed, it is made the ground of decision, as we have seen by the Court of Appeals. The court said: "The decisions in the elevated railroad cases are not in point. There no attempt was made by the State to improve the street for the benefit of the public. Instead, it granted to a corporation the right to make an additional use of the street, in the doing of which it took certain easements belonging to abutting owners, which it was compelled to compensate them for." And, further, making distinction between those cases and that at bar, said: "The State could not if it would—and probably would not if it could—deprive defendant of its right to operate its trains in the street. But it had the power in the public interest to compel it to run its trains upon a viaduct instead of in the subway." And the court concluded that it was the State, not the railroads, which did the injury to plaintiff's property. The answer need not be hesitating. The permission, or command of the State, can give no power to invade private rights, even for a public purpose without payment of compensation; and payment of such compensation, when necessary to the performance of the duties of a railroad company, may be, as we have already observed, part of its submission to the command of the State. The railroads paid one-half of the expense of the change, "'by the com-

mand of the statute, and, hence, under compulsion of law,' " to quote from the Court of Appeals. The public interest, therefore, is made too much of. It is given an excessive, if not a false quantity. Its use as a justification is open to the objection made at the argument, it enables the State to do by two acts that which would be illegal if done by one. In other words, as under the law of New York the State can authorize a railroad to occupy the surface of a street it can subsequently permit or order the railroad to raise its tracks above the street and justify the impairment of property rights by the public interest. It was said in the *Story case* that "the public purpose of a street requires of the soil the surface only." And this was followed in *Fobes* v. *R., W. & O. R. Co.*, 121 N. Y. 505, where a steam railroad was permitted upon a street without liability for consequential damages to adjoining property. The new principle based upon the public interest destroys all distinction between the surface of the soil of a street and the space above the surface, and, seemingly, leaves remaining no vital remnant of the doctrine of the elevated railroad cases. However, we need not go farther than the present case demands. When the plaintiff acquired his title those cases were the law of New York, and assured to him that his easements of light and air were secured by contract as expressed in those cases, and could not be taken from him without payment of compensation.

And this is the ground of our decision. We are not called upon to discuss the power or the limitations upon the power, of the courts of New York to declare rules of property or change or modify their decisions, but only to decide that such power cannot be exercised to take away rights which have been acquired by contract and have come under the protection of the Constitution of the United States. And we determine for ourselves the existence and extent of such contract. This is a truism; and when there is a diversity of state decisions the first in time may constitute the obligation of the contract and the measure of rights under it. Hence the importance of the

elevated railroad cases and the doctrine they had pronounced when the plaintiff acquired his property. He bought under their assurance, and that these decisions might have been different or that the plaintiff might have balanced the chances of the commercial advantage between the right to have the street remain open and the expectation that it would remain so is too intangible to estimate. We certainly can estimate the difference between a building with full access of light and air and one with those elements impaired or polluted. But we have already expressed this. We need only add that the right of passage is not all there is to a street, and to call it the primary right is more or less delusive. It is the more conspicuous right, has the importance and assertion of community interest and ownership, properly has a certain dominance, but it is not more necessary to the making of a city than the rights to light and air, held, though the latter are, in individual ownership and asserted only as rights of private property. The true relation and subordination of these rights, public and private, is expressed, not only by the elevated railroad cases, but by other cases. They are collected in 1 Lewis Eminent Domain, section 91*c*, and, it is there said, "established beyond question the existence of these rights, or easements, of light, air and access, as appurtenant to abutting lots, and that they are as much property as the lots themselves."

Judgment is reversed and cause remanded for further proceedings not inconsistent with this opinion.

MR. JUSTICE BROWN concurs in the result.

MR. JUSTICE HOLMES dissenting.

I regret that I am unable to agree with the judgment of the court, and as it seems to me to involve important principles I think it advisable to express my disagreement and to give my reasons for it.

The plaintiff owns no soil within the limits of the avenue.

The New York and Harlem Railroad Company at the time of the change was and long had been the owner, and the other defendant was the lessee of a railroad with four tracks along the middle of Park avenue, in front of the plaintiff's land, at the south end being at the surface of the avenue, and at the north in a trench about four feet and a half deep, the railroad being bounded on both sides by a masonry wall three feet high, which prevented crossing or access to the tracks. This is the finding of the court of first instance and I take it to be binding upon us. We have nothing to do with the evidence. I take it to mean the same thing as the finding in *Fries* v. *New York & Harlem R. R.*, 169 N. Y. 270, that the defendants had "acquired the right without liability to the plaintiff to have, maintain and use their railroad and railroad structures as the same were maintained and used prior to February 16, 1897." The material portion of the decision of the Court of Appeals is that on this state of facts, as was held in the similar case of *Fries* v. *New York & Harlem R. R.*, the plaintiff had no property right which was infringed in such a way as to be anything more than *damnum absque injuria*. The finding that the railroad had the right to maintain the former structures was held to distinguish the case from the elevated railroad cases, where pillars were planted in the street without right as against the plaintiff. *Story* v. *New York Elevated R. R.*, 90 N. Y. 122, 160, 170, 178; *Lahr* v. *Metropolitan Elevated Ry.*, 104 N. Y. 268. The other so-called finding, that the new structure infringes the plaintiff's right, is merely a ruling of law that notwithstanding the facts specifically found the plaintiff has a cause of action by reason of his being an abutter upon a public street.

The plaintiff's rights, whether expressed in terms of property or of contract, are all a construction of the courts, deduced by way of consequence from dedication to and trusts for the purposes of a public street. They never were granted to him or his predecessors in express words, or, probably, by any conscious implication. If at the outset the New York courts had

decided that apart from statute or express grant the abutters on a street had only the rights of the public and no private easement of any kind, it would have been in no way amazing. It would have been very possible to distinguish between the practical commercial advantages of the expectation that a street would remain open and a right *in rem* that it should remain so. See *Stanwood* v. *Malden*, 157 Massachusetts, 17. Again, more narrowly, if the New York courts had held that an easement of light and air could be created only by express words, and that the laying out or dedication of a street, or the grant of a house bounding upon one, gave no such easement to abutters, they would not have been alone in the world of the common law. *Keats* v. *Hugo*, 115 Massachusetts, 204, 216. The doctrine that abutters upon a highway have an easement of light and air is stated as a novelty in point of authority in *Barnett* v. *Johnson*, 15 N. J. Eq. 481, 489, and that case was decided in a State where it was held that a like right might be acquired by prescription. *Robeson* v. *Pittenger*, 1 Green Ch. 57.

If the decisions, which I say conceivably might have been made, had been made as to the common law, they would have infringed no rights under the Constitution of the United States. So much, I presume, would be admitted by every one. But if that be admitted, I ask myself what has happened to cut down the power of the same courts as against that same Constitution at the present day. So far as I know the only thing which has happened is that they have decided the elevated railroad cases, to which I have referred. It is on that ground alone that we are asked to review the decision of the Court of Appeals upon what otherwise would be purely a matter of local law. In other words, we are asked to extend to the present case the principle of *Gelpcke* v. *Dubuque*, 1 Wall. 175, and *Louisiana* v. *Pilsbury*, 105 U. S. 278, as to public bonds bought on the faith of a decision that they were constitutionally issued. That seems to me a great, unwarranted and undesirable extension of a doctrine which it took this court a good while to explain. The doctrine now is explained, however,

not to mean that a change in the decision impairs the obligation of contracts, *Burgess* v. *Seligman*, 107 U. S. 20, 34; *Stanly County* v. *Coler*, 190 U. S. 437, 444, 445, and certainly never has been supposed to mean that all property owners in a State have a vested right that no general proposition of law shall be reversed, changed or modified by the courts if the consequence to them will be more or less pecuniary loss. I know of no constitutional principle to prevent the complete reversal of the elevated railroad cases to-morrow, if it should seem proper to the Court of Appeals. See *Central Land Co.* v. *Laidley*, 159 U. S. 103.

But I conceive that the plaintiff in error must go much further than to say that my last proposition is wrong. I think he must say that he has a constitutional right not only that the state courts shall not reverse their earlier decisions upon a matter of property rights, but that they shall not distinguish them unless the distinction is so fortunate as to strike a majority of this court as sound. For the Court of Appeals has not purported to overrule the elevated railroad cases. It simply has decided that the import and the intent of those cases does not extend to the case at bar. In those cases the defendants had impaired the plaintiff's access to the street. It is entirely possible and consistent with all that they decided to say now that access is the foundation of the whole matter; that the right to light and air is a parasitic right incident to the right to have the street kept open for purposes of travel, and that when, as here, the latter right does not exist the basis of the claim to light and air is gone.

But again, if the plaintiff had an easement over the whole street he got it as a tacit incident of an appropriation of the street to the uses of the public. The legislature and the Court of Appeals of New York have said that the statute assailed was passed for the benefit of the public using the street, and I accept their view. The most obvious aspect of the change is that the whole street now is open to travel, and that an impassable barrier along its width has been removed, in other

words, that the convenience of travellers on the highway has been considered and enhanced. Now still considering distinctions which might be taken between this and the earlier cases, it was possible for the New York Courts to hold, as they seem to have held, that the easement which they had declared to exist is subject to the fullest exercise of the primary right out of which it sprang, and that any change in the street for the benefit of public travel is a matter of public right, as against what I have called the parasitic right which the plaintiff claims. *Scranton* v. *Wheeler*, 179 U. S. 141; *Gibson* v. *United States*, 166 U. S. 269.

The foregoing distinctions seem to me not wanting in good sense. Certainly I should have been inclined to adopt one or both of them, or in some way to avoid the earlier decisions. But I am not discussing the question whether they are sound. If my disagreement was confined to that I should be silent. I am considering what there is in the Constitution of the United States forbidding the Court of Appeals to hold them sound. I think there is nothing; and there being nothing, and the New York decision obviously not having been given its form for the purpose of evading this court, I think we should respect and affirm it, if we do not dismiss the case.

What the plaintiff claims is really property, a right *in rem*. It is called contract merely to bring it within the contract clause of the Constitution. It seems to me a considerable extension of the power to determine for ourselves what the contract is, which we have assumed when it is alleged that the obligation of a contract has been impaired, to say that we will make the same independent determination when it is alleged that property is taken without due compensation. But it seems to me that it does not help the argument. The rule adopted as to contract is simply a rule to prevent an evasion of the constitutional limit to the power of the States, and, it seems to me, should not be extended to a case like this. Bearing in mind that, as I have said, the plaintiff's rights, however expressed, are wholly a construction of the courts, I cannot

believe that whenever the Fourteenth Amendment or Article I, section 10, is set up we are free to go behind the local decisions on a matter of land law, and, on the ground that we decide what the contract is, declare rights to exist which we should think ought to be implied from a dedication or location if we were the local courts. I cannot believe that we are at liberty to create rights over the streets of Massachusetts, for instance, that never have been recognized there. If we properly may do that, then I am wrong in my assumption that if the New York Courts originally had declared that the laying out of a public way conferred no private rights we should have had nothing to say. But if I am right, if we are bound by local decisions as to local rights in real estate, then we equally are bound by the distinctions and the limitations of those rights declared by the local courts. If an exception were established in the case of a decision which obviously was intended to evade constitutional limits, I suppose I may assume that such an evasion would not be imputed to a judgment which four Justices of this court think right.

As I necessarily have dealt with the merits of the case for the purpose of presenting my point, I will add one other consideration. Suppose that the plaintiff has an easement and that it has been impaired, bearing in mind that his damage is in respect of light and air, not access, and is inflicted for the benefit of public travel, I should hesitate to say that in inflicting it the legislature went beyond the constitutional exercise of the police power. To a certain and to an appreciable extent the legislature may alter the law of nuisance, although property is affected. To a certain and to an appreciable extent the use of particular property may be limited without compensation. Not every such limitation, restriction or diminution of value amounts to a taking in a constitutional sense. I have a good deal of doubt whether it has been made to appear that any right of the plaintiff has been taken or destroyed for which compensation is necessary under the Constitution of the United States. *Scranton* v. *Wheeler*, 179 U. S. 141; *Meyer* v.

Richmond, 172 U. S. 82. See *Mugler* v. *Kansas*, 123 U. S. 623, 668; *Marchant* v. *Pennsylvania R. R.*, 153 U. S. 380; *Camfield* v. *United States*, 167 U. S. 518, 523; *People* v. *D'Oench*, 111 N. Y. 359, 361; *Sawyer* v. *Davis*, 136 Massachusetts, 239; *Commonwealth* v. *Alger*, 7 Cush. 53. Compare *United States* v. *Lynah*, 188 U. S. 445, 470.

I am authorized to say that the CHIEF JUSTICE, MR. JUSTICE WHITE and MR. JUSTICE PECKHAM concur in the foregoing dissent.

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

IN EQUITY. ON BILL AND CROSS BILL.

No. 5, Original. Submitted November 28, 1904.—Decided December 19, 1904.—Decree entered March 5, 1905.

Final Decree entered in accordance with opinion delivered December 19, 1904, reported in 196 U. S. 23, and stipulation of the parties.

THIS cause coming on for final decree, in pursuance of the opinion of this court filed herein on December 19, 1904, and the stipulation of the respective parties by their counsel filed herein on January 30, 1905, which said stipulation is in words and figures as follows, to wit:

"In the opinion of the court in the above-entitled cause, the order and finding of the court having been made as follows:

" 'It appears from the record that about the year 1898 the county surveyors of Nemaha County, Nebraska, and Atchison County, Missouri, made surveys of the abandoned bed of the Missouri River, ascertained the location of the original banks on either side, and to some extent marked the middle of the old channel. If the two States will 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 will cause monuments to be placed so as to permanently mark the boundary lines 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 to these details.'

"In pursuance whereof now come the parties hereto by their respective counsel and agree that the said surveys made by the county surveyors of Nemaha County, Nebraska, and Atchison County, Missouri, as reported by the Commissioners and set forth in the opinion of the court, constitute and be correct boundary lines between the said States, the same constituting the middle of the old channel of Missouri River as found by said court in its opinion.

"It is further agreed between the parties hereto that the monuments marking said boundary line established by the said county surveyors of said counties are not of a permanent character, and many of them have become destroyed or removed, and that in order to mark a permanent boundary line it is necessary and is deemed best that permanent monuments be erected at regular intervals on said line in such manner as will quiet all dispute in reference to said boundary.

"It is further agreed that said permanent monuments can be best established under the supervision of the Commissioners heretofore appointed by the court, to wit, Alfred Hazlett and John W. Halliburton, and it is therefore requested by the parties to this cause that the court, by a proper order, direct and require said Commissioners to establish or cause to be established under their direction such permanent monuments as may by them be deemed necessary in the premises and in accordance with the order of the court heretofore made, and make a report to the court of their acts and doings therein. In the execution of their powers herein said Commissioners

shall have authority to employ such surveyors and other assistants and procure such material as may be necessary in the establishment of the permanent monuments, marking said boundary line in accordance with the opinion of the court heretofore rendered and this agreement.

"It is further agreed that said Commissioners for their services herein shall receive such compensation as may be agreed upon by the respective parties, and if the parties are unable to agree, then such as may be fixed by the court after the services have been performed and due report thereon made.

"On account of the unfavorable condition of the weather during the winter months and of the character of the ground during the spring months, the parties hereto respectfully request the court that said Commissioners be granted until the first day of May, 1905, in which to make their report.

STATE OF MISSOURI, Complainant,
By EDWARD C. CROW,
Attorney General.
SAM B. JEFFRIES,
Assistant Attorney General.
STATE OF NEBRASKA, Defendant,
By F. N. PROUT,
Attorney General."

And on motion of Herbert S. Hadley, Attorney General of the State of Missouri, counsel for said complainant, that a decree be entered in this cause in accordance with said opinion and stipulation:

It is now here ordered, adjudged and decreed by this court 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 and shall be the true boundary line between Missouri and Nebraska, and that said boundary line is indicated upon and shown by the following plat:

And that said boundary line is more particularly shown and described by the following eleven sectional survey maps, with the field notes descriptive of each of said sectional maps and surveys:

Defendant's Exhibit "E."

FIELD NOTES.

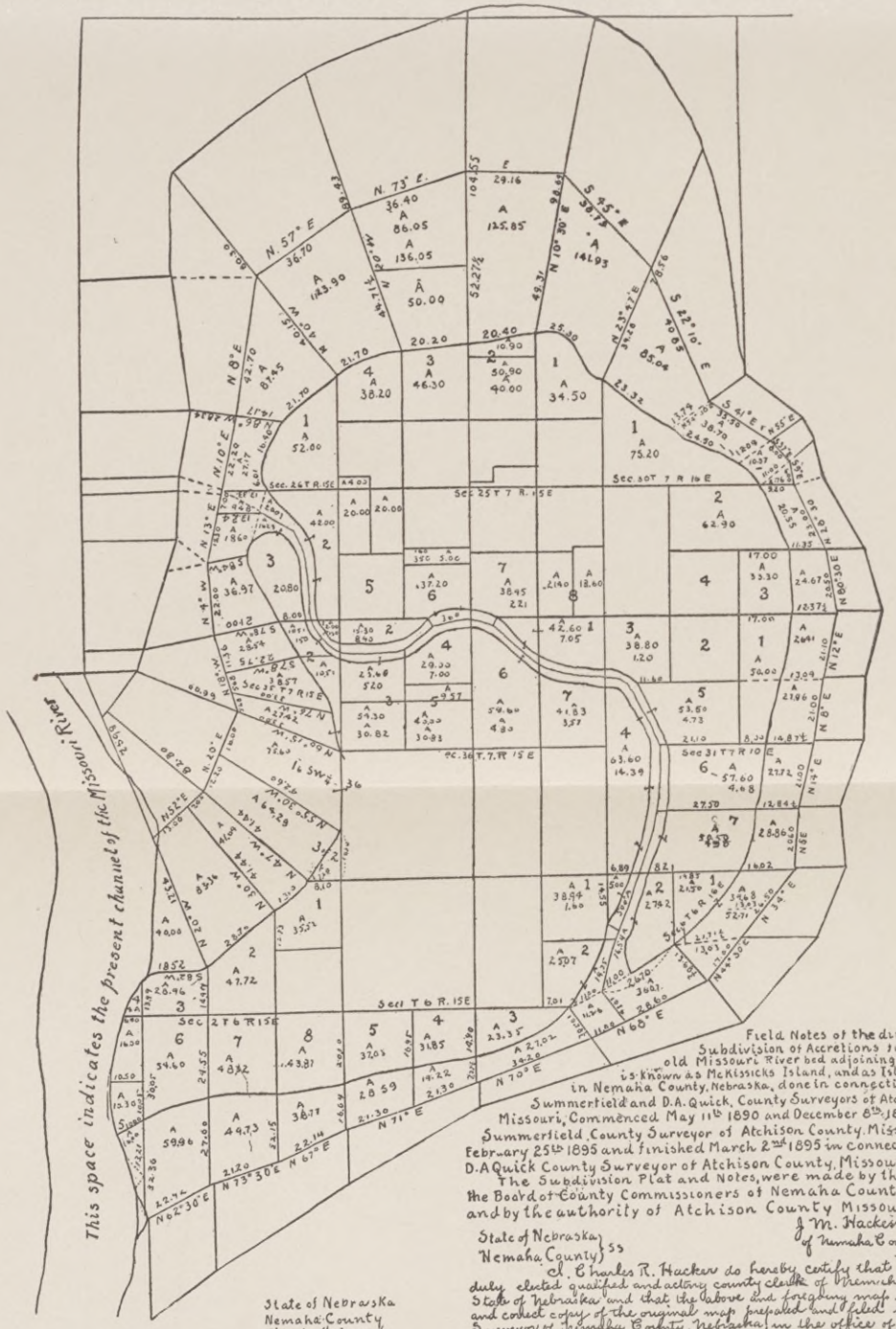
No. of Survey ..... Date February 25th to March 29th 1895
Survey for Nemaha county Nebraska
At request of the Board of County Commissioners
Chainmen sworn W. T. Hacker and H. D. Hacker
Point established divis. of Accretions to Sec. 35, Twp. 7 N, Rng. 15 E, 6th P. M.

Commencing at the meander corner, on the Nebraska bank of the Old Missouri River bed where the Township line between Townships 6 and 7 North of Range 15 East of the 6th Principal Meridian in Nebraska intersects with the Old Missouri River bed and at a point 9.10 chaines West of the South East corner of Section 35 and South West corner of Section 36 in Township 7 North, of Range 15 East of the 6th Principal Meridian in Nebraska, and run thence N 47° W at 40.00 chaines set a random stake for half way and at 82.88 chaines came to a meander corner on the Missouri bank of the Old Missouri river bed. This line run in connection with D. A. Quick Surveyor of Atchison county Missouri. Correcting back we corrected the random stake set at 40.00 chaines to 41.44 chaines for the half way or dividing line between Missouri and Nebraska and set a Limestone 7x12x25 inches square. Marked M. and N. Whole distence across 82.88 chaines. Half the distence across 41.44 chaines.

And Commencing at the quarter section corner on the West line of Section 36 and East line of Section 35 in Township 7 North, of Range 15 East of the 6th Principal Meridian in Nebraska, it being on the Nebraska bank of the Old Missouri

DEFENDANTS EXHIBIT D.

MAP OF Mc KISSICKS ISLANDS AND ACCRETIONS



Field Notes of the division and Subdivision of Accretions formed in the old Missouri River bed adjoining to and what is known as McKissicks Island, and as Island Precinct in Nemaha County, Nebraska, done in connection with B.F. Summerfield and D.A. Quick, County Surveyors of Atchison County Missouri, Commenced May 11th 1890 and December 6th 1891 with B.F. Summerfield, County Surveyor of Atchison County, Missouri; and on February 25th 1895 and finished March 2nd 1895 in connection with D.A Quick County Surveyor of Atchison County, Missouri.

The Subdivision Plat and Notes, were made by the authority of the Board of County Commissioners of Nemaha County, Nebraska and by the authority of Atchison County Missouri.

J. M. Hacker County Surveyor of Nemaha County Nebraska

State of Nebraska } ss
Nemaha County }

I, Charles R. Hacker do hereby certify that I am the duly elected qualified and acting county clerk of Nemaha County State of Nebraska and that the above and foregoing map is a full, true and correct copy of the original map prepared and filed by the County Surveyor of Nemaha County, Nebraska, in the office of the County Clerk of said County and State, as the same now appears among the files and records of my office and that I am as such County Clerk under the laws of the State of Nebraska the proper Custodian of said map.

Given under my hand and the seal said County this 7th day of October A.D. 1902 at Auburn Nebraska

Charles R. Hacker, County Clerk
Nemaha County, Nebraska.

State of Nebraska
Nemaha County
Filed 10th day of
April 1895
J. M. Bruso
County Clerk

River bed and run thence N 67° W and at 32.52 chaines set a random stake for half way and at 66.00 chaines came out 88 links South of the corner on the Missouri bank of the Old Missouri River bed. This line was run in connection with D. A. Quick County Surveyor of Atchison county Missouri. Adjusting our bearing to N 66° 15′ W we corrected back and corrected the random stake set at 32.52 chaines to 33.00 chaines 48 links west and 44 links North of the random stake and on a direct line, and we set a Limestone 8x11x44 inches square for the dividing line between Missouri and Nebraska marked M and N

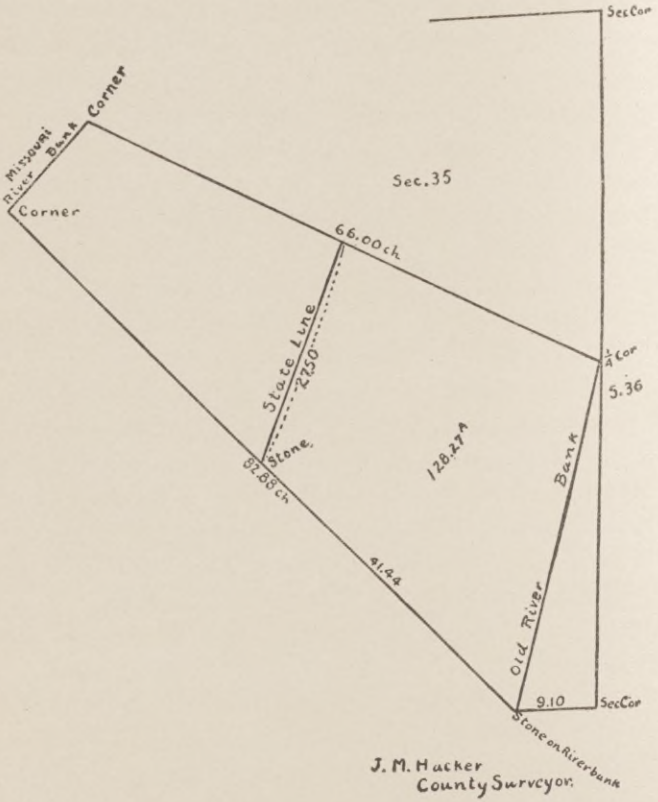
Whole distence across 66.00 chaines.

Half the distence across 33.00 chaines.

SURVEYOR'S RECORD 224+

No 1 PLAT.

Section 35 in Township 7 North, Range 15 East, 6th P.M. Nebr.



J. M. Hacker
County Surveyor.

SURVEYOR'S RECORD.

FIELD NOTES.

No. of Survey ..... Date May 15th to 20th 1890
Survey for J. B. Shields
At request of J. B. Shields
Chainmen sworn Marton Lamb and W. Barrenger
Point established corners to Lots 1 & 2 &c Sec. 35, Twp. 7, Rng. 15 E, 6th P. M.

Commenced at the North East corner of section 35 T 7 N of R 15 E and run thence South and at 6.58 chaines came to North Bank of old River Shute the SE. cor. of Lot 1 in Sec. 35, and at 4.20 chaines on South bank of Old River Shoot at the NE cor. of Lot 2 in Sec. 35 and at 40.00 chaines set a stone 6x6x12 inches square for the quarter Sec. corner on the East line of Sec. 35, the SE. cor. of Lot 2 in Sec. 35. And at 80.00 chaines set a stone 6x10x16 inches square for South East corner of Sec. 35, T 7 R 15 E Nemaha County Nebraska. Then commencing at the North East corner of Sec 35, T 7, R 15 E. and running thence West 6.12 chaines to the East bank of old River Shute, the NW. cor. of Lot 1, in Sec. 35. Thence West 3.10 chaines to the West bank of old River Shute the NE. corner of Lot 2 in Sec. 35, thence West 8.00 chaines to the old bank of the Missouri River Set a Stone 6x8x10 inches square for the NW. cor. of Lot 2 in Sec. 35, and for the bank of the Old Missouri River in Nebraska.

Survey of the Accretion to Lot 2 in Sec. 35, T 7, R 15 E in Nebraska.

Commencing at a stone 6x8x10 inches square, set for the NW. cor. of Lot 2 in Sec 35, T 7, R 15 E. the Nebraska bank of the old Missouri River bed, and running thence S 78° 30′ W 42.00 chaines to the opposite bank of the old Missouri River bed in Missouri as designated by B. F. Rummerfield County

Surveyor of Atchison County, Missouri. Then correcting and setting a stake 3 inches square at the half way point and for the NW. cor. of the Accretion to Lot 2 in Sec. 35, T 7, R 15 E in Nemaha Co. Neb. Said stake witnessed by a Cottonwood tree 9 inches in diameter beares N 49° 30′ W 24 links distant. And by a Cottonwood tree 11 inches in diameter beares N 19 E 32 links distant.

Then commencing at quarter section corner stone on the bank of the old Missouri River bead in Nebraska. Running thence N 67° W 65.05 chaines to the opposite bank of the old Missouri River bed on the Missouri State side of the old River bed. Then correcting and setting a stake & stone at 32.52½ chaines for the half way line and the South West corner of the Accretions to Lot 2 in Sec. 35 town. 7 Range 15 East in Nemaha County Nebraska.

SURVEYOR'S RECORD 128

No 2. PLAT

Sec. 35, Township 7, Range 15 East 6th P.M

SURVEYOR'S RECORD.

FIELD NOTES.

No. of Survey ..... Date May 13th to 20th 1890
Survey for D. P. Holley and J. C. Roberts.
At request of D. P. Holley and J. C. Roberts.
Chainmen sworn Marton Lamb and W. Barrenger
Point established Lots 1, 2 & 3 &c. in Sec. 26, Twp. 7, Rng. 15 E. 6th P. M.

Commencing at the SE. cor. of Sec. 26 T 7 R 15 E in Nemaha Co. Neb. and running thence North, at 20.00 chaines set a stake for East line of Lot 2 in Sec. 26, at 40.00 chaines found quartersection corner post at SE. cor. Lot 1 & NE cor of Lot 2 set by the Government, at 60.00 chaines set stake for East line of Lot 1 and at 73.90 chaines set stake for NE. cor. of Lot 1 and at bank of Missouri River in Nebraska. And from this line as a base we run lines West to find the old Missouri River bank on the Nebraska side, By First Commencing at the stake set at the 60.00 chaines North of SE. cor. of Sec 26, Running thence West 16.50 chaines for bank of river setting a stake 3 inches square. Then commencing at the quarter section corner on the East line of Sec 26. and running thence West 21.45 chaines setting stake 3 inches square for SW. cor. of Lot 1 in Sec 26 and NW cor to Lot 2 in Sec 26, which contains by Government Survey 52.70 Acres.

Then commencing at the stake 20.00 chaines North of the SE. cor. of Sec. 26, and on the East line of Lot 2 in Sec 26, and running thence West at 7.24 chaines, came to East bank of the River Shute the West line of Lot 2, Sec. 26, then at 11.34 chaines came to the West bank of the River Shute the East line of Lot 3 in Sec 26. Thence at 26.84 chaines set a stake for River bank and for the West line of Lot 3 in Sec 26.

Then commencing at the SE. corner of Sec 26 T 7 R 15 E in Nebraska, Running thence West and at 6.12 ch. came to

the East bank of the River Shute and the SW. cor. of Lot 2 in Sec. 26, Lot 2 contains 42.00 Acres and at 9.22 chaines came to West bank of the River Shute and the SE corner of Lot 3 in Sec. 26, and at 17.22 chaines set a stone 6x8x10 in. sqr. for SW. cor. of Lot 3 on Old River line in Sec. 26, T 7 R 15 E. Lot 3 contains 30.80 Acres per Government survey. Survey of Accretions in Sec. 26 T 4 R 15 E in old River bed dividing the Accretions between Lots 1, 2 and 3 in Sec 26, T 7 R 15 E and Dividing between Nebraska and Missouri, and between the parties above named. Then commencing at a stone 6x8x10 inches square set for meander line and at SE cor. of Accretions to Lot 3 in Sec 26 And running thence S 78° 30′ West 42.00 chaines to the opposite Meander bank of Missouri River in Missouri as designated by B. F. Rummerfield County Surveyor of Atchison County Missouri. Then correcting back at 21.00 ch. set stake 3 inches sqr. for Division line and at the SW. cor. of Accretions to Lot 3 in Sec 26. The Stake Witnessed by a Cottonwood tree 9 inches in diameter beares N 49° 30′ W 24 lks distant and by a Cottonwood 11 inches in *in* diameter beares N 19° E. 32 lks. distant.

Then commencing at the stake for the West line of Lot 3 in Sec 26, for the old River bank Running thence S 84° W 24.49 chaines to the opposite bank of the old Missouri River in Missouri as designated by B. F. Rummerfield County Surveyor of Atchison Co. Mo. Then at 12.24½ chaines set stake for division line on the West line of Lot 3 Sec 26, T 7 R 15 E between Mo. & Neb.

Then commencing at stake 3 inches square set for NW. cor. of Lot 2 and SW cor. of Lot 1 in Sec 26, and running thence N 87° W. 27.70 chaines to opposite Meander line of the Missouri River, in Missouri Then at 13.85 chaines half way set a stone 6x6x12 inches square for SW. cor. Accretions to Lot 1 and NW. cor. of Accretions to Lot 2 in Sec 26, T. 7, R 15 E in Nebraska.

Then commencing at a stake 3 inches square set for the meander line of the old Missouri River on the West line of

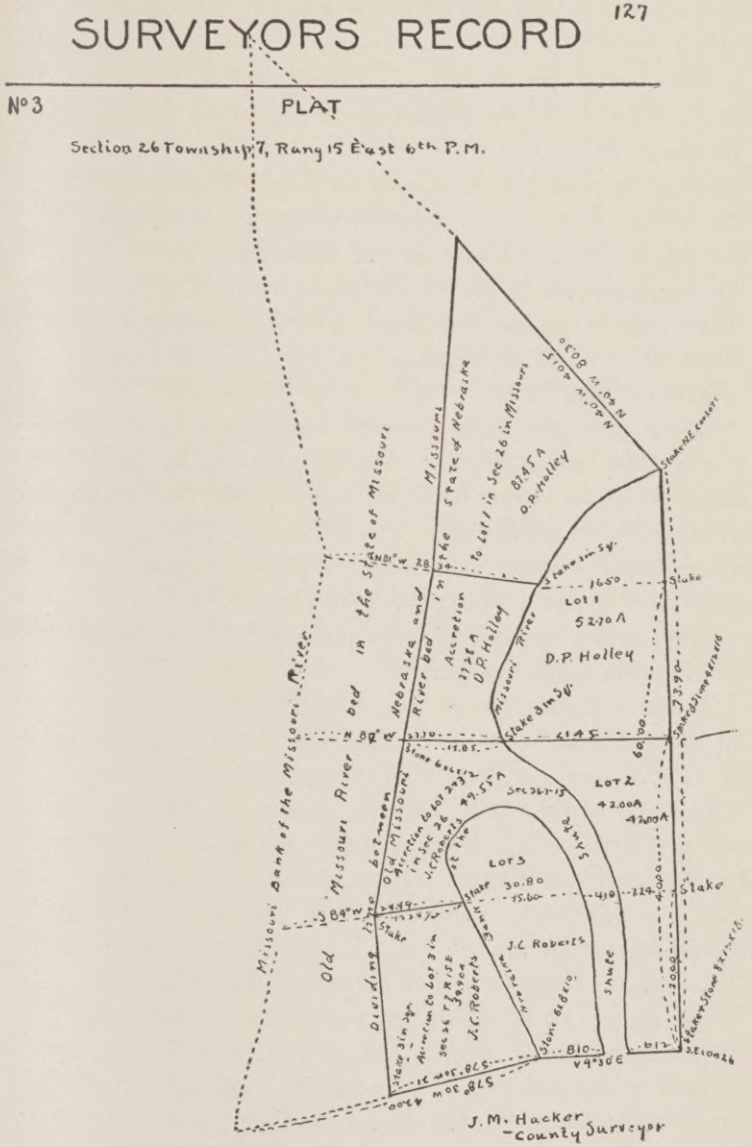
lot 1 in Sec 26. T 7. R 15 E. in Nebraska. Running thence N 81° W 28.34 chaines to the meander line on the Missouri side of the old Missouri River bead. Then setting a stake at 14.17 chaines for half way dividing line between Nebraska and Missouri.

Then commencing at a stake at the NE. corner of Lot 1 in Sec 26 T 7 R 15 E and at the intersection of the East line of Sec. 26 with the Missouri River in Nemaha County Nebraska. And running thence N 40° W 80.30 chaines to the meander line on the Atchison county Missouri side of the old Missouri River.

Then correcting and setting at 40.15 chaines the half way dividing point between Missouri and Nebraska a Limestone 3x12x18 inches square, for the NW. cor. of the Accretions in Missouri River belong g to Lot 1 in Sec 26 Nemaha Co. Neb. Witnessed by a cottonwood tree 5 inches in diameter beares East 6½ lks. distant. And by a White Willow tree 5 inches in diameter beares West 5° S 9½ links distant

This survey made in connection with B. F. Rummerfield County Surveyor of Atchison county Missouri

Magnetic V 9° 30′ east.


SURVEYORS RECORD 127
No 3 PLAT
Section 26 Township 7, Rang 15 East 6th P.M.
Missouri River Bed in the State of Nebraska and Missouri River Bed in the State of Missouri
Missouri Bank of the Missouri River
Old Missouri River Dividing Line between Nebraska and Missouri
Accretion to Lot 1 in Sec 26 in Missouri 87.45A D.P. Holley
Accretion 17.2A D.P. Holley
Lot 1 52.70A D.P. Holley
Lot 2 42.00A 42.00A
Lot 3
J.C. Roberts
Old Missouri Accretion to Lot 2 in Sec 26 J.C. Roberts 49.5A
Accretion to Lot 3 in Sec 26 T7N R15E 39.90A J.C. Roberts
Stake
Stone Mound
Stone Witness
J. M. Hacker
-County Surveyor

SURVEYOR'S RECORD.

FIELD NOTES.

No. of Survey ..... Date May 16th to 20th 1890
Survey for D. P. Holley and J. Henderson
At request of D. P. Holley and J. Henderson
Chainmen sworn Marton Lamb and W. Barrenger
Point established Accretions to Lots 3 & 4 Sec. 25, Twp. 7, Rng. 15 E, 6th P. M.

Commenced the survey of the Accreations to Lots 3 and 4 of Sec 25 Town 7 North of Range 15 East, by Commencing at the Meander corner, at intersection of the half section line, running North and South threw section Twenty-five Town seven Range Fifteen East, with the Missouri River and at the Northeast corner of Lot No. 3, marked by a Bur Oak stake 4x4x36 inches square and by a peace of an iron bar drove in by the side of the stake.

Running thence North 102.88 chaines to the meander line on the opposite bank of the Missouri River as designated by B. F. Rummerfield County Surveyor of Atchison County Mo.

Then correcting back making corner on dividing line between Nebraska and Missouri at 51.44 chains at a stone set by the Atchison County Missouri Surveyor and Chainmen. And at 12.70 chaines north of the meander corner at the Northeast corner of Lot No 3 in Sec 25 set a stone for the NE. cor. of Twenty-eight acres off of the South end of the Acretians to Lot No 3, of Sec 25. Then commencing at the NW. cor. of Lot 3, Sec. 25, running thence N 20° W 89.43 chaines to meander line on opposite bank of the Missouri River in Atchison County Mo. as designated by the County Surveyor of Atchison County Missouri B. F. Rummerfield. Then correcting back and setting a limestone 8x9x14 inches square at 44.71½ ch for the NW. cor. of Acreations to Lot No. 3

in Sec. 25. T 7. R 15 East in Nebraska and on the dividing line between Nebraska and Missouri Said stone is Witnessed by a Willow tree 9 inches in diameter bears N 63° 30′ W 54 lks distant And setting a stone 12.70 ch. North of NW. cor. Lot 3, S 25, for NW. cor. of 28.00 acres off of South end of Acreations in Missouri River to Lot No. 3, Sec 25, T 7 R 15 E.

Then commencing at the intersection of the West line of Section 25 Town 7 North of Range 15 E, with the Missouri River. in Nebraska, at the meander corner at the North West corner of Lot No 4 in Sec 25, running thence N 40° W 80.30 chaines to the meander line of the opposite bank of the Missouri River in Missouri as designated by the County Surveyor of Atchison County Missouri B. F. Rummerfield. Then correcting back and at 40.15 chaines, the half way point, set a Limestone 3x12x18 inches square. Witnesses by a Cottonwood tree 5 inches in diameter, Beares East 6½ links distent. And also by a White Willow tree 5 inches in diameter Beares W 5° South 9½ links distent. This stone marks the North West corner of the Acretion in the Missouri River to Lot Number Four 4 in Section 25 Town 7 North of Range 15 East, in Nebraska, Nemaha County.

SURVEYOR'S RECORD

126

N°4 PLAT.

Section 25, Township 7 Range 15 East 6th P M.

J. M. Hacker.
County Surveyor.

SURVEYOR'S RECORD.

FIELD NOTES.

No. of Survey ..... Date December 8th to 23d 1891
Survey for The Lombard Investment Co.
At request of J. H. Stewart 512 Exchange B'ld'g. Kansas City Mo.
Chainmen sworn Henry C. Taylor and Robert Taylor
Point established Accretions to Lots 1 & 2 Sec. 25, Twp. 7, Rng. 15 E 6th P. M.

Began the survey by commencing at the quartersection corner on the East line of section 25 Town 7 Range 15 East where we found the old government stake standing and for the purpose of preserving the corner we set a Limestone 4x9x16 inches square marked $\frac{1}{4}$, in the ground by the side of the old stake—Running from thence North to find the Meander corner at the NE. cor of Lot No 1 in Sec. 25 and at 20.00 chains found a stone heretofore set at the SE. cor. of Lot 1, and at 32.00 chaines set a random stake for the Meander corner on the Bank of the old Missouri River at the NE. cor. of Lot No 1

Then commencing at a stone set for the center of Sec 25, T 7 R 15 E, and at 20.00 cha. found a stake heretofore set and at 40.00 chaines found an iron bar heretofore set the NW. cor. of 40. acres off of the South end of Lot 2, in Sec. 25, and set a limestone 6x12x15 inches square in by the side of the Iron bar, and at 43.40 chaines found an oak post heretofore set for the meander Corner at the NE. cor. of Lot 3 in Sec 25-7-15 and by the side of the oak post we set a limestone 3x9x18 inches square for the NW. Meander cor. of Lot 2 in Sec. 25-7-15 E.—Witnessed by a Sycamore tree 12 inches in diameter beares S 75° 30′ W. 44 links distant And by a Sycamore tree ten inches in diameter. Bears S 35° E. 53 lks. distant. And also Witnessed by a Cottonwood tree 20 inches in diameter Beares N 31° 30′ W. 69 lks distant Then commencing at a stone

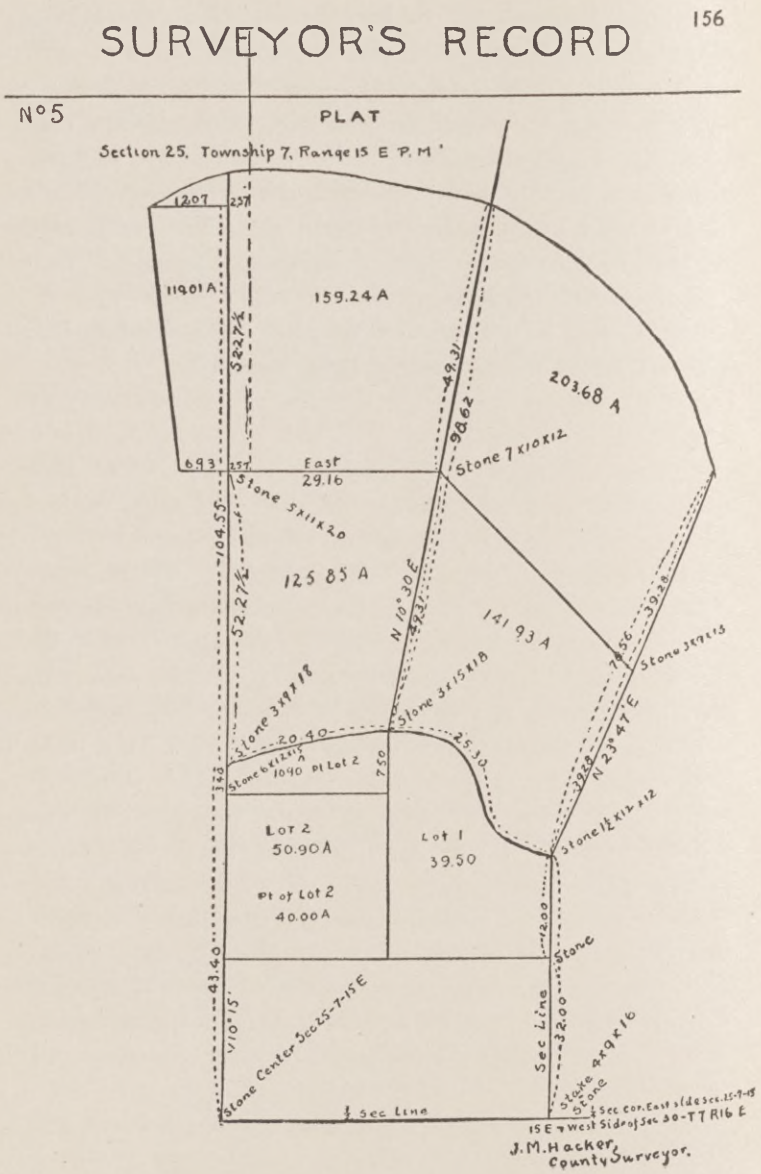
heretofore set for the NE. cor. of 40 acres off of the South end of Lot 2 in S 25, and run thence North 7.50 chains and set a random stake for the NE. Meander cor. to lots 1 & 2 in Sec 25. Then after testing the Meander random stake set at the NE. corners of Lots 1 & 2 of Sec. 25.-7-15 E. At the NE. Meander cor of Lot 1 we set a Blue Limestone 1½x12x12 inches square —Witnesses by a cottonwood tree 13 inches in diameter Beares N 63° W 16 lks distant, And by a Sycamore tree 9 inches in diameter, Beares N 61° 30′ E. 53 lks distent. And at the NE. Meander cor. of Lot 2 & NW. cor of Lot 1 we set a Blue Limestone 3x15x18 inches sqr. Witnessed by a cluster of Willows Beares S 57° 30′ W. 33 lks. distant. Then commencing at the NW. cor. of Lot 2 in Sec. 25.7-15 E and run thence North at 52.00 ch. set a random stake for half way point across the old Missouri river bead, at 104.55 chains came to the North bank of the old Missouri river bed 2.57 ch. West of a Meander stake at the intersection of a Sec. line with the river, set by Rummerfield, making a jog of 2.57 ch. between ½ Sec & Sec lines in the diferent states, Then correcting back and at 27½ lks. North of the random stake set at 52.00 chains. Setting a Limestone 5x11x20 inches square for the NW. cor. of the accretions in the old Missouri river bed to Lot 2 in Sec 25 T 7 R 15 E.

Then commencing at the NE. cor of Lot 2 & the NW. cor. of Lot 1 in Sec 25, running thence N 10° 30′ E at 50.00 chaines set a random stake for ½ way and at 98.62 chains came to a stone at Meander corner on the North bank of the Mo. River set by Rummerfield for North bank of river Then correcting back at 49.31 chains the half way point from NE. cor. of Lot 2 in Sec. 25-7-15 E. on the South bank of old Missouri river, to the meander corner on the opposite bank of the old Missouri river to a stone by Rummerfield for Meander corner on old Mo. river bank in the state of Mo. Setting a limestone 7x10x12 inches sqr at the NE. corner of accretion to Lot 2 in Sec 25.-7-15 in Nebraska. And NW. cor. of Lot 1 in Sec 25.

Then commencing at the NE. cor. of Lot 1 in Sec 25-7-15 E

Neb running thence N 23° 47′ E at 40.00 chaines set a random stake and at 78.56 chaines came to meander corner set by Rummerfield for north bank of old Missouri river. Then correcting back and correcting random stake set at 40.00 chaines by setting a limestone 3x9x13 inches square at 39.28 chaines the half way point. Being the NE. cor. of the accretion to Lot 1 in Sec 25 T 7 R 15 E. on the State line. The stone Witnessed by a cottonwood tree 6 inches in diameter. Beares N. 37° E 70 links distant

This survey made in connection with B. F. Rummerfield County Surveyor of Atchison county Missouri


SURVEYOR'S RECORD
156
No 5
PLAT
Section 25, Township 7, Range 15 E P. M.
1207
257
119.01 A
159.24 A
52.27½
49.31
98.62
203.68 A
693
257
East
29.16
Stone 7x10x12
Stone 5x11x20
104.55
125.85 A
52.27½
N 10° 30 E
49.31
141.93 A
39.28
Stone 3x9x18
Stone 3x15x18
20.40
25.30
N 23° 47' E
Stone 12x12x12
Stone 6x12x12
1040 Pt Lot 2
7.50
Lot 2
50.90 A
Lot 1
39.50
Pt of Lot 2
40.00 A
43.60
V 10° 15'
Stone Center Sec 25-7-15E
Sec Line
32.00
Stone
Stone 4x9x16
Stone
¼ Sec Line
¼ Sec cor. East side Sec. 25-7-15
15E West Side of Sec 30-7T R16 E
J. M. Hacker,
County Surveyor.

FIELD NOTES.

No. of Survey ..... Date December 8th to 23d 1891
Survey for The Lombard Investment Co.
At request of J. H. Stewart
Chainmen sworn Henry C. Taylor and Robert Taylor
Point established Accretion to Lot 1 Sec. 30, Twp. 7, Rng. 16 E, 6th P. M.

Commencing at quartersection corner on the West line of Sec. 30, Town 7 North of Range 16 East. (By the side of the stake set by the Government Surveyors I set a limestone 4x9x16 to preserve and perpetuate the qr. sec. corner on the West line of Sec 30 T 7 R 16 E.) And run thence East on the half section line at 20.00 chaines set a stake, at 40.00 chaines set a random stake and at 47.60 chaines set random stake for the meander corner on the bank of the Old Missouri river bed and the SE. cor. of Lot 1 in S 30 T 7 R 16 E. At the SE. cor. of Lot 1 in Sec. 30 T 7 R 16 E set a limestone 2x11x17 inches square for Meander cor. on the Old Missouri river bed- Then correcting back on half section line and at 20.00 chains set a limestone 4x8x16 inches square, Witnessed by a White elm tree 21 inches in diameter. Beares N 49½° E 17½ lks. distent. Then commencing at the Meander corner stone set at the NE. corner of Lot 1 in S 25 T 7 R 15 E. and also the NW. corner of Lot 1 in Sec 30 T 7 R 16 E. (see page 156 for sise of stone & Witness tree) running thence S 59° 30′ E 23.10 chaines for Meander corner set a limestone 2x12x14 inches square for meander corner on river bank. Witnessed by a cottonwood tree 14 inches in diameter Beares S 54° 30′ E-1.47 chaines distant. Then run S 55° E- 24.33 chaines for meander corner on bank of old Missouri river bed, and set a limestone 4x9x19 for meander corner.

Then commencing at the Meander corner at the NW. cor. of Lot 1 Sec. 30 T 7 R 16 E and run thence N 23° 47′ E for the meander corner on the opposite side of the old Missouri river

for the purpose of dividing the accretions and obtaining the amount belonging to Lot 1 Sec. 30 T 7 R 16 E. at 40.00 chaines set a random stake for half way, at 78.56 chaines came to the meander corner stone set by Rummerfield on Meander river line Then correcting back at halfway random stake corrected and at 39.29 chaines half way set a Limestone 3x9x13 inches square. Witnessed by a cottonwood tree 6 inches in diameter N 37° E 70 links distant. Then commencing at meander corner stone No 4 and run N 54° 30′ E at 12.00 chaines set a random stake at 27.49 chaines came to random corner set by Rummerfield at SE. cor Lot 1 Se 9 T 66 R 42 W in Missouri, Then correcting back at half way at 13.75 chaines set a stone 3x10x13 inches square Witnessed by a cottonwood tree 6 inches in diameter. Beares S 14° 30′ E 67 links distent.

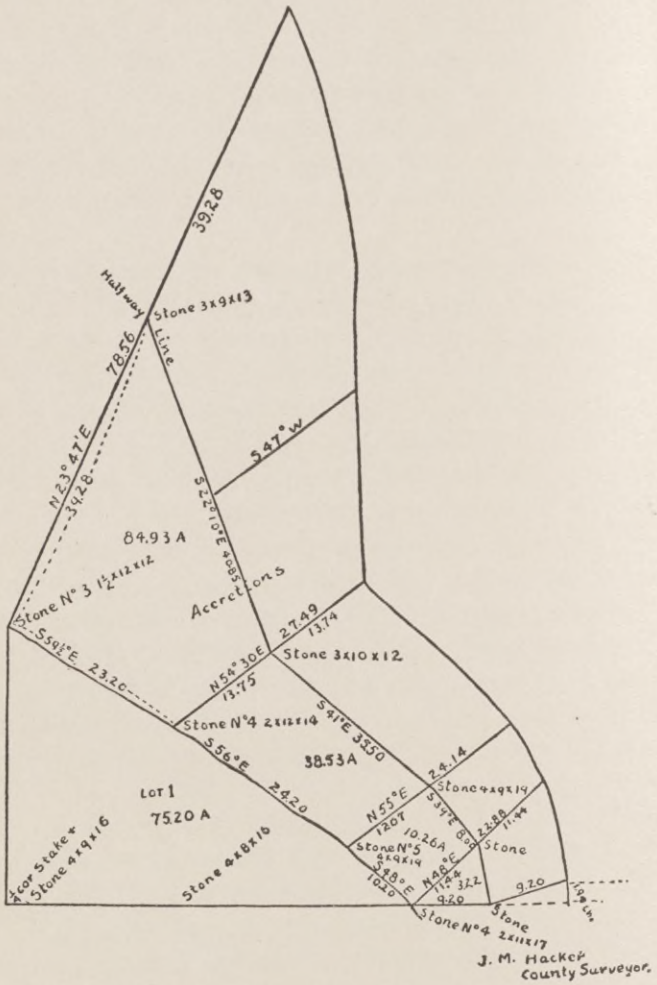
Then commencing at meander corner stone No. 5 and run N 55° E at 10.00 chaines set a random stake for half way at 24.14 chaines came to random corner set by Rummerfield. Then correcting back at 12.07 chaines set a stone for the NE. corner of a part of accretions to Lot 1 in Sec 30-7-16 E 12.07 chaines N 55° E from a limestone 4x9x19 inches square on meander bank of the old Missouri river on North line of lot 1 S 30-7-16 E Then commencing at a stone 2x11x17 inches square set at SE meander corner of Lot No 1 Sec 30-7-16 E and run N 48° E at 10.00 chaines set a random stake for half way across the old river bed and at 22.88 chaines found it to be the distance across the river. Then correcting back moved random stake set at 10.00 ch by setting a stone at 11.44 chaines for the NE. cor of accretions to Lot 1, Sec 30-7-16 E. Then from the 2x11x17 inches square set for the SE. cor. of Lot 1 S 30-7-16 E. run east at 9.20 chaines set a stone for half way across the old bed of the Missouri river, and at 14.28 chaines set a random stake on the East bank of the Nishneyboteny River which river is in the old Missouri river bed, 4.12 chaines West of the East bank of the old Missouri River bed. At which point the half section line running East & West threw

Sec 30 T 7 R 16 E in Nebraska Jogs South 1.94 chaines of an 80 rod line running E & W threw the Section opposite and in Missouri state and 80 rods North of the South line of said sec. in Mo.

SURVEYOR'S RECORD 157

No 6 PLAT.

Section 30 Township 7 Range 16 East of 6th P.M. Neb



The division of the accretions from the North East corner of lot 2 and the SE. corner of Lot 1 in Section 30 Town 7 North, of Range 16 East of the 6th P. M. in Nebraska. Was made in connection with B. F. Rummerfield, Surveyor of Atchison county Missouri in December 1891. Run East and at 9.20 chaines set a stone for the dividing line and was 1.94 chaines South of Rummerfield's line

Whole distence across 18.40 chaines. Half the distince across 9.20 chaines. V 9° 30′ E

FIELD NOTES.

No. of Survey ..... Date From February 25th to March 29th 1895

Survey for Nemaha County Nebraska

At request of the Board of County Commissioners

Chainmen sworn W. T. Hacker and H. D. Hacker

Point established Divis. Accretions in Old River Sec. 30, Twp. 7 N, Rng. 16 E, 6th P. M. Neb

Commencing at the meander corner on the Nebraska bank of the Old Mo. River bed at the intersection of the South line of S. 30, T 7, N. R 16 E. 6th P. M. in Nebr. with the Old Mo. River bed, it *it* being the S E. cor. of Lot 3 in S 30, and the N E. cor. of Lot 1 in S 31. And run East to meet D. A. Quick Surveyor of Atchison county Mo. Running from the Mo. side of the Old Mo. River bed on a division of Accretions therein and at 13.32½ ch. set a stake and came out 1.53 ch. apart he N and me S. and at half the difference between us 76½ lks. we set a Limestone 5x14x25 in. sqr. for the dividing line between Mo. and Neb. Whole distence across 26.65 chains. Half the distence across 13.32½ chaines. And Commencing at the meander corner on the Nebr. bank of the Old Mo. River bed, at the S E. cor. of Lot 2 and the N East cor. of Lot 3 in S 30 T 7 N R 16 E 6th P. M. in Nebr. And run East to meet D. A. Quick Surveyor of Atchison county Mo. running from the Mo. side of the Old Mo. River bed on a division of Accretions therein

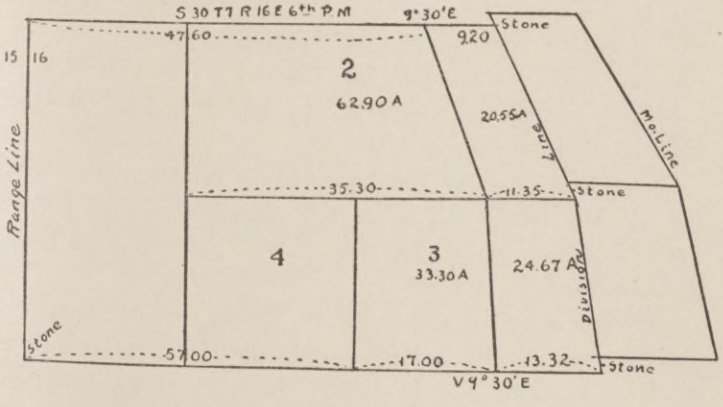
and at 11.35 chaines set a stake and came out 2.00 chaines apart he North and me South, and at half the difference between us, 1.00 chain, we set a Limestone 6x11x20 inches square for the dividing line between Mo. and Nebr. Marked M. and N.

Whole distence across 22.70 chaines. Half the distence across 11.35 chaines.

SURVEYOR'S RECORD 220

No 7 PLAT.

Section 30. Township 7N Range 16E 6th P.M. Nebr.



J. M. Hacker
County Surveyor.

FIELD NOTES.

No. of Survey ..... Date From February 25th to March 29th 1895

Survey for Nemaha County Nebraska

At request of the Board of County Commissioners of Nemaha County Nebr.

Chainman sworn W. T. Hacker and H. D Hacker

Point established division of Accretions Sec 31, Twp, 7 N, Rng. 16 E, 6th P. M.

Commencing at the meander corner on the Nebraska bank of the Old Missouri River bed at the intersection of the Township line between Townships 6 and 7 North of Range 16 East of the 6th P. M. in Nebr. with the Old Missouri River bed. Said meander corner being the S E. corner of Lot No 7 in Sec 31 Town 7 N of R 16 E of the 6th P. M in Nebraska.

And run thence East for the purpose of meeting D. A. Quick County Surveyor of Atchison county Missouri coming from the Missouri side of the Old Missouri River bed on a division of the Accretions formed in the Old Missouri River bed, and at 16.02 chaines set a stake for half way and came out 89 links apart he North and me South and at half the difference between us, 44½ links, we set a Limestone 6x15x35 inches square for the dividing line between Missouri and Nebr. marked M & N.

Whole distence across the Old River bed 32.04 chaines. Half the distence across 16.02 ch.

Commencing at the meander corner on the Nebr. bank of the Old Mo. River bed at the S E. meander cor. of Lot 6 and the N E corner of Lot No 7 in S 31, T 7 N of R 16 E of 6th P. M in Nebr.

And run East to meete D. A. Quick County Surveyor of Atchison county Mo. running from the Mo. side on a division of the Accretions and at 12.84½ ch. set a stake & came out 89 lks. apart, he N & me S and at ½ the diference 44½ lks we set a Limestone 6x15x36 inches Sqr for the dividing line between

Mo. and Nebr. Marked M & N. Whole distence across 25.69 ch. Half the distence across 12.84½ chaines. And commencing at the meander corner on the Nebr. bank of the Old Mo. River bed at the S E. cor. of Lot 1, and the N E cor. of Lot 6 in S 31 T 7 N of R 16 E. of 6th P. M in Nebr. and run East to meet D. A. Quick County Surveyor of Atchison Co. Mo. running from the Mo. side on a divission of the Accretions and at 14.87½ ch. set a stake & came out 1.00 ch. apart, he N and Me S at half the difference 50 lks. set a Limestone 6x15x30 inches Sqr. for the dividing line between Mo & Nebr. Marked M & N Whole dist. across 29.75 ch. Half the distence across 14.87½ ch. And Commencing at the East meander line of Lot 1 on the Nebr. bank of the Old Mo. river bed about 20.00 ch. N. of the SE. cor. of Lot 1 in S 31 T 7 N. R. 16 E of 6th P. M. in Nebr. and run East to meet D. A. Quick Co. Surveyor Atchison Co. Mo. running from the Mo. side on a division of the Accretions & at 13.09 ch. set a stake & came out 1.15 ch. apart he N & me S. at half the difference 57½ lks we set a Limestone 5x14x27 in. Sqr. for the dividing line between Mo. & Nebr. Marked M & N. Whole distence across 26.18 chaines.

Half the " " 13.09 chaines.

And Commencing at the meander corner on the Nebr. bank of the Old Mo. river bed at the intersection of the section line between S 30 & 31 in T 7, N. R 16 E of 6th P. M in Nebr. with the Old Mo River bed. It being the NE. cor. of Lot 1 in S 31 and the SE. cor. of Lot 3 in S 30, T 7, N. R 16 E and run East to meet D. A. Quick Surveyor of Atchison Co. Mo. Running from the Mo. side of the Old River bed on a division of the Accretions and at 13.32½ ch. set a stake and came out 1.53 chaines apart he N and me S at half the difference between us 76½ links set a Limestone 5x14x25 inc. sqr. for the dividing line between Mo. and Nebr. Marked M and N.

Whole distence across 26.65 chaines.

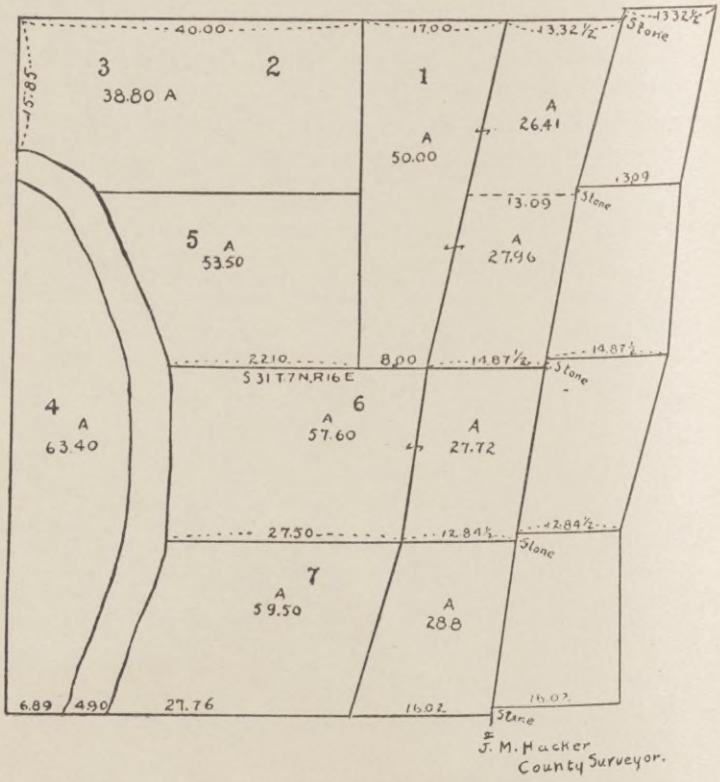
Half the distence across 13.32½ chaines.

V 9° 30′ E

SURVEYOR'S RECORD 219

N° 8 PLAT.

Section 31, Township 7 N. Range 16 E of 6th P.M. Nebr.



J. M. Hacker
County Surveyor.

FIELD NOTES.

No. of Survey ..... Date February 25th to March 29th 1895
Survey for Nemaha County Nebraska
At request of the Board of County Commissioners
Chainmen sworn W. T. Hacker and H. D. Hacker.
Point established Div. of Accretions to Sec. 6, Twp. 6 N, Rng. 16 E, 6th P. M.

Commencing at the meander corner of the Nebr. bank of the Old Mo. River bed at the intersection of the Township line between Towns. 6 and 7 N. of R. 16 E of the 6th P. M. in Nebr. with said river bed. Said corner being the N E. cor. of Lot 1 in S 6, T 6 N, R 16 E, and the S E. cor. of Lot 7 in S 31 T 7 N. R 16 E. of 6th P. M in Nebr. And run East to meete D. A. Quick Surveyor of Atchison county Mo. running from the Mo. bank of the Old Mo. River bed on a division of Accretions in the Old Mo. river bed and at 16.02 ch. set a stake for half way and came out 89 links. apart he N and me S. at half the difference between us 44½ lks we set a Limestone 6x15x35 in. Sqr. for the dividing line between Mo. and Nebr. Marked M and N. Whole distence across 32.04 ch. Half the distence across 16.02 chaines. And commencing at the meander corner on the Nebr. bank of the Old Mo. River bed at the S. W cor. of Lot 1 and the S E cor of Lot 2 in Sec. 6, T 6, N. R 16 E of the 6th P. M. in Nebr. And run East for the purpose of meeting D. A. Quick Surveyor of Atchison co. Mo. running from the Mo. side of the Old Mo. River bed on a division of Accretions in the Old river bed and at 21.71½ ch. set a stake and came out 3.48 ch. apart he N and me S. At half the difference between us 1.74 ch. we set a Limestone 6x15x40 in. Sqr. for the dividing line between Mo. and Nebr. Marked M. and N.

Whole distence across 43.43 chaines. Half the distince across 21.71½ chaines.

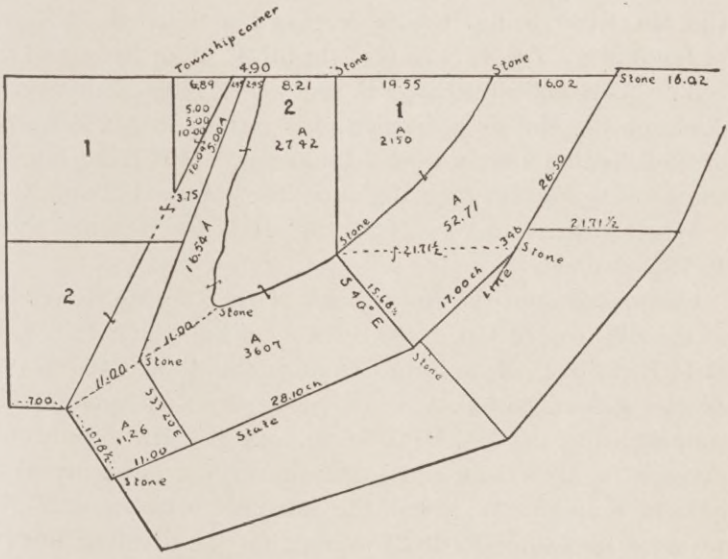
Commencing at the meander corner at the SW. cor. of Lot 1 and the SE. cor. of Lot 2 in S 6 T 6 N R 16 E of the 6th P. M. in Nebr. And run S 40° E to meet D. A. Quick Surveyor of Atchison Co. Mo. running from the Mo. side on a division of the Accretions, and at 15.68½ ch. set a stake and came out 1.98 ch. apart he E and me W. at half the difference between us 99 lks. we set a Limestone 6x13x39 in. Sqr. for the dividing line between Mo. and Nebr. Marked M & N. Whole distence across 31.37 ch. Half the distence across 15.68½ ch.

Commencing at a stone set N 54° E 11.00 ch. from the SE. cor. of Lot 2 Sec 1 T 6 R 15 E and at S 47° W 11.00 ch. from the SW. cor. of lot 2 in S 6 T 6. R 16 E 6th P. M. Nebr. and run S 33° 30′ E 11.70 ch. more or less to the dividing line between Mo. and Nebr.

SURVEYOR'S RECORD 221

N° 9 PLAT.

Section 6 Township 6 N. Range 16 E 6th P.M. Nebr.



J. M. Hacker.
County Surveyor.

FIELD NOTES.

No. of Survey ..... Date February 25th to March 29th 1895
Survey for Nemaha County Nebraska
At request of the Board of County Commissioners
Chainmen sworn W. T. Hacker and H. D. Hacker
Point established div. of Accretions to Sec. 1, Twp. 6 N, Rng. 15 E, 6th P. M.

Commencing at the meander corner on the Nebr. of the Old Mo. River bed at the SE. cor. of Lot 2 and the NE. cor. of Lot 3 in S 1 T 6 N. R 15 E of the 6th P. M. in Nebr. and run S 33° 30′ E and at 10.87½ ch. met D. A. Quick Surveyor of Atchison Co. Mo. on a division of Acretions with a difference of 26 lk between us, we set a Limestone 6x15x41 in. Sqr. for the dividing line between Mo. and Nebr., Marked M and N.

Whole distence across 21.57 ch. Half the distence across 10.78½ chaines.

Commencing on the Nebr. bank of the Old Mo. River bed at the SW. cor. of Lot 3, the SE. cor. of Lot 4 in S 1, T. 6, N. R 15 E of 6th P. M. in Nebr. And run South and at 7.27½ ch. & set a stake & met D. A. Quick Surveyor of Atchison Co. Mo. running from the Mo. bank of the old Mo. River bed, on a division of Accretions and came out with a difference of 55 links he E and me W. at half the difference between us 27½ lks. we set a Limestone 8x10x23 in. Sqr. for the dividing line between Mo. & Nebr. marked M & N. Whole distence across 14.55 ch. Half the distence 7.27½ ch.

Commencing on the Nebr. bank of the old Mo. River bed at the intersection of the section line between Sec 1 and 2 in T 6 N. R 15 E 6th P. M. in Nebr. with the Old Mo. River bed being the SW. cor. of Lot 5 in S 1 and the SE. cor. of Lot 8 in S 2 T 6 R 15 E in Neb. and run South and at 16.64 ch. set a stake and met D. A. Quick Surveyor of Atchison Co. Mo. running from the Mo. bank of the old Mo. River bed on a divi-

sion of Accretions and came out 30 links apart he E and me West and at half the difference 15 lks. we set a Limestone 6x6x30 in. sqr. for the dividing line between Mo. and Nebr. Marked M and N. Whole distence across 33.28 chaines Half the distence across 16.64 chaines.

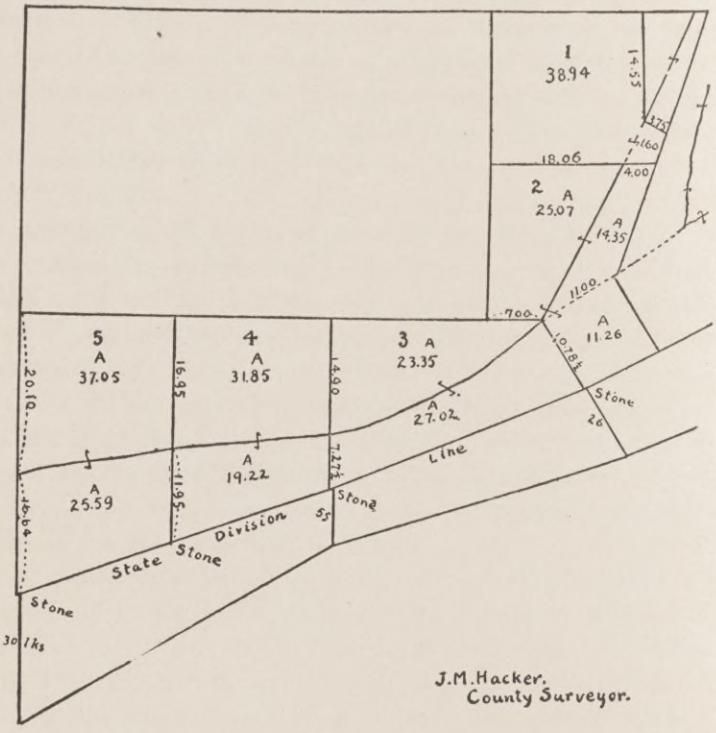
Commencing on the Nebr. bank of the Old Mo. River bed at the SW. cor. of Lot 4 the SE. cor. of Lot 5 in S 1 T 6 N. R 15 E 6th P. M. in Nebr. and run South 11.95 chaines more or less to the dividing line between Mo. and Nebr. and set a Limestone 10x12x16 inches sqr. Marked M and N.

SURVEYOR'S RECORD

222

No 10 PLAT.

Section 1. Township 6 N., Range 15 E. 6th P.M. Nebr.



J. M. Hacker.
County Surveyor.

FIELD NOTES.

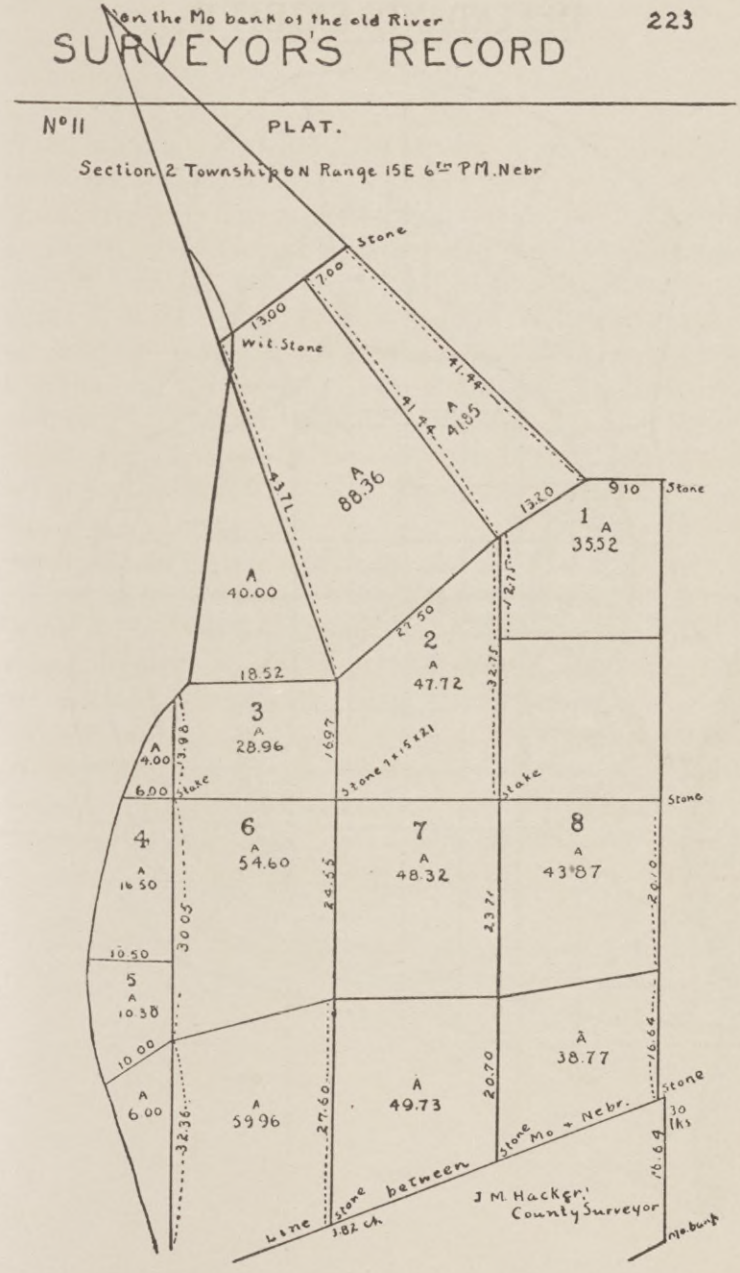
No. of Survey ..... Date February 25th to March 29th 1895
Survey for Nemaha county Nebraska
At request of the Board of County Commissioners
Chainmen sworn W. T. Hacker and H. D. Hacker

Point established Div. of Accretions to Sec. 2, Twp. 6 N, Rng. 15 E, 6th P. M.

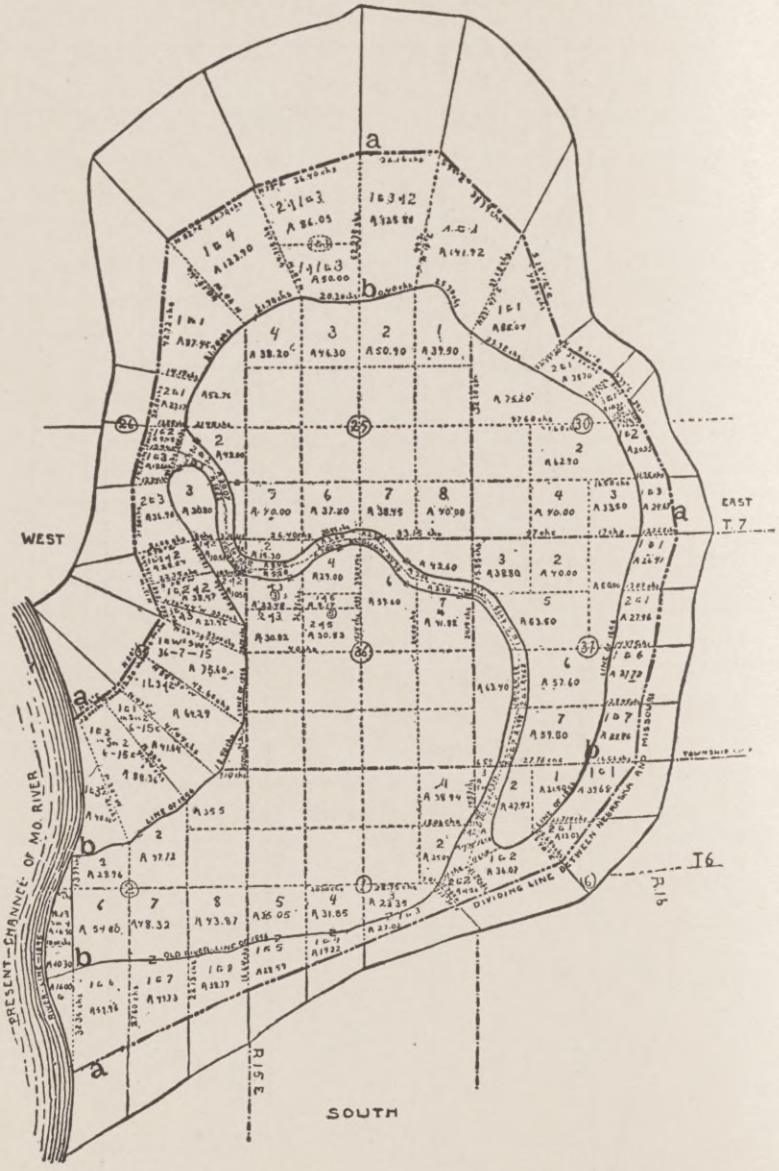
Commencing on the Nebr. bank of the Old Mo. river bed at the SW. cor of Lot 5 in S 1 and SE. cor. of Lot 8 in S 2 T 6 N. R 15 E and run South to meet Surveyor Quick running from the Mo. bank of said River bed on a division of Accretions, at 16.64 ch. set a stake and came out thirty lks W. of Quick's line at half the difference 15 lks. we set a Limestone 6x6x30 in. Sqr. for the dividing line between Mo & Nebr. Marked M & N. Whole distence across 33.28 chs

Commencing on the Nebr. bank of the Old Mo. river bed at the SW. cor. of Lot 7, and the SE. cor. of Lot 6 in S 2 T 6. R 15 E. and run South to meet Surveyor Quick running on division of Accretions at 27.60½ ch. set a stake and was 3.84 ch. West of Quick at half the diference 1.92 ch. we set a Limestone 7x8x20 in. Sqr. for the dividing line between Mo. & Nebr. Marked M & N. Whole distence across 55.21 ch. Commencing on the Nebr. bank of the Old Mo. river bed at the SW. cor. of Lot 6 and the SE. cor. of Lot 5 in S 2 T 6 R 15 E and run South to meet Surveyor Quick running North on a division of Accretions at 32.36 ch. set a stake and was 80 links West of Quick's line at half the diffirence 40 lks we set a Limestone 7x14x23 in. Sqr for the dividing line between Mo. & Nebr. Marked M & N. Whole distence across 64.72 chs. Commencing on the Nebr. bank of the Old Mo. River bed at a corner 9.10 chs. West of the NE. cor. of S 2, T 6 N. R 15 E and run N 47° W at 40.00 ch set a random stake and at 82.88 chs. came to a cor. on the Mo. bank of the Old Mo. river bed, Run with Surveyor Quick,– Correcting back we corrected the

stake set at 40.00 chs., to 41.44 ch. and set a Limestone 7x12x25 in. Sqr. for the dividing line between Mo. & Nebr. Marked M. & N. Whole distence across 82.88 chs. Commencing on the Nebr. bank of the Old Mo. river bed at the NW. cor. of Lot 2 and NE. cor. of Lot 3 in S 2 T 6 R 15 E and run N 20° W at 40.00 chs. set a stake and at 86.42 chs. came to a Cor. on the Mo. bank of the Old Mo. river bed. Run with surveyor Quick. Correcting back we corrected the stake set at 40.00 chs. to 43.21 chs. and set a Limestone 6x15x25 in. Sqr. as a Witness Corner N 50° E 3.00 ch. the true corner being in a hole of watter on the sand bar. Marked M & N and on the dividing line between Mo. & Nebr. The distence from the SE. cor. of Lot 4 S 2 T 6 R 15 E, North to the Mo. river is 13.99 ch. And from the SE. cor. of said Lot 4. West is 6.00 chs. to the Mo. River. And the distence from the NE. cor. of Lot 5 in said S 2 to the Mo. River is 10.50 chs. And South from the NE. cor. of said Lot 5 is 10.05 ch. to the old Mo. River bed. Then Commencing on the Nebr. bank of the Old Mo. river bed at the SE cor. of Lot 7, the SW. cor. of Lot 8 in S 2, T 6 R 15 E and run S. 20.70 chs. to the dividing line between Mo & Nebr. and set a Limestone 7x13x27 in. Sqr. Marked M. & N. Dividing Accretions between Lots 7 & 8 S 2. Commencing at the NW cor. of Lot 1, the NE cor. of Lot 2, in said S 2, and run N 30° W 41.44 chs. and set a stake at the dividing line between Mo and Nebr. Run to find the amount of Accretions to Lots 1 and 2 in S 2 T 6 N R 15 E of 6th P. M. in Nebraska.


on the Mo bank of the old River
223
SURVEYOR'S RECORD
N°11
PLAT.
Section 2 Township 6N Range 15E 6th PM. Nebr
Stone
700
1300
Wit. Stone
41.44
41.44
A 41.85
A 88.36
437
910
Stone
1320
1 A 35.52
A 40.00
27.50
2 A 47.72
18.52
3 A 28.96
1697
Stone 1.15 E 21
Stake
Stake
Stone
A 4.00
6.00
4 A 16.50
6 A 54.60
7 A 48.32
8 A 43.87
10.50
5 A 10.38
10.00
A 6.00
A 59.96
A 49.73
A 38.77
Stone
30 lks
Stone Mo + Nebr.
J M Hacker
County Surveyor
Line
Stone between
182 ch
Mo bank

DEFENDANTS EXIBIT B.



PLAINTIFFS EXHIBIT B.

State of Missouri } ss
County of Atchison }

I D. A. Quick County Surveyor of and for the County and State aforesaid do hereby certify that in pursuance of an order of the County Court of said County of Atchison, made on the 4th day of March 1895 and in pursuance of an act of the general Assembly of the State of Missouri, entitled an Act to grant certain Lake and river land to the Counties in which they are located, for relief purposes, approved April 5th 1893. I did on November 26th and Jan 1st 1895 survey certain Lands, claimed to be of said character, located on Township (66 & 67) Sixty six and Sixty seven of Range (42 & 43) Forty two and Forty three West of the 5th Principal Meridian in Atchison Co. Mo. and that this is a true and correct Plat thereof, this survey being an extension of G overnment lines and fractional thereof.

D. A. Quick County Surveyor of Atchison Co Mo.

Fractional Townships 66 and 67 North of Ranges 42 and 43 West of the 5th Principal Meridian covering land of Old Missouri River Bed
Thin line shows Meander of Mo. River when the Government Survey was made

And it is further ordered, adjudged and decreed by the court that the Commissioners heretofore appointed, namely, Alfred Hazlett, Esq., and John W. Halliburton, Esq., be, and they are hereby, directed to establish, or cause to be established, under their direction, permanent monuments marking said boundary line between the State of Missouri and the State of Nebraska, as shown by said aforesaid surveys, and that said Commissioners establish such permanent monuments upon said boundary line as may in their opinion be necessary for permanently marking and establishing the same, and that they make a report to this court of their acts and doings therein, and that said report contain a full and complete description of said boundary line and the monuments thereon established. And that in the execution of this decree said Commissioners are hereby authorized to employ such surveyors and other assistants, and procure such material as may be necessary in the establishment of said permanent monuments marking said boundary line, in accordance with the decree of this court.

And it is further ordered that said Commissioners be paid for their services herein such compensation as may be agreed upon by the respective parties to this suit and said Commissioners, and if the parties to this suit and said Commissioners are unable to agree upon said compensation, such compensation shall be awarded to said Commissioners as in the opinion of this court, upon the filing of the final report of said Commissioners, may seem proper.

It is further ordered that said Commissioners make said final report of their acts and doings in the premises to this court on or before the 15th day of May, 1905.

March 6, 1905.

OPINIONS PER CURIAM, ETC., FROM FEBRUARY 21 TO APRIL 10, 1905.

No. 312. EDWARD D. JOHNSON ET AL., APPELLANTS, *v.* ELIZABETH THOMAS. Appeal from the Court of Appeals of the District of Columbia. Motion to dismiss submitted February 20, 1905. Decided February 27, 1905. *Per Curiam.* Dismissed for the want of jurisdiction. *McLish* v. *Roff*, 141 U. S. 661; *Lubin* v. *Edison*, 195 U. S. 625; *Lodge* v. *Twell*, 135 U. S. 235; *Haseltine* v. *Central Bank*, 183 U. S. 130. Case below, 23 App. D. C. 141. *Mr. D. W. Baker* and *Mr. Wm. Robert Andrews* in support of motion. *Mr. S. Herbert Giesy* in opposition thereto.

No. —, Original. *Ex parte:* IN THE MATTER OF PETER MILLER AND THOMAS SHEPPERSON, PETITIONERS. March 20, 1905. Motion for leave to file petition for writs of *habeas corpus* denied. *Mr. Thomas M. Patterson, Mr. Charles S. Thomas* and *Mr. Milton Smith* for petitioners.

No. 201. W. J. WARDER, PLAINTIFF IN ERROR, *v.* MRS. LAURA LOOMIS ET AL. In error to the United States Circuit Court of Appeals for the Fifth Circuit. Argued April 7, 1905. Decided April 10, 1905. *Per Curiam.* Dismissed for the want of jurisdiction. *Spencer* v. *Duplan Silk Company*, 191 U. S. 526; *Arbuckle* v. *Blackburn*, 191 U. S. 405; *Continental National Bank* v. *Buford*, 191 U. S. 119; *Blackburn* v. *Portland Gold Mining Company*, 175 U. S. 571; *Washer* v. *Bullitt County*, 110 U. S. 558. *Mr. Thomas H. Clark, Mr. A. Seymour Thurmond* and *Mr. Jay Good* for plaintiff in error. *Mr. Millard Patterson* and *Mr. T. J. Beall* for defendants in error.

Decisions on Petitions for Writs of Certiorari from February 21 to April 10, 1905.

No. 458. THE LUDINGTON NOVELTY COMPANY, PETITIONER, *v.* CHARLES H. LEONARD ET AL. February 27, 1905. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Fred L. Chappell* and *Mr. George A. Prevost* for petitioner. *Mr. Edward Taggart* and *Mr. Arthur C. Denison* for respondent.

No. 495. THE MERCHANTS AND MINERS TRANSPORTATION COMPANY, ETC., ET AL., PETITIONERS, *v.* THE STEAMSHIP THORNHILL, ETC. February 27, 1905. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Robert H. Smith* and *Mr. Daniel H. Hayne* for petitioners. *Mr. J. Parker Kirlin* for respondent.

No. 525. JAMES TALCOTT ET AL., PETITIONERS, *v.* HENRY FRIEND ET AL. February 27, 1905. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Horace Kent Tenney* for petitioners. *Mr. Jacob Newman, Mr. Benj. V. Becker* and *Mr. Solomon Levinson* for respondents.

No. 527. MARCELLUS E. THORNTON ET AL., PETITIONERS, *v.* THE BOARD OF MAYOR AND ALDERMEN OF THE CITY OF NATCHEZ ET AL. February 27, 1905. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Wade R. Young* for petitioners. *Mr. Eaton J. Bowers* and *Mr. Marcellus Green* for respondents.

No. 521. THE REMBERT ROLLER COMPRESS COMPANY, PETITIONER, *v.* THE AMERICAN COTTON COMPANY ET AL. March 6,

1905. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Walter Gresham* for petitioner. No one opposing.

No. 543. GEORGE E. ZARTMAN, AS TRUSTEE, PETITIONER, *v.* THE FIRST NATIONAL BANK OF WATERLOO, N. Y. March 6, 1905. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. George E. Zartman* for petitioner. *Mr. W. H. Sholes* for respondent.

No. 533. THE UNITED STATES LIFE INSURANCE COMPANY, ETC., PETITIONER, *v.* AGNES MCMAHON ET AL. March 13, 1905. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. George Clark* for petitioner. *Mr. A. L. Beaty* and *Mr. C. H. Smith* for respondents.

No. 540. JOHN T. MCGRAW ET AL., PETITIONERS, *v.* SAMUEL B. WOODS ET AL. March 20, 1905. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Holmes Conrad, Mr. John H. Holt* and *Mr. Melville D. Post* for petitioners. *Mr. L. L. Lewis* for respondents.

No. 551. TENNESSEE OIL, GAS AND MINERAL COMPANY, PETITIONER, *v.* F. D. BROWN ET AL. April 3, 1905. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Harvey D. Goulder* and *Mr. H. H. Ingersoll* for petitioner. *Mr. Edward T. Sanford* and *Mr. C. E. Lucky* for respondents.

No. 557. Central Commercial Company, Petitioner, *v.* Chicago Title and Trust Company, Trustee, et al. April 3, 1905. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Lewis W. Parker* for petitioner. No one opposing.

No. 558. The Boston Water and Light Company, Petitioner, *v.* The Farmers' Loan and Trust Company, Trustee, et al. April 3, 1905. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. S. S. Gregory* and *Mr. C. H. Poppenhusen* for petitioner. *Mr. John S. Runnells* and *Mr. William Burry* for respondents.

No. 559. The New England Water Works Company et al., Petitioners, *v.* The Farmers' Loan and Trust Company, Trustee, et al. April 3, 1905. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. James Hamilton Lewis* for petitioners. *Mr. John S. Runnells* and *Mr. William Burry* for respondents.

No. 567. Ionia Transportation Company, Petitioner, *v.* J. I. Case Threshing Machine Company, Claimant, etc. April 3, 1905. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. John C. Richberg* for petitioner. *Mr. George D. Van Dyke* for respondent.

No. 583. First National Bank of Baltimore, Petitioner, *v.* William H. Staake, Trustee, etc., et al.; and No. 584. Henry K. McHarg et al., Receivers, etc., et al., Petitioners, *v.* William H. Staake, Trustee, etc. April 3,

1905. Petitions for writs of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit granted. *Mr. S. Hamilton Graves* for petitioners. *Mr. H. Gordon McCouch* for respondents.

No. 547. The Kansas City Southern Railway Company, Petitioner, *v.* Clark Prunty. April 10, 1905. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Samuel W. Moore* for petitioner. No one opposing.

No. 577. Albert C. Gunnison et al., Petitioners, *v.* Chicago, Milwaukee and St. Paul Railway Company. April 10, 1905. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Wm. F. Vilas, Mr. John C. Spooner* and *Mr. J. R. Sanborn* for petitioners. *Mr. George R. Peck, Mr. Burton Hanson* and *Mr. C. H. Van Alstine* for respondent.

No. 580. Memphis Consolidated Gas and Electric Company, Petitioner, *v.* Jane Letson. April 10, 1905. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Thomas B. Turley* for petitioner. No one opposing.

No. 585. Charles E. Moore et al., Petitioners, *v.* Robert B. Petty et al., Executors, etc. April 10, 1905. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Elbert H. Hubbard* for petitioners. No one opposing.

No. 589. Stratton's Independence, Limited, Petitioner, *v.* Tyson S. Dines et al., Executors, etc., et al. April 10, 1905. Petition for a writ of certiorari to the United States

Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Louis Marshall* and *Mr. Samuel Untermyer* for petitioner. *Mr. L. M. Goddard* for respondents.

No. 593. THE WESTERN ELECTRIC COMPANY, PETITIONER, *v.* JOHN F. HANSELMANN, JR. April 10, 1905. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. John Notman* for petitioner. *Mr. John F. Hanselmann, Jr., pro se.*

No. 594. GREAT NORTHERN RAILWAY COMPANY, PETITIONER, *v.* WILLIAM C. FOWLER. April 10, 1905. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. James B. Howe* and *Mr. L. C. Gilman* for petitioner. No one opposing.

No. 595. THE UNITED ENGINEERING AND CONTRACTING COMPANY, PETITIONER, *v.* FRANCIS BROADNAX. April 10, 1905. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. L. Laflin Kellogg, Mr. Alfred C. Pette* and *Mr. Franklin Nevius* for petitioner. *Mr. Andrew Wilson* and *Mr. Noel W. Barksdale* for respondent.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT FROM FEBRUARY 21 TO APRIL 10, 1905.

No. 437. HENRY F. MCCLURE ET AL., PLAINTIFFS IN ERROR, *v.* UNITED STATES MORTGAGE AND TRUST COMPANY. In error to the Supreme Court of the State of Oregon. March 3, 1905.

Dismissed with costs on motion of *Mr. John H. Mitchell* for the plaintiffs in error. *Mr. John H. Mitchell* for plaintiffs in error. *Mr. John H. Hall* for defendant in error.

No. 270. RUSSELL SAGE, AS ASSIGNEE, ETC., PLAINTIFF IN ERROR, *v.* THEODORE A. MAXWELL ET AL; and No. 271. RUSSELL SAGE, AS ASSIGNEE, ETC., PLAINTIFF IN ERROR, *v.* HENRY MUNSTERMAN ET AL. In error to the Supreme Court of the State of Minnesota. March 20, 1905. Dismissed, per stipulation, on motion of *Mr. A. B. Browne* for the plaintiff in error. *Mr. A. B. Browne, Mr. Alexander Britton* and *Mr. Owen Morris* for plaintiff in error.

No. 265. THE DISTRICT OF COLUMBIA, APPELLANT, *v.* COLUMBUS J. ESLIN, ADMINISTRATOR, ET AL.; No. 266. COLUMBUS J. ESLIN, ADMINISTRATOR, ETC., APPELLANT, *v.* THE DISTRICT OF COLUMBIA; No. 293. SAMUEL J. RITCHIE, APPELLANT, *v.* THE DISTRICT OF COLUMBIA; and No. 296. WILLIAM A. GORDON ET AL., EXECUTORS, ETC., APPELLANTS, *v.* THE DISTRICT OF COLUMBIA. Appeals from the Court of Claims. April 3, 1905. Dismissed, per stipulation, on motion of *Mr. Solicitor-General Hoyt. The Attorney General* for appellant in No. 265 and appellees in Nos. 266, 293 and 296; *Mr. Wm. B. King* for appellant in No. 266; *Mr. John J. Hemphill* for appellant in No. 293, and *Mr. J. W. Douglass* for appellant in No. 296.

No. 207. ENOCH HUNSAKER, PLAINTIFF IN ERROR, *v.* TOLTEC RANCH COMPANY. In error to the Circuit Court of the United States for the District of Utah. April 5, 1905. Dismissed with costs, pursuant to the tenth rule. *Mr. B. Howell Jones* for plaintiff in error.

No. 348. The American Surety Company, Appellant, *v.* Willis G. Bowland et al.; No. 349. The Fidelity and Casualty Company, Appellant, *v.* Willis G. Bowland et al.; and No. 350. The American Bonding and Trust Company, Appellant, *v.* Willis G. Bowland et al. Appeals from the Circuit Court of the United States for the Southern District of Ohio. April 10, 1905. Dismissed, per stipulation. *Mr. Hartwell Cabell* for appellants. *Mr. Augustus T. Seymour* for appellees.

No. 402. Louis Auguste Marande et al., Plaintiffs in Error, *v.* The Texas and Pacific Railway Company. In error to the United States Circuit Court of Appeals for the Second Circuit. April 10, 1905. Dismissed, per stipulation. *Mr. Treadwell Cleveland* for plaintiffs in error. *Mr. Rush Taggart* for defendant in error.

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ACTION.

1. *Ancillary action.*

All the parties to an action in the United States Circuit Court, to determine title to land, united in an agreement that judgment be entered in favor of two of the parties who were to convey the property to a purchaser and to deposit the purchase price in a bank to the credit of arbitrators, who were to determine the exact rights of all the parties and distribute the fund accordingly; judgment was entered and never appealed from or otherwise attacked. *Held*: that the parties in whose favor judgment is entered are not trustees of the court, nor is the purchase price received by them a fund of, or under the control of the court; and a suit brought against them to compel them to account for the purchase money is not ancillary, to the original action and the final judgment rendered therein, and jurisdiction of the Circuit Court cannot be maintained on that ground alone. *Stillman* v. *Combe*, 436.

2. *Nature, where statutory liability is contractual.*

Although a statutory liability may be contractual, or *quasi*-contractual in its nature, an action given by statute is not necessarily to be regarded as brought on simple contract, or breach of simple contract. *McClaine* v. *Rankin*, 154.

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ALASKA, section 171 of Alaska Code, 31 Stat. 358 (see Constitutional Law, 10): *Rassmussen* v. *United States*, 516.

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ARMY.

Pay of officers for services in Porto Rico, etc., under acts of 1900 *and* 1901.

The ten per cent increase over and above pay proper allowed to an officer of the United States Army for service in Porto Rico, Cuba, Philippine Islands, Hawaii and Alaska, under the act of May 26, 1900, 31 Stat. 211, and beyond the limits of the States comprising the Union and Territories contiguous thereto under the act of March 2, 1901, 31 Stat. 903, is to be computed upon the total amount to which the officer is entitled at the time of such service both for longevity pay and the pay provided for by § 1261, Rev. Stat. *United States* v. *Mills*, 223.

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BANKRUPTCY.

1. *Preference: surrender within meaning of act of* 1898 *may be either compelled or voluntary.*

The word "surrender," as generally defined, may denote either compelled or voluntary action. In § 57*g* of the Bankruptcy Act of 1898, providing that the claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences, it is unqualified and generic and hence embraces both meanings. A penalty is not to be readily implied and a person subjected thereto

unless the words of the statute plainly impose it, and courts will not construe the provision so as to cause the word "surrender," as used in § 57*g* of the Bankruptcy Act, to embrace only voluntary action and thus read into the statute a qualification conflicting with equality of creditors and also creating a penalty not expressly or by implication found in the statute. Such a construction would create a penalty by judicial action alone and would also necessitate judicial legislation in order to define the character and degree of compulsion essential to prevent the surrender in fact from being a surrender within the meaning of the section. *Keppel* v. *Tiffin Savings Bank*, 356.

2. *Proof of claim; effect upon, of retention of preference until compelled surrender.*

The creditor of a bankrupt, who has received a merely voidable preference, and who has in good faith retained such preference until deprived thereof by the judgment of a court upon a suit of the trustee, can thereafter prove the debt so voidably preferred. *Ib.*

BENEFITS.

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Where the bill of exceptions, after referring to the empanelling of the jury, contains recitals that the plaintiff produced witnesses, followed in each case by the testimony of the witness at the close of all of which there were further recitals that the parties rested, these statements are sufficient, even in the absence of a technical affirmative recital to that effect, to show that the bill of exceptions contains all the testimony, and defendant is not to be deprived of a full consideration of the question of his guilt by such omission; and even in the absence of a motion to instruct the jury to find for the defendant this court may examine the question where it is plain that error has been committed. *Clyatt* v. *United States*, 207.

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Northern Pacific Railway Co. v. *Townsend*, 190 U. S. 267, affirmed by *Northern Pacific Railway Co.* v. *Ely*, 1.

CASES EXPLAINED.

Northern Securities case, 193 U. S. 197. The decree of the Circuit Court in the *Northern Securities case*, affirmed by this court, 193 U. S. 197, did not determine the quality of the transfer as between the defendants, and the provisions therein as to return of shares of stock transferred to it by the railway stockholders were permissive only, and not

an adjudication that any of the vendors were entitled to a restitution of their original railway shares. The judgment of this court affirming the decree of the Circuit Court in the *Northern Securities case* went no further than the decree itself, and while it leaves the Circuit Court at liberty to proceed in the execution of its decree as circumstances may require, it does not operate to change the decree or import a power to do so not otherwise possessed. Nothing in the judgment or opinion of this court in the *Northern Securities case*, 193 U. S. 197, enlarged the scope of the decree of the Circuit Court so as to make it an adjudication that any of the vendors of railway stocks were entitled to judicial restitution of the stocks transferred by them to the Securities Company, or that the Securities Company could not distribute the shares of railway stock held by it *pro rata* between its own shareholders. *Harriman* v. *Northern Securities Co.*, 244.

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To Circuit Court of Appeals where that court practically disposes of entire case. Where the decree of the Circuit Court of Appeals in an action in equity, only reverses an order of the Circuit Court granting an injunction, but the court, the record presenting the whole case, practically disposes of the entire controversy on the merits, certiorari may issue from this court and this court may finally dispose of it by its direction to the Circuit Court. *Harriman* v. *Northern Securities Co.*, 244.

See JURISDICTION, A 3.

CITIZENSHIP.

See INDIANS, 2;
JURISDICTION, B 1.

CLAIMS AGAINST THE UNITED STATES.

District of Columbia Act of 1880 *construed—Jurisdiction of Court of Claims.* The intent of the District of Columbia Act of June 16, 1880, 21 Stat. 284, was to enable parties to submit the justice of their claims against the United States for work done in the District prior to March 14, 1876, to adjudication in a competent court, and for that purpose the jurisdic-

tion conferred was equitable as well as legal; under the equitable jurisdiction so conferred the Court of Claims has power to reform a written contract between the District of Columbia and a claimant to supply therein what was omitted by mutual mistake of the parties, and to award money relief to the claimant on the contract as so reformed. It was also the intention of the act of June 16, 1880, to permit the Court of Claims to adjudicate claims for all work done by order and direction of the Commissioners and accepted by them for the use and benefit of the District of Columbia; for this purpose the statute is remedial, and a claimant, if the facts support his claim, can recover for work so done and accepted notwithstanding it was under verbal directions of the Commissioners and not under written contract as required by prior acts of Congress. The main purpose of the Court of Claims is to arrive at and adjudicate the justice of alleged claims against the United States, and the court is not bound by special rules of pleading. *District of Columbia* v. *Barnes*, 146.

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See NAVY, 4;
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COMBINATIONS IN RESTRAINT OF TRADE.

1. *Compliance with decree in Northern Securities case.*

The Northern Pacific system taken in connection with the Burlington system is competitive with the Union Pacific system, and the entire record considered, to deliver to the complainants, the Northern Pacific stock claimed by them and distribute the balance of the stock ratably between the other Securities Company stockholders, would not only be inequitable but would tend to smother competition and thus contravene the object of the Sherman law and the purposes of the suit brought by the Government against the Northern Securities Company. It was the duty of the Securities Company under the decree in the Government suit to end a situation which had been adjudged unlawful, and as this could be effected by sale and distribution in cash, or by distribution in kind, the company was justified in adopting the latter method and avoiding the forced sale of several hundred million dollars of stock which would have involved disastrous results. *Harriman* v. *Northern Securities Co.*, 244.

2. *Monopoly defined.*

The idea of monopoly is not now confined to a grant of privileges but is understood to include a condition produced by the acts of individuals and the suppression of competition by unification of interest or management or through agreement and concert of action. It is the power to control prices which makes both the inducement to make such combinations and the concern of the law to prohibit them. *National Cotton Oil Co.* v. *Texas*, 115.

See CONSTITUTIONAL LAW, 3;
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CONSTITUTIONAL LAW.

1. *Contracts—Repudiation by municipality of contract debt held not an impairment of obligation.*

The wrongful repudiation of, and refusal to pay, a contract debt by a city may amount merely to a naked breach of contract, and in the absence of any legislative authority affecting the contract or on which the refusal to pay is based, the mere fact that the city is a municipal corporation does not give to its refusal the character of a law impairing the obligation of contracts or depriving a citizen of property without due process of law, and give rise to a suit under the Constitution of the United States within the jurisdiction of the Circuit Court. *Dawson* v. *Columbia Trust Co.*, 178.

See post, 3;
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2. *Due process of law—Validity of arrest by state officer under Federal treaty.*

There is no constitutional or statutory provision of California prohibiting the arrest of a seaman on the request of a French consul under the treaty with France of 1853, and such arrest, being for temporary detention of a sailor whose contract is an exceptional one, does not deprive him of his liberty without due process of law, and if the chief of police voluntarily performs the request of the consul the arrest is not illegal on that ground. *Dallemagne* v. *Moisan*, 169.

3. *Due process of law—Validity of Texas anti-trust acts.*

The Anti-Trust Acts of Texas of 1889, 1895 and 1899, are all directed to the prohibitions of combinations to restrict trade, to in any way limit competition in the production or sale of articles, or to increase or reduce

prices in order to preclude free and unrestricted competition; and, as the legislature of a State may ordain that competition and not combination shall be the law of trade, and may prohibit combinations to control prices, the statutes as they now stand are not in conflict with the Fourteenth Amendment and do not, as against corporations dealing in cotton oil and combining to regulate the price of cotton seed, work a deprivation of property without due process of law, or impair their liberty of contract. *National Cotton Oil Co.* v. *Texas*, 115.

See ante, 1;
POLICE POWER, 1.

4. *Equal protection of laws—Validity of assessment for grading street; benefits, how estimated.*

In determining whether an improvement does, or does not, benefit property within the assessment district, the land should be considered simply in its general relations and apart from its particular use at the time; and an assessment, otherwise legal, for grading, paving and curbing an adjoining street is not void under the Fourteenth Amendment because the lot is not benefited by the improvement owing to its present particular use. *Louisville & Nashville R. R. Co.* v. *Asphalt Co.*, 430.

See post, 12;
LOCAL LAW (TEX.);
TAXATION, 1, 2.

Extradition. *See* Extradition.

5. *Fourteenth Amendment; due process of law; deprivation of property rights by decree against one not a party.*

No person can be deprived of property rights by any decree in a case wherein he is not a party. Where a corporation is not itself made a party to the suit, complainant alleging that its corporate existence had ended, its rights cannot be adjudged even though certain persons are made defendants on the ground that they are using the name of the corporation as a cover for their alleged wrongful acts and they answer, denying any personal interest, and claiming that the corporation is a going concern and justify their acts as its agent; and a decree of a state court in such an action cannot be reviewed in this court at the instance of one of such defendants on the ground that the corporation has been deprived of its property without due process of law. *Iron Cliffs Co.* v. *Negaunee Iron Co.*, 463.

6. *Fourteenth Amendment—Requiring removal of gas pipes in exercise of police power not an unconstitutional deprivation of property.*

Uncompensated obedience to a regulation enacted for the public safety under the police power of the State is not a taking of property without due compensation. Under the facts of this case, the changing of the location of gas pipes at the expense of the gas company to accommodate a system of drainage, which has been upheld by the state court as

an execution of the police power of the State, does not amount to a deprivation of property without due process of law. *New Orleans Gas Co.* v. *Drainage Commission*, 453.

7. *Fourteenth Amendment; construction relative to methods of taxation.*
A system of delusive exactness should not be extracted from the very general language of the Fourteenth Amendment in order to destroy methods of taxation which were well known when the Amendment was adopted, and which no one then supposed would be disturbed. *Louisville & Nashville R. R. Co.* v. *Asphalt Co.*, 430.

Indians. *See* INDIANS, 1.

8. *Involuntary servitude; power of Congress to enforce prohibition.*
While the ordinary relations of individuals to individuals are subject to the control of the States and not to that of the General Government the Thirteenth Amendment grants to Congress power to enforce the prohibition against involuntary servitude, including peonage, and to punish persons holding another in peonage; and §§ 1990, 5526 Rev. Stat. are valid legislation under such power and operate directly on every person violating their provisions whether in State or Territory and whether there be or not any municipal ordinance or state law sanctioning such holding. *Clyatt* v. *United States*, 207.

9. *Involuntary servitude—Peonage within prohibition.*
Peonage is a status or condition of compulsory service based upon the indebtedness of the peon to the master. The service is enforced unless the debt be paid, and however created, it is involuntary servitude within the prohibition of the Thirteenth Amendment to the Federal Constitution. *Ib.*

10. *Jury trial; invalidity of provision of Alaska Code.*
Under the treaty with Russia ceding Alaska and the subsequent legislation of Congress, Alaska has been incorporated into the United States and the Constitution is applicable to that Territory, and under the Fifth and Sixth Amendments Congress cannot deprive one there accused of a misdemeanor of trial by a common law jury, and that § 171 of the Alaska Code, 31 Stat. 358, in so far as it provides that in trials for misdemeanors six persons shall constitute a legal jury, is unconstitutional and void. *Rassmussen* v. *United States*, 516.

Property rights. *See* STREETS AND HIGHWAYS.

11. *Scope of words—Word "charged" in Art. IV, sec. 2, subd. 2, defined.*
Words in the Constitution of the United States do not ordinarily receive a narrow and contracted meaning, but are presumed to have been used in a broad sense with a view of covering all contingencies. The word "charged" in Art. IV, § 2, Subd. 2, was used in its broad signification to cover any proceeding which a State might see fit to adopt for a formal accusation against an alleged criminal. *Matter of Strauss*, 324.

States. See POLICE POWER, 2;
TAXATION.

12. *Validity of Massachusetts compulsory vaccination law.*

(*a.*) *Preamble as source of Federal power.*

The United States does not derive any of its substantive powers from the Preamble of the Constitution. It cannot exert any power to secure the declared objects of the Constitution unless, apart from the Preamble, such power be found in, or can properly be implied from, some express delegation in the instrument. *Jacobson* v. *Massachusetts*, 11.

(*b*) *Spirit of Constitution.*

While the spirit of the Constitution is to be respected not less than its letter, the spirit is to be collected chiefly from its words. *Ib.*

(*c*) *Exclusion of evidence in state court considered.*

While the exclusion of evidence in the state court in a case involving the constitutionality of a state statute may not strictly present a Federal question, this court may consider the rejection of such evidence upon the ground of incompetency or immateriality under the statute as showing its scope and meaning in the opinion of the state court. *Ib.*

(*d*) *Police power of State.*

The police power of a State embraces such reasonable regulations relating to matters completely within its territory, and not affecting the people of other States, established directly by legislative enactment, as will protect the public health and safety. *Ib.*

(*e*) *Police power of State; bounds of exercise.*

While a local regulation, even if based on the acknowledged police power of a State, must always yield in case of conflict with the exercise by the General Government of any power it possesses under the Constitution, the mode or manner of exercising its police power is wholly within the discretion of the State so long as the Constitution of the United States is not contravened, or any right granted or secured thereby is not infringed, or not exercised in such an arbitrary and oppressive manner as to justify the interference of the courts to prevent wrong and oppression. *Ib.*

(*f*) *Liberty of individual defined.*

The liberty secured by the Constitution of the United States does not import an absolute right in each person to be at all times and in all circumstances wholly freed from restraint, nor is it an element in such liberty that one person, or a minority of persons residing in any community and enjoying the benefits of its local government, should have power to dominate the majority when supported in their action by the authority of the State. *Ib.*

(*g*) *Statute within police power of State.*

It is within the police power of a State to enact a compulsory vaccination law, and it is for the legislature, and not for the courts, to determine

in the first instance whether vaccination is or is not the best mode for the prevention of smallpox and the protection of the public health. *Ib.*

(*h*) *Equal protection of laws; right not denied.*

There being obvious reasons for such exception, the fact that children, under certain circumstances, are excepted from the operation of the law does not deny the equal protection of the laws to adults if the statute is applicable equally to all adults in like condition. *Ib.*

(*i*) *Statute not in derogation of Constitutional rights.*

The highest court of Massachusetts not having held that the compulsory vaccination law of that State establishes the absolute rule that an adult must be vaccinated even if he is not a fit subject at the time or that vaccination would seriously injure his health or cause his death, this court holds that as to an adult residing in the community, and a fit subject of vaccination, the statute is not invalid as in derogation of any of the rights of such person under the Fourteenth Amendment. *Ib.*

CONSTRUCTION.

OF STATUTES. *See* Statutes A.
OF CONSTITUTION. *See* Constitutional Law.
OF LAND GRANTS. *See* Public Lands, 4.

CONTRACTS.

Rights of parties in pari delicto to recover property delivered under illegal contract—Transaction between stockholders of competing railroads held to be one of sale and not of bailment or trust—Estoppel.

After affirmance of the decree in the *Northern Securities case*, 193 U. S. 197, adjudging the combination illegal under the Anti-Trust Act the corporation adopted a resolution reducing its capital stock and distributing the surplus of assets created by the reduction and consisting of shares of the Northern Pacific and Great Northern Railway Companies ratably among its stockholders. Complainants objected to the *pro rata* distribution and insisted that the Northern Pacific stock they had delivered to the Securities Company was not so delivered in pursuance of an absolute sale but to be held in trust; that they were entitled to have their stock returned to them; that the decree in the Government suit practically so adjudicated and that as they acted in good faith, believing that the original contract was not within the prohibitions of the Anti-Trust Act, the doctrine of *in pari delicto* did not apply. The Circuit Court granted a temporary injunction against *pro rata* distribution and the Circuit Court of Appeals reversed the order and practically disposed of the entire case adversely to complainants. This court granted a writ of certiorari. *Held*, that: The transaction between complainants and the Northern Securities Company was one of purchase and sale of Northern Pacific Railway Company stock for shares of stock of the Securities Company and cash and not a bailment or trust. When a vendor testifies that the transaction was an unconditional sale and that he attached to his negotiations no other conditions than that of price he is estopped from afterwards

denying that this is a statement of fact and claiming that he only swore to a conclusion of law. Property delivered under an executed illegal contract cannot be recovered back by any party *in pari delicto*, and the courts cannot relax the rigor of this rule where the record discloses no special considerations of equity, justice or public policy. The fact that the complainants in this case acted in good faith and without intention to violate the law does not exempt them from the doctrine of *in pari delicto*. All the parties having supposed the statute would not be held applicable to the transaction neither can plead ignorance of the law as against the other and the defendant secured no unfair advantage in retaining the consideration voluntarily delivered for the price agreed. Where a vendor after transferring shares of railway stock to a corporation in exchange for its shares becomes a director of the purchasing corporation and participates in acts consistent only with absolute ownership by it of the railway stocks, and does so after an action has been brought to declare the transaction illegal, his right to rescind the contract and compel restitution of his original railway shares, if it ever existed, is lost by acquiescence and laches. *Harriman* v. *Northern Securities Co.*, 244.

See CLAIMS AGAINST UNITED STATES;
CONSTITUTIONAL LAW, 1, 3;
JURISDICTION, B 2;
STREETS AND HIGHWAYS;
TAXATION, 3.

CORPORATIONS.

See CONTRACTS;
JURISDICTION, B 2;
LOCAL LAW (OHIO).

COURTS.

1. *Judge and court—Power of Hawaiian judges at chambers—Construction of Organic Act.*

The statutes of 1892 of the Territory of Hawaii purporting to confer upon the judges of the several courts, at chambers, within their respective jurisdictions, judicial power not incident or ancillary to some cause pending before a court, are not in conflict with § 81 of the Organic Act of the Territory, approved April 30, 1900, 31 Stat. 141, 157, and the power of the judges to act at chambers was expressly saved by the provision in § 81 continuing the law of Hawaii theretofore in force concerning courts and their jurisdiction until the legislature otherwise ordered, except as otherwise provided in the Organic Act. In construing the organic act of a Territory the whole act must be considered in order to obtain a comprehensive view of the intention of Congress, and no single section should be segregated and given undue prominence where other sections bear upon the same subject. Whether a petition in a probate proceeding to a court acting as a probate court shall be addressed to, and passed upon by the judge, while sitting in court or at chambers is more a matter of form than of substance. *Carter* v. *Gear*, 348.

2. *Power of courts to overrule judgment of Congress.*
In construing a statute affecting the relationship of the Government and the Indians it is not within the power of the courts to overrule the judgment of Congress. While there may be a presumption that no radical change of policy is intended, and courts may insist that a supposed purpose of Congress to change be made clear by its legislation, when that purpose is made clear the question is at an end. *Matter of Heff*, 488.

See ACTION, 1; CRIMINAL LAW, 2; EXTRADITION; IMMIGRATION, 2; JURISDICTION; LOCAL LAW (OHIO); STREETS AND HIGHWAYS; TREATIES.

COURT OF CLAIMS.

See CLAIMS AGAINST UNITED STATES; JURISDICTION, A.

COURT-MARTIAL.

See NAVY.

CRIMINAL LAW.

1. *Peonage—Sufficiency of evidence to support indictment.*
Conviction cannot be had under an indictment charging defendants with returning certain persons to a condition of peonage unless there is proof that the persons so returned had actually been in such condition prior to the alleged act of returning them thereto. *Clyatt* v. *United States*, 207.

2. *Duty of court as to sufficiency of evidence.*
No matter how severe may be the condemnation due to the conduct of a party charged with crime, it is the duty of the court to see that all the elements of the crime are proved or that testimony is offered which justifies a jury in finding those elements. *Ib.*

3. *Section 939 of District of Columbia Code construed and held not to affect the general statute of limitations in force there.*
Section 939 of the District of Columbia Code, providing that if any person charged with a criminal offense shall have been committed or held to bail to await the action of the grand jury, and the grand jury does not act within nine months the prosecution on the charge shall be deemed to be abandoned and the accused set free or his bail discharged, is not a statute of limitations, and does not repeal or affect the general statute of limitations in force in the District, § 1044 Rev. Stat., and a person, who in this case had not made any application under § 939 to be released from bail, may be held to answer upon an indictment found more than nine months after he was arrested and held to bail. It would require clear and specific language to indicate a legislative intent to bar the prosecution of all offenses for the failure of the grand

jury to act within nine months of the arrest of the accused when the latter is at large under bail. *United States* v. *Cadarr*, 475.

See CONSTITUTIONAL LAW, 10, 11;
EXTRADITION.

CUSTOMS DUTIES.

1. *Power of Secretary of Treasury to order reliquidation at exchange value of rupees instead of bullion value.*

Under the proviso of § 25 of the act of Congress of August 27, 1898, 28 Stat. 509, 552, the Secretary of the Treasury is authorized, when he has satisfactory evidence that the rupee price of imported goods stated in the invoice does not mean rupees at bullion value, but as a certain fraction of a pound sterling, to order a reliquidation so as to make the value in United States currency correspond with the actual value of the goods. *United States* v. *Whitridge*, 135.

2. *Public facts considered in determining power of Secretary.*

In determining when the Secretary of the Treasury exceeded his powers under a statute, this court may consider public facts that were known to Congress when enacting the statute and must have been before the Secretary's mind when acting thereunder, even though such facts were not proved on the trial. *Ib.*

See PHILIPPINE ISLANDS;
PUBLIC OFFICERS.

DEFENSES.

Ignorance of law no defense.

Mere ignorance of the law standing alone does not constitute any defense against its enforcement, and a mistake of law, pure and simple, without the addition of any circumstances of fraud or misrepresentation constitutes no basis for relief at law or in equity and forms no excuse in favor of the party asserting that he made the mistake. *Utermehle* v. *Norment*, 40.

See CONTRACTS;
ESTOPPEL;
PUBLIC LANDS, 1.

DISTRIBUTION.

See CONTRACTS.

DISTRICT OF COLUMBIA.

See CLAIMS AGAINST UNITED STATES (*District of Columbia* v. *Barnes*, 146).
CRIMINAL LAW, 3 (*United States* v. *Cadarr*, 475).
DEFENSES (*Utermehle* v. *Norment*, 40).
ESTOPPEL. *Ib.*
JURISDICTION, A 3 (*Massachusetts, Petitioner*, 482).
PUBLIC OFFICERS, (*Bartlett* v. *United States*, 230).

DIVERSE CITIZENSHIP.

See JURISDICTION, B 1.

DUE PROCESS OF LAW.

See CONSTITUTIONAL LAW;
POLICE POWER, 1.

EASEMENTS.

See STREETS AND HIGHWAYS.

EQUAL PROTECTION OF LAWS.

See CONSTITUTIONAL LAW, 4, 12;
LOCAL LAW (TEX.);
TAXATION, 1, 2.

EQUITY.

See PUBLIC LANDS, 1.

ESTOPPEL.

To deny validity of will, not affected by ignorance of law.

The rule of law is that a party taking a benefit of a provision in his favor under a will is estopped from attacking the validity of the instrument; and where an heir at law has taken a benefit under the will, acquiesced in its validity for many years, permitted the legatees and devisees to act upon such consent and acquiescence, has so changed his position on that account that he cannot be restored to it, and meanwhile witnesses have died, this estoppel is not affected because he was at the time ignorant of this rule of law. *Utermehle* v. *Norment*, 40.

See CONTRACTS.

EVIDENCE.

See CONSTITUTIONAL LAW, 12; IMMIGRATION, 2;
CRIMINAL LAW, 1; PUBLIC LANDS, 1.

EXECUTIVE ORDER.

See PHILIPPINE ISLANDS, 2, 3.

EXTRADITION.

1. *Definition—Duty of courts to prevent wrong to person sought to be extradited.*

Extradition, or rendition, is but one step in securing the presence of the accused in the court in which he may be tried and in no manner determines the question of guilt, and while courts will always endeavor to prevent any wrong in the extradition of a person to answer a charge of crime ignorantly or wantonly made, the possibility cannot always be guarded against and the process of extradition must not be so burdened as to make it practically valueless. *Matter of Strauss*, 324.

2. *Case within constitutional provision.*

The extradition of an alleged fugitive from justice against whom a charge of the crime of securing property by false pretenses has been made and is pending before a justice of the peace of Ohio, having jurisdiction conferred upon him by the laws of that State to examine and bind over for trial in a superior court, is authorized by Art. IV, § 2, Sudb. 2 of the Constitution of the United States, and section 5278, Rev. Stat. *Ib.*

FACT.

See IMMIGRATION, 2;
PRACTICE, 2.

FEDERAL QUESTION.

See CONSTITUTIONAL LAW, 5, 12;
JURISDICTION, A.

FEDERAL POWERS.

See CONSTITUTIONAL LAW, 12;
POLICE POWER.

FRAUD.

See PUBLIC LANDS, 1.

GRAND JURY.

See CRIMINAL LAW, 3.

GUARDIAN AND WARD.

See INDIANS.

HABEAS CORPUS.

See TREATIES, 1.

HAWAII.

See COURTS, 1.

HEALTH REGULATIONS.

See CONSTITUTIONAL LAW, 12;
POLICE POWER, 1.

IMMIGRATION.

1. *Construction of section* 10 *of act of March* 3, 1891—*Duty of shipowner relative to excluded immigrants.*

Section 10 of the act of March 3, 1891, 26 Stat. 1084, which imposes upon one who has brought immigrants into the United States not permitted to land here, the duty of returning them to the place from whence they came, with a penalty in case the duty is neglected, is a highly penal statute and must be strictly construed; the word "neglect" cannot be

construed so as to make the shipowner or master an insurer of the absolute return of the immigrant at all hazards, but it does require him to take every precaution to prevent the immigrant from escaping and holds him to the care and diligence required by the circumstances. *Hackfeld & Co.* v. *United States*, 442.

2. *Action under section* 10 *of act of March* 3, 1891—*Effect of stipulation as to facts.*

Where in an action under § 10 of the act of March 3, 1891, the Attorney General and the other party have stipulated the facts as to the escape of immigrants and that the escape did not occur by reason of any negligence or want of proper care on the part of the master or officers of the vessel, the court cannot regard the stipulation as to lack of negligence a mere conclusion of law and find that there was negligence on the evidentiary facts as stipulated. It will presume that the Attorney General has done his duty and not stipulated away any of the rights of the prosecution, and the defendant is entitled to have the case tried upon the assumption that the ultimate fact of lack of negligence stipulated into the record was established as well as the specific facts recited. *Ib.*

INDIANS.

1. *Relation of Government to.*

The recognized relation between the Government and the Indians is that of a superior and an inferior, whereby the latter is placed under the care of the former. The Government, however, is under no constitutional obligation to continue the relationship of guardian and ward and may, at any time and in the manner that Congress shall determine, abandon the guardianship and leave the ward to assume and be subject to all the privileges and burdens of one *sui juris*. *Matter of Heff*, 488.

2. *Effect of receiving land under act of February* 8, 1887.

Under the act of February 8, 1887, 24 Stat, 388, an Indian who has received an allotment and patent for land is no longer a ward of the Government but a citizen of the United States and of the State in which he resides, and, as such, is not within the reach of Indian police regulations on the part of Congress, and this emancipation from Federal control cannot be set aside without the consent of the Indian or the State, nor is it affected by the provisions in the act subjecting the land allotted to conditions against alienation and encumbrance and guaranteeing him an interest in tribal or other property. *Ib.*

3. *Allottee under act of February* 8, 1887, *not within prohibition of act of January* 30, 1897.

The act of January 30, 1897, 29 Stat. 506 prohibiting sales of liquors to Indians, is a police regulation and does not apply to an allottee Indian who has become a citizen under the act of February 8, 1887. *Ib.*

See COURTS, 2.

INDICTMENT.
See CRIMINAL LAW.

IMPAIRMENT OF CONTRACT.
CONSTITUTIONAL LAW.
See STREETS AND HIGHWAYS.

IMPORTS.
See PHILIPPINE ISLANDS.

INJUNCTION.
See CERTIORARI;
CONTRACTS;
JURISDICTION, A 3.

IN PARI DELICTO.
See CONTRACTS.

INSURANCE.
See JURISDICTION, B 2.

INTERNAL REVENUE.
See POLICE POWER, 2.

INTERSTATE COMMERCE.
See CONSTITUTIONAL LAW;
JURISDICTION, B 3;
TAXATION, 1.

INTERSTATE RENDITION.
See EXTRADITION.

INTOXICATING LIQUORS.
See INDIANS, 3;
POLICE POWER, 2.

INVOLUNTARY SERVITUDE.
See CONSTITUTIONAL LAW, 8, 9.

JUDGE AND COURT.
See COURTS, 1.

JUDGMENTS AND DECREES.
Final Decree entered in accordance with opinion delivered December 19, 1904, reported in 196 U. S. 23 and stipulation of the parties. *Missouri v. Nebraska*, 577.
See CASES EXPLAINED;
CONSTITUTIONAL LAW, 5;
RAILROADS.

JURISDICTION.

A. Of This Court.

1. *Appeals from Court of Claims.*

Findings of fact made by the Court of Claims are conclusive here, and the jurisdiction of this court is limited to determination of questions of law. *District of Columbia* v. *Barnes*, 146.

2. *Direct appeal from Circuit Court not affected by appeal of one party to Circuit Court of Appeals.*

The appeal to this court on the ground that the Circuit Court had no jurisdiction by a defendant who had not appeared generally is not affected by the fact that one of the defendants has appealed to the Circuit Court of Appeals. *Stillman* v. *Combe*, 436.

3. *Original—Restraint of justices of Supreme Court of District of Columbia —Direct review of judgment of Supreme Court, D. C.*

In a proceeding brought by a State on petition for writs of prohibition, mandamus or certiorari, to restrain the justices of the Supreme Court of the District of Columbia from proceeding further in an action brought by a citizen of the District of Columbia against the Secretary of the Treasury to enjoin him from issuing to the Governor of the petitioning State a duplicate warrant, *held*, that this court has no original jurisdiction and as the controversy was not one between a State and citizens of another State, and under the act of February 9, 1893, 27 Stat. 434, establishing the Court of Appeals of the District of Columbia, this court has no appellate jurisdiction as it cannot review judgments and decrees of the Supreme Court of the District directly by appeal or writ of error. In cases over which this court has no original or appellate jurisdiction it cannot grant prohibition, mandamus or certiorari as ancillary thereto. *Massachusetts, Petitioner*, 482.

4. *Federal question raised too late when.*

A foreign corporation sued in a state court appeared specially and objected to the jurisdiction on the sole ground that the person served was not its agent within the meaning of the state statute; the lower court sustained the objection, but on plaintiff's appeal the highest court of the State held the service good; defendant then demurred on the ground that the statute as to service on foreign corporations was violative of the Federal Constitution; on second appeal after the demurrer had been overruled and there had been judgment for plaintiff on the merits, the highest court of the State declined to consider the constitutionality of the statute on the ground that the question of jurisdiction had been settled on the first appeal. *Held*, that the writ of error must be dismissed. Had the objection been raised in the first instance and disposed of on plaintiff's appeal, the adherence by the state court on defendant's appeal to its prior adjudication might not have cut off consideration of the Federal question, but as it was not so raised, and as the state court could in its discretion consider it as coming too late

and refuse to pass upon it, the jurisdiction of this court cannot be maintained. *Supply Company* v. *Light & Power Co.*, 299.

5. Where the Federal question is not raised until the petition for rehearing to the highest court of the State, it is too late to give this court jurisdiction under Rev. Stat. § 709, to review a writ of error unless the court grants the rehearing and then proceeds to pass upon the question. *McMillen* v. *Ferrum Mining Co.*, 343.

6. *Federal question not necessarily raised in case brought under Federal statute.*

Where in all the state courts the question was treated as one of local law, the fact that the suit was brought under Rev. Stat. § 2326, to try adverse rights to a mining claim, does not necessarily involve a Federal question so as to authorize a writ of error from this court. *Ib.*

7. *Sufficiency of questions raised to give jurisdiction under section 709, Rev. Stat.*

Where the record discloses no title, right, privilege or immunity, specially set up or claimed under the Constitution, or any law of the United States, which was denied by the decision, nor any assertion of an infraction of any provision of the Constitution, and the right of review by this court is based on the contention that the validity under the Constitution of a state statute is necessarily drawn in question and sustained, the writ will be dismissed unless a definite issue as to the validity of such statute is distinctly deducible from the record and it appears that the judgment could not have rested on grounds not involving its validity. *Caro* v. *Davidson*, 197.

See Bill of Exceptions;
Certiorari;
Constitutional Law, 5, 12.

B. Of Circuit Courts.

1. *Diversity of citizenship by contrivance of parties.*

An arrangement of parties which is merely a contrivance between friends to found jurisdiction on diverse citizenship in the Circuit Court will not avail, and when it is obvious that a party who is really on complainant's side has been made a defendant for jurisdictional reasons, and for the purpose of reopening in the United States courts a controversy already decided in the state courts, the court will look beyond the pleadings and arrange the parties according to their actual sides in the dispute. *Dawson* v. *Columbia Trust Co.*, 178.

2. *Foreign corporations—Prerequisites to jurisdiction in New York—Local law governing service of process—On whom process may be served—What amounts to doing business in State.*

(*a*) In order that a Federal court may obtain jurisdiction over a foreign corporation, the corporation must, among other things, be doing business within the State.

(*b*) To obtain such jurisdiction in New York, personal service of the sum-

mons upon, and a delivery to, the defendant must be made in the manner designated by § 432 of the Code of Civil Procedure of that State, and if the corporation has no property in the State and service cannot be made on the president, treasurer or secretary, and no person has been designated, such service can only be made on a director or person specified in subdivision 3 of that section, in case the cause of action arose within the State.

(*c*) A fire insurance company which issues its policies upon property in another State, is engaged in its business in that State when its agents are there, under its authority, adjusting the losses covered by its policies.

(*d*) Where an insurance company, after loss has occurred on property insured by it in another State, fails to make the payment, or to build or repair, as required by the policy involved in this action, it fails to comply with the terms of the contract, and out of that failure the cause of action arises in the State where the loss occurs.

(*e*) In this case as the company was doing business in New York and the cause of action arose in New York, service under subdivision 3 of § 432 of the Code of Civil Procedure, on a director of the company residing in New York was sufficient to give the Circuit Court of the United States, in New York, jurisdiction of a Pennsylvania corporation. *Lumbermen's Insurance Co.* v. *Meyer*, 407.

3. *Of original proceeding seeking relief by mandamus.*

The Circuit Court of the United States has no original jurisdiction to issue a writ of mandamus at the instance of the Interstate Commerce Commission against a railroad company to compel it to make a report of the matters and things specified in § 20 of the act of Congress to regulate commerce. *Knapp* v. *Lake Shore & Michigan South. Ry. Co.*, 536.

See ACTION, 1;
CONSTITUTIONAL LAW, 1;
LOCAL LAW (OHIO).

Of Court of Claims. *See* Claims Against United States.

Generally. *See* Contracts, 1.

JURY TRIAL.

See CONSTITUTIONAL LAW, 10.

JUSTICE OF THE PEACE.

See EXTRADITION, 2.

LACHES.

See CONTRACTS;
ESTOPPEL;
PUBLIC LANDS, 1.

LAND GRANTS.

See PUBLIC LANDS.

LICENSE.

See POLICE POWER, 2.

LIMITATION OF ACTIONS.

See PUBLIC LANDS, 1;
STATUTE OF LIMITATIONS.

LOCAL LAW.

Alaska. Jury trial, sec. 171 of Code, 31 Stat. 358 (see Constitutional Law, 10). *Rassmussen* v. *United States*, 516.

California. Taxation (see Taxation, 4). *San Francisco National Bank* v. *Dodge*, 70.

District of Columbia. Code, section 939 (see Criminal Law, 3). *United States* v. *Cadarr*, 475.

Hawaii. Judiciary statutes of 1892 and Organic Act of 1900 (see Courts, 1). *Carter* v. *Gear*, 348.

Massachusetts. Compulsory vaccination law (see Constitutional Law, 12). *Jacobson* v. *Massachusetts*, 11.

Nebraska. Riparian rights (see Public Lands, 4). *Whitaker* v. *McBride*, 510.

New York. (See Streets and Highways). *Muhlker* v. *New York & Harlem R. Co.*, 544. Foreign corporations (see Jurisdiction, B 2). *Lumbermen's Ins. Co.* v. *Meyer*, 407.

Ohio. Constitutional provision relative to individual liability of stockholders. Article XIII, § 3, of the constitution of Ohio of 1851, providing that dues from corporations be secured by individual liability of the stockholders as may be prescribed by law to a further sum over and above their stock at least equal to the amount of such stock, is not so far self-executing that it may be enforced outside of the jurisdiction of that State without compliance with the requirements of the state statute fixing the amount of the liability and the method of enforcing it. *Middletown National Bank* v. *Railway Co.*, 394.

Corporations; remedy against stockholders under section 3260 *Rev. Stat., Ohio.* Under § 3260, Rev. Stat., Ohio, the remedy must be pursued in the courts of that State and a creditor, who has not commenced any action in the Ohio courts, cannot obtain the relief given by the statute, in the Circuit Court of the United States in another State, against stockholders resident therein. *Ib.*

Texas. Anti-trust act of 1895. The Supreme Court of Texas having construed the act of 1895 as invalid, so far as it was discriminatory by excepting from its operation combinations of agriculturists and organized laborers and fell within the terms of *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, and sustained the act in other respects, and having also held that the act of 1899 although cumulative did not continue the invalid discriminatory provisions of the act of 1895, this court follows the state court in holding that under the laws of Texas, as they now exist, combinations described in the Anti-trust Laws are

forbidden and penalized whether by agriculturists, organized laborers or others, and there is therefore no discrimination against oil companies, and the latter are not deprived of the equal protection of the laws. *National Cotton Oil Co.* v. *Texas*, 115.

Anti-trust acts of 1889, 1895 and 1899 (see Constitutional Law, 3). *National Cotton Oil Co.* v. *Texas*, 115.

Washington. Limitation of actions (see Statute of Limitations, 3). *McClaine* v. *Rankin*, 154.

MANDAMUS.

See JURISDICTION, A 3; B 3.

MINES AND MINING.

1. *Relinquishment of rights of location; subsequent rights of party relinquishing.*

Where an attempted mineral location is a failure by reason of a lack of discovery and all rights have been conveyed to a third party who formally relinquishes them, the land is again open to location and the party so relinquishing may locate it and become entitled thereto by subsequent discovery, and otherwise complying with the law, without waiting until the relinquished location lapsed by failure to do the annual work required by statute. *Chrisman* v. *Miller*, 313.

2. *Sufficiency of discovery.*

In controversies between two mineral claimants the rule as to sufficiency of discovery is more liberal than it is in controversies between a mineral claimant and an agricultural entryman, as in the latter the land is sought to be withdrawn from the category of agricultural lands, while in the former the question is merely one of priority. While the statute does not prescribe what is necessary to constitute a discovery under the mining laws of the United States, it is essential that it gives reasonable evidence of the fact either that there is a vein or lode carrying precious minerals, or if it be claimed as placer ground that it is valuable for such mining; and where there is not enough in what a locator claims to have seen to justify a prudent person in the expenditure of money and labor in exploitation this court will not overthrow a finding of the lower court that there was no discovery. *Ib.*

MISTAKE.

See DEFENSES.

MONOPOLY.

See COMBINATIONS IN RESTRAINT OF TRADE; CONSTITUTIONAL LAW, 3.

MORTGAGE.

See RAILROADS.

MUNICIPAL CORPORATIONS.

See CONSTITUTIONAL LAW, 1.

NATIONAL BANKS.

See STATUTE OF LIMITATIONS, 1, 2;
TAXATION, 4.

NAVY.

1. *Regulations of* 1865, *paragraph* 1205 *construed as to what constitutes bar to further proceedings.*

An officer in the Navy failing to report at the time ordered, while his vessel was in Japanese waters, in 1865, was placed under arrest for drunkenness and neglect of duty; later, on the same day he was, by order of the rear admiral, restored to duty to await an opportunity to investigate the case. Subsequently the rear admiral convened a court-martial consisting of seven officers all of equal or superior rank to accused who was served with charges and arrested, arraigned and tried, found guilty and dismissed. Accused stated he had no objections to any of the court and knew of no reason why it should not proceed with his trial. Subsequently in a suit for salary on ground of illegal dismissal he claimed the first arrest was an expiation of the offense and bar; that the court was invalid and incompetent and the sentence invalid not having been approved by the rear admiral or the President. *Held*, that par. 1205, Naval Regulations of 1865, providing that the arrest and discharge of a person in the Navy for an offense shall be a bar to further martial proceedings against him for that offense, does not apply to an arrest and temporary confinement not intended as a punishment but as a reasonable precaution for the maintenance of good order and discipline aboard. *Bishop* v. *United States*, 334.

2. *Service of charges—Arrest within meaning of law of* 1800 *and Naval Regulations of* 1865.

Under Article 38 of the law of April 23, 1800, 2 Stat. 50, and Par. 1202, Naval Regulations of 1865, the provision as to service of charges upon the accused at the time that he is put under arrest refers not to the temporary arrest necessary for order and discipline at the time of the commission of the offense but to the subsequent arrest for trial by court-martial. *Ib.*

3. *Service of charges—Arrest within meaning of Article* 43 *of Section* 1624, *Rev. Stat.*

The word "arrest" as employed in Article 43 of § 1624, Rev. Stat., requiring service of the charge on which the accused is to be tried by court-martial, does not relate to the preliminary arrest or detention of an accused person awaiting the action of higher authority to frame charges and specifications and order a court-martial, but to the arrest resulting from preferring the charges by the proper authority, and the convening of a court-martial. *United States* v. *Smith*, 386.

4. *Court-martial—Personnel of court; waiver of objection to.*
It is a question for the officer convening the court to determine whether more officers could be convened without injury to the service and his action in this respect cannot be attacked collaterally, and if the accused expresses satisfaction with the court-martial as constituted, it is a clear waiver of any objection to its personnel. *Bishop* v. *United States*, 334.

5. *Court-martial—Confirmation of sentence by officer convening court.*
Under Articles 19 and 20 of the act of July 17, 1862, 12 Stat. 605, the rear admiral convening the court-martial was not obliged to confirm the sentence of dismissal. *Ib.*

6. *Court-martial—Sentence; approval by President; sufficiency of showing.*
The approval by the President sufficiently appears where the record shows that the sentence was submitted to the President and his approval appears at the foot of a brief in the case and the Secretary of the Navy writes to the accused that the President has approved the sentence. *Ib.*

7. *Court-martial; power to convene—Article 38 of section 1624, Rev. Stat., applicable where.*
The provision in Article 38 of § 1624, Rev. Stat., that no commander of a fleet or squadron shall convene a general court-martial without express authority from the President was enacted in 1862 and will be construed as intending to apply to waters within the continental limits of the United States, and not to waters in the territory beyond the seas acquired since the passage of that act, and the acquisition whereof was not contemplated at that time. *United States* v. *Smith*, 386.

NORTHERN PACIFIC RAILWAY.

See PUBLIC LANDS, 2.

NORTHERN SECURITIES CASE.

See CASES EXPLAINED;
COMBINATIONS IN RESTRAINT OF TRADE;
CONTRACTS.

PARTIES.

See CONSTITUTIONAL LAW, 5;
JURISDICTION, B 1.

PATENT FOR LAND.

See PUBLIC LANDS, 1.

PEONAGE.

See CONSTITUTIONAL LAW, 8, 9;
CRIMINAL LAW.

PHILIPPINE ISLANDS.

1. *Insurrection after treaty of peace; effect upon status of islands.*
After the title to the Philippine Islands passed to the United States by the

exchange of ratifications of the treaty of peace, there was nothing in the Philippine insurrection of sufficient gravity to give to the islands the character of foreign countries within the meaning of a tariff act (*Fourteen Diamond Rings*, 183 U. S. 176). *Lincoln* v. *United States*, 419.

2. *Executive order of July* 12, 1898, *relative to duties on imports.*

The order of the President of July 12, 1898, directing the levying of duties on goods landed in the Philippine Islands, was a regulation for and during the then existing war with Spain, referred to as definitely as if it had been named, and was not a power for any other military occasion. The right to levy duties thereunder on goods brought from the United States ceased on the termination of the war by the exchange of ratifications of the treaty of peace with Spain on April 11, 1899 (*Dooley* v. *United States*, 182 U. S. 222). *Ib.*

3. *Ratification by Congress of Executive order; scope of, as to collection of duties.*

Under the act of Congress of July 1, 1902, 32 Stat. 691, ratifying the action of the President and the authorities of the government of the Philippine Islands, the ratification is confined to those acts which were in accordance with the provisions of the order of July 12, 1898, and not to the collection of duties after April 11, 1899, which were within such provisions. *Ib.*

PLEADING.

See CLAIMS AGAINST UNITED STATES;
BILL OF EXCEPTIONS.

POLICE POWER.

1. *Public health regulations—Constitutionality of execution of police power.*

The drainage of a city in the interest of the public health and welfare is one of the most important purposes for which the police power can be exercised. Every reason of public policy requires that grants in the sub-surface of streets shall be held subject to such regulation as the public health and safety may require. Uncompensated obedience to a regulation enacted for the public safety under the police power of the State is not a taking of property without due compensation. Under the facts of this case, the changing of the location of gas pipes at the expense of the Gas Company to accommodate a system of drainage, which has been upheld by the state court as an execution of the police power of the State, does not amount to a deprivation of property without due process of law. *New Orleans Gas Co.* v. *Drainage Commission*, 453.

2. *Relation of state to Federal Government—Regulation of sale of intoxicants —Federal license not an attempted exercise of police power.*

In the United States there is a dual system of government, National and

state, each of which is supreme within its own domain and it is one of the chief functions of this court to preserve the balance between them. The general police power is reserved to the States subject to the limitation that it may not trespass on the rights and powers vested in the National Government. The regulation of the sale of intoxicating liquors is within the power of the State and the license enacted by the National Government is solely for revenue and is not an attempted exercise of the police power. *Matter of Heff*, 488.

See CONSTITUTIONAL LAW, 6, 12;
INDIANS, 3.

POWERS OF CONGRESS.

See CONSTITUTIONAL LAW, 8;
INDIANS, 1;
STATE OFFICERS.

PRACTICE.

1. *Following Land Department's construction of statute.*

It is the duty of this court in the absence of cogent reasons therefor, not to overrule the construction of a statute upon which the Land Department has uniformly proceeded in its administration of the public lands. *McMichael* v. *Murphy*, 304.

2. *Following state court's conclusions as to facts.*

This court does not review questions of fact in cases coming from a state court but accepts the conclusions of the state tribunal as final. *Chrisman* v. *Miller*, 313.

See CUSTOMS DUTIES, 2;
PUBLIC LANDS, 2;
TAXATION, 4.

PREAMBLE.

See CONSTITUTIONAL LAW, 12.

PREFERENCE.

See BANKRUPTCY.

PRESUMPTIONS.

See IMMIGRATION, 2;
PUBLIC LANDS, 1.

PROCESS.

See INJUNCTION;
JURISDICTION, B 2;
NAVY, 2, 3.

PROHIBITION.

See JURISDICTION, A 3.

PROPERTY RIGHTS.

See CONSTITUTIONAL LAW;
STREETS AND HIGHWAYS.

PUBLIC HEALTH.

See CONSTITUTIONAL LAW, 12;
POLICE POWER, 1.

PUBLIC LANDS.

1. *Action by Government to cancel patents.*

The Government, like an individual, may maintain any appropriate action to set aside its grants and recover property of which it has been defrauded; and while laches or limitations do not of themselves constitute a distinct defense as against the Government, yet the respect due to a patent, the presumption that all preceding steps were observed before its issue, and the necessity of the stability of titles depending on official instruments demand that suits to set aside or annul them should be sustained only when the allegations are clearly stated and fully sustained by proof. In such a suit the Government is subjected to the same rules as an individual, respecting the burden of proof, quantity and character of evidence, presumptions of law and fact, and it is a good defense that the title has passed to a *bona fide* purchaser for value without notice. Generally speaking, equity will not simply consider whether the title was fraudulently obtained from the Government but will also protect the rights of innocent parties. *United States* v. *Stinson*, 200.

2. *Railway right of way—Adverse possession by individual.*

Northern Pacific Railway Company v. *Townsend*, 190 U. S. 267, affirmed as to the point that individuals cannot for private purposes acquire by adverse possession under a state statute of limitations any portion of the right of way granted to the Northern Pacific Railway Company. But by the act of April 28, 1904, that right of way was narrowed to two hundred feet in width and title acquired to land outside of a strip of that width was confirmed. As the decree in this case was rendered and a writ of error therefrom was pending in this court prior to April 28, 1904, the decree must be reversed and the case remanded to the state courts to be dealt with in view of the application of the act of April 28, 1904. *Northern Pacific Ry. Co.* v. *Ely*, 1.

3. *Rights of second entryman where first entry subsequently ascertained to be invalid.*

A settlement or entry on public land already covered of record by another entry, valid upon its face, does not give a second entryman any right in the land notwithstanding the first entry may subsequently be relinquished or ascertained to be invalid by reason of facts *dehors* the record of such entry; and one first entering after the relinquishment or cancellation has priority over one attempting to enter prior to such relinquishment or cancellation. *McMichael* v. *Murphy*, 304.

4. *Riparian rights of patentee—Rights to unsurveyed island as against one claiming it as homestead—Local law governing construction of grant.*

The question of the title of a riparian owner is one of local law, and unrestricted grants of the Government, bounded on streams and other waters, are to be construed according to the law of the State in which the lands lie. *Hardin* v. *Jordan*, 140 U. S. 371. Where the Government has surveyed and patented the lands up to the bank of a channel in which an unsurveyed island is situated, a patentee of the land on such bank, although his land may itself be an island surrounded by two channels of the river, has all the rights of a riparian owner in the channel lying opposite his banks, including the unsurveyed island if, as a riparian owner, he is entitled thereto by the laws of the State. By the law of Nebraska, as interpreted by its highest court, riparian proprietors own the bed of a stream to the center of the channel. The Government as original proprietor has the right to survey and sell any lands, including islands in a river or any other body of water, and if it omits to survey an island in a stream and refuses to do so when its attention is called to the matter, no citizen can overrule the Department, and assuming that the island should be surveyed, occupy it for homestead or preëmption entry. In such a case the rights of riparian owners are to be preferred to those of the settler. *Whitaker* v. *McBride*, 510.

5. *Surveys—Collateral attack.*

Government surveys of public lands are not open to collateral attack in an action at law between private parties. *Ib.*

6. *Surveys—Meander line defined.*

A meander line is not a line of boundary but a means of ascertaining the quantity of land in the fraction which is to be paid for by the purchaser. *Ib.*

7. *Texas school grant—Greer County, Oklahoma, not entitled to lands granted to Greer County, Texas, prior to creation of former.*

The decision in *United States* v. *Texas*, 162 U. S. 1, that Greer County was not within the boundaries of Texas did not effect a cession of the territory included in the county from Texas to the United States or amount to a transfer of sovereignty, but was simply a revelation that such territory belonged to the United States. Greer County, Oklahoma, as created after that decision by the act of 1896, 29 Stat. 113, is a corporation created by a different sovereignty from that which purported to create Greer County, Texas, and as such is technically a different person, and does not succeed to land situated elsewhere in Texas granted by that State prior to such decision for school purposes to Greer County, Texas. *Greer County* v. *Texas*, 235.

See MINES AND MINING.

PUBLIC OFFICERS.

Power of Secretary of Treasury to appoint and allow compensation to dis-

bursing agent for funds appropriated for building post office at Washington.

The words "waters and shores" of a river as used in §§ 2550, 2551, Rev. Stat., are broad enough to include the whole of a city on those shores and within the limits named. The Collection District of Georgetown includes the whole of the city of Washington, D. C., and the Secretary of the Treasury has no power, general or statutory, under §§ 3657, 3658, Rev. Stat., to appoint, and allow compensation to, a disbursing agent for funds appropriated for building a post office in Washington. *Bartlett* v. *United States*, 230.

See CONSTITUTIONAL LAW, 2;
CUSTOMS DUTIES.

RAILROADS.

Receivership—Claims for supplies not entitled to precedence over prior mortgage lien—Receivers' certificates.

Claims for supplies furnished to a railroad company within six months before the appointment of a receiver are not entitled under any general rule to precedence over a lien expressly created by a mortgage recorded before the contracts for such supplies were made. Under the orders authorizing receivers' certificates involved in this case one furnishing ties within six months prior to the appointment of the receiver, and some of which were not used until after such appointment, *held* not entitled to payment therefor out of the proceeds of the certificates. *Gregg* v. *Metropolitan Trust Co.*, 183.

See CONTRACTS;
STREETS AND HIGHWAYS.

RAILROAD LAND GRANTS.

See PUBLIC LANDS, 2.

RECEIVERSHIP.

See RAILROADS.

RES JUDICATA.

See CASES EXPLAINED.

RESTRAINT OF TRADE.

See COMBINATIONS IN RESTRAINT OF TRADE;
CONSTITUTIONAL LAW, 3.

RIPARIAN RIGHTS.

See PUBLIC LANDS.

SALE.

See CONTRACTS.

SCHOOL GRANTS.

See PUBLIC LANDS, 7.

SEAMEN.

See CONSTITUTIONAL LAW, 2;
TREATIES.

SHERMAN ACT.

See COMBINATIONS IN RESTRAINT OF TRADE.

SPIRIT OF LAWS.

See CONSTITUTIONAL LAW, 12.

STARE DECISIS.

General expressions in an opinion which are not essential to dispose of a case are not permitted to control the judgment in subsequent suits. *Harriman* v. *Northern Securities Co.*, 244.

STATES.

See CONSTITUTIONAL LAW; LOCAL LAW; POLICE POWER; TAXATION.

STATE OFFICERS.

Power to execute duty imposed by act of Congress.

Power may be conferred upon a state officer, as such, to execute a duty imposed under an act of Congress, and the officer may execute the same, unless its execution is prohibited by the constitution or legislation of the State. *Dallemagne* v. *Moisan*, 169.

See TREATIES, 1.

STATUTE OF LIMITATIONS.

1. *State statute applicable to suit under act of Congress.*

In the absence of any provision of the act of Congress creating the liability of stockholders of national banks, fixing a limitation of time for commencing actions to enforce it, the statute of limitations of the particular State is applicable. *McClaine* v. *Rankin*, 154.

2. *Against enforcement of statutory liability of stockholders in national banks, begins to run when.*

The liability of stockholders of national banks is conditional, and the right to sue does not obtain until the Comptroller of the Currency has acted; his order is the basis of the suit, and the statute of limitations does not commence to run until assessment made, and then it runs as against an action to enforce the statutory liability and not an action for breach of contract. *Ib.*

3. *Period of limitation of such action under laws of State of Washington.*

As the statute of limitations of Washington has been construed by the

courts of that State the time within which such an action must be brought is two years under § 4805, Ballinger's Code, and not within three years under subd. 3 of § 4800. *Ib.*

See CRIMINAL LAW, 3.

STATUTES.

A. CONSTRUCTION OF.

See CLAIMS AGAINST UNITED STATES; COURTS; CRIMINAL LAW, 3; IMMIGRATION; PRACTICE, 1.

B. OF THE UNITED STATES.

See ACTS OF CONGRESS.

C. OF THE STATES AND TERRITORIES.

See LOCAL LAW.

STIPULATIONS.

See IMMIGRATION, 2.

STOCK AND STOCKHOLDERS.

See CASES EXPLAINED; CONTRACTS; LOCAL LAW (OHIO); STATUTE OF LIMITATIONS, 1, 2.

STREETS AND HIGHWAYS.

Rights of owners of property abutting on streets—Easements of light and air as property to be compensated for in case of diminution.

The permission or command of the State can give no power to invade private property rights even for a public purpose without payment of compensation. An abutting owner cannot be deprived of his easements of light and air above the surface of the street without compensation because the structure interfering with those easements was formerly on the surface and the raising of it to an elevated structure gave him an increase in his easement of access.

The *Elevated Railroad cases*, decided by the Court of Appeals, established the law of the State of New York to be that the easement of light and air of abutting property owners in the streets of New York above the street to be property and within the protection of the Constitution for compensation in case of its diminution by an elevated railroad structure.

Such decisions assured to purchasers of property, abutting on a street the bed of which had deeded to the city of New York in trust for a street, that their easements of light and air were secured by contract and could not be taken from them without compensation; and the courts of that State cannot change or modify their decisions so as to take away rights which have been acquired by contract and are within the protection of the Federal Constitution.

This court determines for itself whether there is an existing contract and

where there is a diversity of state decisions the first may in time constitute the obligation of the contract and the measure of rights under it.

The raising, in pursuance of a state statute requiring it, of the New York and Harlem Railroad structure, in Park avenue, New York City, which was formerly on, or partially below, the surface of the street, to an elevated structure, deprived the abutting owner, who in this case had purchased after the decisions by the Court of Appeals in the *Elevated Railroad cases*, of property right in his easements of light and air and under the Constitution of the United States he was entitled to compensation therefor and cannot be deprived of it, either because the structure was erected under a state statute requiring it or because the access to his property was increased by the raising of the structure. *Muhlker* v. *New York & Harlem R. R. Co.*, 544.

See CONSTITUTIONAL LAW, 4;
POLICE POWER, 1.

SURVEYS.

See PUBLIC LANDS, 4, 5, 6.

TAXATION.

1. *State—Validity of tax as to domestic business of agent of one doing interstate business.*

As a tax upon the seller of goods is a tax upon the goods themselves, and a tax upon goods sold in one State delivered to a common carrier and consigned to the purchaser in another State is an illegal interference with interstate commerce, a State cannot impose a privilege tax on agents of packing houses as to meats shipped to him from another State merely for distribution to purchasers from his principal; but where the Supreme Court of the State has held that the tax is void as to interstate shipments and applies only to the domestic business of the agent in the ordinary course of trade, and all other such agents, whether of domestic or foreign packing houses, are subject to the tax, that construction will be accepted by this court as in reality a part of the statute itself, and the tax is within the power of the State and is not as to his domestic business an interference with interstate commerce even though all of the goods sold by an agent may be shipped to him from another State. Nor is such a tax void because it is laid upon the agents themselves and cannot be apportioned between the interstate and the domestic business carried on by the same person. While such a tax might not apply to an agent whose domestic business was purely nominal and strictly incidental to his interstate business, it does apply to one whose domestic business is a definite, although a minor, part of his business in the State as the application of the tax does not depend on the greater or less magnitude of the business. Where such a tax is imposed alike upon the managing agent both of domestic and foreign houses, it does not deny to the agent of a foreign house the equal protection of the laws. *Kehrer* v. *Stewart*, 60.

2. *State—Classification of occupations for purposes of taxation.*

A State has the right to classify occupations and impose different taxes upon different occupations. The necessity for, and the amount of, the tax are exclusively within the control of the state legislature, and, in the absence of discrimination against citizens of other States, its determination in regard thereto is not open to criticism in this court. *Ib.*

3. *State—Effect on contracts between principal and agent.*

Such a tax does not impair the obligation of, or affect, any contract previously made between the principal and the agent. The power of taxation overrides any agreement of an employé to serve for a specific sum. *Ib.*

4. *State—Taxation of shares of stock of national banks—Effect of different methods of taxation of state and national banks—Discrimination against national banks.*

(*a*) Section 5219, Rev. Stat., authorizes the taxation by the States of shares of stock of national banks but exacts that the tax when levied shall be at no greater rate than that imposed on other moneyed capital; no conflict necessarily arises between the Federal statute and a state law solely because the latter provides one method for taxation of state banks and another method for national banks if there is no actual discrimination against the shares of the national banks resulting from the difference in methods. If, however, irrespective of the face of the law, the system created by the state law in its practical execution produces an actual and material discrimination against national banks it does conflict with § 5219, Rev. Stat., and is void.

(*b*) Where the record contains an express admission that a specified instance of taxation showing an undervaluation of the property of a corporation is illustrative of the method by which all other similar institutions are assessed under a statute requiring full valuation, this court cannot disregard the admission and consider that such undervaluation is an isolated instance and that all the property of other similar institutions is assessed at full value in accordance with the provisions of the statute.

(*c*) As it appears from the agreed statement of facts in this case that under the laws of California, as construed by the highest court of that State, all the elements of value which are embraced in the assessment of shares of stock in national banks are not included in assessing the value of property of state banks and other moneyed corporations, there is a discrimination against the shares of national banks and the state law taxing such shares as so construed violates, and is void under, § 5219, Rev. Stat. *San Francisco National Bank* v. *Dodge*, 70.

See Constitutional Law, 4, 7;
Police Power, 2.

TERRITORIES.

See Philippine Islands;
Treaties, 2.

TITLE.

See PUBLIC LANDS, 1.

TRADE.

See COMBINATIONS IN RESTRAINT OF TRADE;
CONSTITUTIONAL LAW, 3.

TREATIES.

1. *Treaty with France of* 1853—*Method of enforcing provision as to arrest of seamen—Power of court to release seamen properly arrested.*

The only method of enforcing treaty provisions for arrest of seamen on requisition of foreign consuls is pursuant to the act of June 11, 1864, 13 Stat. 121, now §§ 4079, 4080, 4081, Rev. Stat., and thereunder the requisition must be made to the District Court or judge and the arrest made by the marshal, and an arrest by a local chief of police is not authorized; but if after a seaman so arrested has been produced before the District Court on *habeas corpus* and the courts find that his case comes under the treaty and he should be held, the mere fact that he was arrested by a person not authorized to do so does not entitle him to his discharge. After a seaman has been properly arrested on the request of the French consul under the treaty of 1853 with France, he can be held in prison at the disposal of the consul for sixty days, as provided for in § 4081, Rev. Stat., and the court cannot discharge him within that period against the protest of the consul because the vessel to which he belonged has left the port at which he was arrested. *Dallemagne* v. *Moisan*, 169.

2. *Treaty with Russia concerning Alaska; status of inhabitants under—Applicability of Constitution to that Territory—Jury trial.*

The treaty with Russia concerning Alaska, instead of exhibiting, as did the treaty with Spain respecting the Philippine Islands, the determination to reserve the question of the status of the acquired territory for ulterior action by Congress, manifested a contrary intention to admit the inhabitants of the ceded territory to the enjoyment of citizenship, and expressed the purpose to incorporate the territory into the United States. Under the treaty with Russia ceding Alaska and the subsequent legislation of Congress, Alaska has been incorporated into the United States and the Constitution is applicable to that Territory and under the Fifth and Sixth Amendments Congress cannot deprive one there accused of a misdemeanor of trial by a common law jury, and that § 171 of the Alaska Code, 31 Stat. 358, in so far as it provides that in trials for misdemeanors six persons shall constitute a legal jury, is unconstitutional and void. *Rassmussen* v. *United States*, 516.

See CONSTITUTIONAL LAW, 2;
PHILIPPINE ISLANDS.

TRIAL.

See CONSTITUTIONAL LAW, 10.

TRUSTS AND TRUSTEES.
See ACTION, 1;
CONTRACTS;
STREETS AND HIGHWAYS.

UNLAWFUL COMBINATIONS.
See COMBINATIONS IN RESTRAINT OF TRADE;
CONSTITUTIONAL LAW, 3.

VACCINATION.
See CONSTITUTIONAL LAW, 12.

VENUE.
See JURISDICTION, B 2.

WAIVER.
See NAVY, 4.

WATERS.
See NAVY;
PUBLIC LANDS, 4;
PUBLIC OFFICERS.

WILLS.
See ESTOPPEL.

WORDS AND PHRASES.
See BANKRUPTCY, 1;
CONSTITUTIONAL LAW, 11;
PUBLIC OFFICERS.

WRIT AND PROCESS.
See CERTIORARI;
JURISDICTION, A 3; B 2;
NAVY, 2, 3.